
(2004) 03 MAD CK 0180

In the Madras High Court

Case No : Writ Petition No. 14162 of 1996

Madurai District Pandiyan Consumer Co-operative Wholesale
Stores Limited

APPELLANT

Vs

The Deputy Commissioner of Labour (Appellate Authority
under Tamil Nadu Shops and Establishments Act) and
Another

RESPONDENT

Date of Decision : 31-03-2004

Acts Referred:

Citation : (2004) 5 CTC 47

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

**Advocate : N. Umapathy, for S. Silambanan, for the Appellant; S. Prabhakaran,
Additional Government Pleader and S. Subbiah, for the Respondent**

Final Decision : Allowed

Judgement

Prabha Sridevan, J.—This writ petition has been filed challenging the award passed by the Labour Court, where under, the dismissal of the workman was set aside only on the ground that subsistence allowance was not paid and therefore, the authority found that the enquiry itself was vitiated.

2. The question whether the enquiry is vitiated merely on the ground of non-payment of subsistence allowance is moot in this case, since the second respondent, while making a claim for subsistence allowance, had not pleaded the non-payment of subsistence allowance for his non-participation in the enquiry, but marriages in the family, illness in the family etc., as the reason. However, the first respondent/appellant authority had come to the conclusion that the enquiry was vitiated. If so, the appellate authority ought to have permitted the petitioner herein to adduce evidence to support their order of dismissal. I do not intend to go into the merits of the case since it is only on this ground that I am remitting the matter to the first respondent for fresh consideration after giving an opportunity to the parties to adduce evidence.

3. For the purpose, the learned counsel for the petitioner relied on the decision *Bharat Overseas Bank Ltd. Vs. The Deputy Commissioner of Labour and Another*, , where this Court, relying on the decision *United Planters' Association of Southern India v. K. G. Sangameswaran and Anr.*, 1997(2) LLN 73, held that even if no enquiry had been held by the employer before passing the order of dismissal or if an order had been passed ex parte, it was still open to the employer to let in evidence afresh before the appellate authority. That was also a matter like the present case which arose under the Tamil Nadu Shops and Establishments Act, 1947.

4. In the decision *The Nilgiris District Consumers' Co-operative Wholesale Stores Ltd. Vs. Appellate Authority, Deputy Commissioner of Labour*, , this Court held that considering the nature of the misconduct, there was no warrant to interfere with the order of dismissal and even though in that case also, the employee had claimed subsistence allowance which was not paid, when he approached the authorities under the Act, the dismissal was not interfered with.

5. In the decision *Indra Bhanu Gaur Vs. Committee, Management of M.M. Degree College and Others*, , in paragraph 8, it was held as under:

"From the judgment of the High Court, in the writ petition it appears that there is no reference to the alleged infirmity on account of subsistence allowance having not been paid. There was also no specific finding recorded for the question of bias as alleged presently. We find that there was total lack of co-operation from the appellant as the factual background highlighted above would go to show. Ample opportunity was granted to the appellant to place his case. He did not choose to do so. It is only a person who was ready and willing to avail of opportunity given can make a grievance about denial of any opportunity and not a person like the appellant who despite repeated opportunities given and indulgence shown, exhibited defiance and total indifference in extending co-operation. Therefore, on that score the appellant cannot have any grievance, so far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. The appellant could not plead or substantiate also that the non payment was either deliberate or to spite him and not due to his own fault. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as absolute proposal in law that nonpayment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings."

6. Taking into consideration the above decisions and the order made there under as also the interests of justice, the writ petition is allowed and the matter is

remanded to the first respondent for fresh consideration in accordance with law giving opportunity to the parties to adduce evidence, both oral and documentary. The first respondent is given four months" time to conclude the proceedings. No costs. WMPs. 19312 of 1996 and 1546 and 1547 of 1997 are closed.

7. Since the subsistence allowance has admittedly not been paid, the amount of Rs. 6,772 which was directed to be deposited by the authority under the Tamil Nadu Payment of Subsistence Allowance Act may be withdrawn by the second respondent.