

(2011) 04 MAD CK 0241

In the Madras High Court

Case No : Writ Petition No. 46265 of 2002 and W.M.P. No's. 67339, 67340 of 2002 and 9088, 42920 of 2003 and 66 of 2007

The Executive Engineer, Water Supply and Drainage Board,
Maintenance Section

APPELLANT

Vs

R. Munusamy and The Presiding Officer, Labour Court

RESPONDENT

Date of Decision : 19-04-2011

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 106

Industrial Disputes Act, 1947 — Section 12(3), 2, 25B, 25F, 25FF

Payment of Gratuity Act, 1972 — Section 2

Citation : (2011) 4 LLJ 321

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : Sudharshanasundar, for the Appellant; K.M. Ramesh, for 1st Respondent and Labour Court for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Writ Petition filed by the Petitioner/Tamil Nadu Water Supply and Drainage Board is directed against the Award

dated 24.06.2002 in I.D. No. 207 of 1996 passed by the 2nd Respondent/Labour Court, Vellore.

2. The 2nd Respondent/Labour Court, Vellore, in its Award dated 24.06.2002 in I.D. No. 207 of 1996, has observed that "as per Ex.W.9, the

1st Respondent/Petitioner has worked for 127 days, as per Ex.W.9 series, has worked for 89 days, as per Ex.W.12 has worked for 237 days

and in all, has worked for 450 days as per the written arguments filed on behalf of the 1st Respondent/Petitioner. On perusal of Ex.W.1 series, it is

seen that the Petitioner has worked during the year 1995.If he has been removed from service on 26.12.1990 how he has been allowed to work

during 1995 has not been explained. From 26.9.89 till 26.7.90 he has worked for 237 days as seen from Ex.W.12. Since on the side of

Respondent/Writ Petitioner, the refusal of work to the 1st Respondent has not been denied and it is construed that the Petitioner in a year has

worked for more than 240 days and as such, the refusal of work to him is not legally a valid one and therefore ordered his reinstatement and

passed an Award thereto."

3. In I.D. No. 207 of 1996 filed by the 1st Respondent/Petitioner on the file of the 2nd Respondent, it is averred that he has been appointed and

posted on 1.7.1989 as Mazdoor and Valve Operator on daily wage coolie of Rs. 14.25 paise. He has been paid a salary once in a month and

further has been placed in-charge of Cheyyatraivendran. According to the 1st Respondent/Petitioner on 24.6.1989 his daily wage has been

increased to a sum of Rs. 22/- from Rs. 14.25 and it has been paid every month in a lumpsum. On 5.9.90 he has been transferred from

Cheyyatraivendran to perform the work at Chinna Chengadu, Peria Chengadu, Krishnavaram, Nemmeli, Oorkudi, Thennanur and Pancharai and

has been working there upto 28.9.90.

4. The case of the 1st Respondent/Petitioner is that he has been working till 26.12.1990 and that he has been removed from service without any

reason or justification. There has been no charge or defect on his part in discharging his duties. His sudden removal from service is against the

principles of natural justice.

5. The Writ Petitioner/T.W.A.D. Board, in its counter to I.D. No. 207 of 1996, has, among other things, stated that the Petitioner has not been

recruited through Employment Exchange and that the Respondent is not empowered to appoint him in their division. Also, it is the stand of the Writ

Petitioner/T.W.A.D. Board that the 1st Respondent/Petitioner has been appointed on daily wages whenever required and moreover, the Cheyyar

division has been closed and therefore, it is not in a position to absorb him. That apart, after his removal in the year 1990, he has filed I.D. No.

207 of 1996 after a gap of six years and that the same is barred by limitation.

6. The Learned Counsel for the Petitioner/T.W.A.D. Board submits that the Labour Court has failed to note that Section 12(3) Settlement under

the Industrial Disputes Act applied to individuals who have been in employment

in the Board at the time of settlement and who has put in 480 days of continuous service in 24 calendar months.

7. Also, it is the contention on the part of the Writ Petitioner/Management that the 1st Respondent/Petitioner has not put in 480 days of continuous service in two calendar years prior to termination and Exs.W.6 to W.11 will not help the case of the workman.

8. The Learned Counsel for the Petitioner/Board contends that the 1st Respondent/Workman has been appointed on a daily wages by means of an oral order as and when it is required contrary to Board Proceedings No. 247 dated 9.10.90.

9. In this connection, it is useful to refer to the evidence of W.W.1 (Petitioner in I.D. No. 206/1996), W.W.2 (S.K. Venkatesan-Petitioner in I.D.

No. 203/1996) and the evidence of M.W.1 (Junior Engineer of the T.W.A.D. Board) for a fuller and better appreciation of the controversies

involved in the respective industrial disputes.

10. W.W.1 (Petitioner in I.D. No. 206/1996), in his evidence [adduced on behalf of other Petitioners in I.D. Nos. 203, 204, 205, 207, 213, 233

of 1996), has deposed that the Petitioner in the aforesaid industrial disputes have worked in the Desur Thellar Joint Drinking Water Scheme and

the Scheme Headquarters is situated at Vellore Gandhi Nagar and they have all worked as Valve Operator and Night Watchman.

11. It is the further evidence of W.W.1 that he has been appointed on 22.8.1988 and on 6.12.88 place of work where he has to work has been

allotted to him and the said order is Ex.W.1 and on 14.6.89 he has been transferred and the Transfer Order is Ex.W.2 and on 24.6.89 his nature

of work [viz., opening the valve and closing the valve] has been issued to him and the said order is Ex.W.3 and Ex.W.4 is the Transfer Order

issued to him on 5.9.90 and another Transfer Order-Ex.W.5 issued to him is dated 28.9.90 and the Ex.W.6-Certificate has been issued to him by

the Junior Engineer for the Valve Operator Job performed by him and that the Junior Engineer has issued the Job Certificate to him for his good

work viz., Ex.W.7.

