

(1998) 06 MAD CK 0041

In the Madras High Court

Case No : W.A. No. 1292 of 1993 and C.M.P. 15978 of 1993

Kothari (Madras) Ltd. (Kothari Industrial Corpn. Ltd.)

APPELLANT

Vs

Appellate Authority under T.N. Shops and Establishments Act
and Another

RESPONDENT

Date of Decision : 22-06-1998

Acts Referred:

Tamil Nadu Shops and Establishments Act, 1947 — Section 2(2)

Citation : (1999) 81 FLR 707 : (1999) 1 LLJ 1299 : (1998) 3 MLJ 135

Hon'ble Judges : Manmohan Singh Liberhan, C.J;K. Govindarajan, J

Bench : Division Bench

Advocate : S. Jayaraman, for the Appellant; R. Viduthalai, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh Liberhan, C.J.—This appeal arises out of an order of the Hon"ble single Judge dated September 14, 1993, whereby it

was held that the second respondent is an employee of the appellant under the Tamil Nadu Shops and Establishments Act, 1947 (hereinafter

referred to as "the Act") and the order by which the services of the second respondent were terminated as being not required any more as a

"Trainee" is not sustainable.

2. The second respondent preferred an appeal against the order of termination of his services. In the appeal, it was found as a fact, on appreciation

of the evidence on record, that in fact he was not a Trainee, but an employee as defined under the Act. The termination order was set aside. He

was reinstated in service. The appellant impugned the order of the appellate authority through writ petition, which was dismissed; the order of the

appellate authority was affirmed, which is under challenge in this appeal.

3. Learned counsel for the appellant vehemently argued that the second respondent was a trainee. The reasons given by the Hon''ble single Judge as taken out by the Hon''ble single Judge from the award of the appellate authority to come to the conclusion that the second respondent is not a trainee does not lead to such an inference. The appellant does not acquire the status of an "employee" as envisaged in the Act. The reasons given by the first respondent as set out in the order passed by the Hon''ble single Judge are as follows:

1. In Ex.A-8, the Branch Manager, Coimbatore writes on July 6, 1991 that the second respondent had completed his training by June 30, 1981

and that his services may therefore be confirmed.

2. Exs. A-13 and A-16 show that bonus was paid to the second respondent for the year 1981-1982.

3. Ex. A-14 is an important letter which says for the sale of super phosphate for the months of December, 1981, January, 1982 and May, 1982,

the staff members were . paid incentives and the petitioner was also paid his share of the incentive.

4. The second respondent was placed in independent charge of Erode area and therefore, he could not be treated as a trainee.

5. Ex. R. 13 instructs the second respondent as follows:

Please arrange to collect a demand draft for Rs. 50,000 from the Dealer before the end of this month, towards the security deposit and guide him

to make good sales in the District during the ensuing season. Please note you are responsible for the sale and collections of outstanding in the

District.

6. The evidence of R.W. 1 and the document Ex. A-10 prove that the second respondent was eligible for sick leave, privilege leave.

7. The Ledgers-filed in the case prove that the second respondent was paid wages and not stipend.

4. We have heard the learned counsel for the appellant and gone through the judgment cited in the decision in The Employees" State Insurance

Corporation and Another Vs. The Tata Engineering and Locomotive Co. Ltd. and Another, In the Country of minimum wages where majority of

the population are poverty-stricken and where unemployment is the fashion of the day, and exploiting the manpower, articulating new words to

bypass welfare labour legislation enacted by the State is the creed of the endless human greed, it has become a more hardened duty of the Courts

to lift the veil and enforce the welfare legislation with liberal approach.

5. We are of the considered view that in facts and circumstances as referred to in the earlier part of the judgment as reasons for concluding that the

respondent is not a trainee, categorically leads to the inference that it is a case of articulation of words in order to put a veil around the real

relationship of the Employer and an Employee in order to escape from the regulations of duties imposed by the statute on the employer. It is a case

of obvious articulation of the language by giving a nomenclature to a worker as "Trainee". The appellate authority as well as the Hon"ble single

Judge, on an appreciation of the evidence, have categorically come to the conclusion that the second respondent was in fact, a person employed as

defined in Section 2(2) of the Act which is as follows:

Person employed"" means-

(i).....

(ii) in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such a factory or undertaking;

(iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or

principally employed in connection with the business of the establishment, and includes a peon;

(iv)...

(v).....

(vi) in the case of an establishment not falling under paragraphs (i) to (v) above, a person wholly or principally employed in connection with the

businesses of the establishment, and includes a peon;

(vii).....

but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer who lives with and is dependent on such

employer.

It is not disputed that the appellant is an establishment . From the facts referred to above by the Hon"ble single Judge taken out from the judgment

of the appellate authority, it categorically leads to an inference that he was a

person employed in connection with the business of the establishment.

There can be no gainsaying that unless a person is employed as an employee, in the ordinary course of a human conduct, the employer does not

pay bonus which is the statutory duty, nor does pay incentive to a trainee as understood in the industrial world, who is a raw hand getting training

for a particular trade in the industry. The trainee is not expected to independently discharge functions of an employee in the ordinary course of the

business of an establishment. The trainee may be given some pocket money or stipend. But, they are never paid as wages. The appellant has given

to the second respondent, wages and all other benefits. But, then it comes to treating him as employee, in order to get out of the rigours of the

provisions of labour laws which are welfare laws, nomenclature, or the suffix "trainee" for the respondent. Even if two opinions are possible, we

find no ground to take any other view than the one taken by the Hon"ble single Judge confirming the finding of fact arrived at by the appellate

authority.

6. Learned counsel for the second respondent had relied upon the decision in Employees" State Insurance Corporation v. Tata Engineering and

Loco. Company (supra) which deals with the statutory provisions of "Trainees". Neither the facts nor the question involved in the law laid down as

relevant to the facts in the case on hand is dealt with in that case. The Court was dealing with the case of an Apprentice, which is defined as such in

the Apprentices Act. The definition of "Apprentice" under the labour laws cannot be imported into the definition given under the Act which is an

independent statutory legislation. Learned counsel for the appellant, faced with the situation, alternatively contended that chargesheet was issued to

the second respondent for not performing his duties entrusted to him and no opportunity for leading evidence was granted to them to lead evidence

to prove that charges have been proved and that the respondent is liable to be removed from service.

7. Learned counsel for the appellant relied on the decision in The United Planters Association of Southern India Vs. K.G. Sangameswaran and

another, . There is no dispute with respect to the law laid down, to the effect that the authorities are competent or have jurisdiction to record

evidence and come to a conclusion, whether the order of termination is

innocuous or punitive in nature. The appellate authority, in case of ex parte enquiry, can take additional evidence and reach a conclusion on the charges of misconduct levelled against the delinquent are proved or not.

8. In our considered view, the very arguments advanced is destructive of the stand taken by the appellant. The appellant cannot be permitted to reprobate and approbate on the same breath, i.e., no enquiry was required to be held and no charge is required to be framed since the second respondent is a trainee and that no order of termination of service is required to be given. At the same time, not by way of an alternative plea, but totally a new plea is set up in this appeal that no opportunity to lead additional evidence was given to the appellant. The appellant never prayed before the appellate authority an opportut to lead additional evidence to prove charges. It was never a case set up before the appellate authority that charge stands proved or that the second respondent is liable to be dismissed on the ground that his services are no more required. The second respondent was never made aware of the fact that he is being dismissed on the ground of charges proved against him. Though, concedingly no charges were framed and no enquiry was held except issuing a letter, the appellant is estopped by his own conduct in contending mat the appellant has dismissed the second respondent from service on account of the charges attributed to him. Throughout the proceedings, they have taken the stand that he was a trainee and his period of training was extended and his services were terminated as a trainee. The very argument further confirms the finding arrived at by the Hon"ble single Judge that the appellant has been indulging in unfair labour practice by designating their employees as trainees and unscrupulously, the welfare laws of the State Legislation, which were meant to protect the employees, were being violated. The Courts were extending their hands in cases like these in exercise of the powers under Article 226 of the Constitution of India, would obliterate the effect of welfare labour laws and permitting and encouraging the articulation of designation. In view of the finding arrived at the appellate authority, which was affirmed by the single Judge on merits, we find no ground to interfere with the same.

9. Resultantly, the appeal is dismissed. The second respondent shall be deemed to have been reinstated in service with backwages and other

ancillary service benefits. In view of the fact that the employee has been made to fight the litigation and has been kept out of service for no fault of

his, the appeal is dismissed with costs of Rs. 500. Consequently, the C.M.P is also dismissed.