12. The evidence of W.W.1 is to the effect that when he joined the job originally he has been paid on daily wage of Rs. 14.25 paise and that he

has been paid the monthly salary and from 29.6.90 daily wage of Rs. 22/- has

been calculated and the same has been paid monthly to him.

13. The substance of evidence of W.W.1 is that he along with other workers [Petitioners who raised individual industrial disputes] have worked

continuously for 480 days and therefore, they have to be regularised and pray for the reinstatement with backwages and also that totally 67

persons have worked and 7 workers have been made permanent and also they have been given the promotion.

14. W.W.1, in his cross examination, has stated that they have not been appointed through Employment Exchange and that they have been taken

in as Daily Coolies by the Vandavasi Water Supply and Drainage Board and at that time, one Sivasankaran has been serving as Executive

Engineer and that the Desur Thellar Joint Drinking Water Supply Scheme has been completed and for that scheme work they have been appointed

and after the closure of the said scheme, the Vandavasi Water Supply and Drainage Scheme Board has been closed and one section of their

workers have been transferred to Chetpet and another set of persons have been transferred to Cheyyar and lastly they have served at Cheyyar

and Chetpet division and these divisions are presently there or presently in existence and they have not added the companies.

15. W.W.2-S.K.Venkatesan [Petitioner in I.D.No.203/1996], in his evidence, has deposed [before the 1st Respondent/Labour Court] to the

effect that he and others have been removed from service on 26.12.90 and that they have been given the petition through their Union before the

Inspector of Labour after the removal and the Inspector of Labour has passed an order Ex.W.14 dated 10.10.91 that they should be reinstated

into service and that the Managing Director has given an order that if a person has worked for 480 days he can be made permanent and

accordingly, 71 persons have been made permanent and the further, the details of date of appointment, number of days worked are mentioned in

Ex.W.15-order of the 2nd Respondent/ Management to the workers dated 19.9.96.

16. W.W.2 in his cross examination has deposed that they obtained Ex.W.15-Order of the Management dated 19.9.96 through their workers

Union and the original of Ex.W.15 has not been marked and also it is true to state that persons mentioned in Serial No. 1, 2, 42 to 48 and 50 to

71 have been recruited through Employment Exchange and the persons who have been recruited through the Employment Exchange have passed

in 10th Standard. It is also the evidence of W.W.2 that after 12.5.88 all appointments have been made through Employment Exchange office and

the Vandavasi division presently has been included in the Cheyyar division.

17. It is the evidence of M.W.1 [Junior Engineer of the T.W.A.D.Board] that he has not worked at the Vandavasi section and at that time when

the Petitioners have filed the case before the Tribunal, he served as Junior Engineer at Chetpet Deputy Water and Drainage Board and that he

served from 24.11.88 till 6.6.94 and that he does not know about the details of appointments of the Petitioners and that the Petitioners have

worked as daily wages.

18. It is the further evidence of M.W.1 that their Board's Memorandum Order M.S. No. 247 dated 9.10.90 is Ex.M.1 and for more than 7 seven

days the Petitioners have not been appointed continuously and that they are appointing persons for all jobs through Employment Exchange.

19. M.W.1 in his cross examination, has stated that the details mentioned in Ex.W.2 [Transfer Order dated 14.6.89 issued to W.W.1 and other

two workers] and Ex.W.3 [order dated 24.6.89 issued to W.W.1 and another worker] are true and that he does not know about Ex.W.10 [list of

workers worked at Cheyyar office] and he does not know as to the number of days worked by the Petitioners which has been mentioned in

Exs.W.9 to 13 and further, it is not correct to state that Ex.M.1 the Proceedings Order of the Appellant/Management bearing No. M.S.247 dated

9.10.96 will not bind the Petitioners.

20. In Ex.W.9-Copy of Muster Roll of Chetpet Office of the Writ Petitioner, the Assistant Executive Engineer of T.W.A.D. Board, R.W.S. Sub

Division, Chetpet in Serial No.5 there is a reference to the Petitioner-Munusamy that he has worked for 127 days.

21. In Ex.W.11 series the Petitioner-R. Munusamy is reported to have worked for 26 days for the period from 26.5.95 to 25.6.95 and for 30

days for the period from 26.6.95 to 25.7.95 and for 30 days for the period from 26.7.95 to 25.8.95 and in all, he has worked for 86 days. During

the aforesaid period, there has been a break of 6 days in all.

22. As per Ex.W.12-Statement in respect of 1st Respondent/ Petitioner-

Munusamy for the period from 26.9.1989 till 25.8.1990, he has worked in all for 237 days and has remained absent for duty from 26.2.90 to 25.5.90 and absented himself on 18.6.90, as evident from the said statement.

During the period from 26.5.95 to 25.8.95 the 1st Respondent/Petitioner has worked for 86 days. Thus, it is clear from Ex.W.11 and Ex.W.12

that the 1st Respondent/Petitioner has worked for 323 days (237 + 86) in all.

23. Going by Ex.W.12 Statement furnished by the Assistant Engineer of the Cheyyar Office in respect of the 1st Respondent/ Petitioner, he has worked for 237 days for the period from 26.9.1989 to 25.08.1990.

24. In Ex.W.14-Communication dated 10.10.91 of the Inspector of Labour, Tiruvannamalai addressed to the Superintending Engineer of the

Tamil Nadu Water Supply and Drainage Board, Vellore and to the Chairman of the Tamil Nadu Water Supply and Drainage Board, Vellore, the

1st Respondent/Petitioner's name is found in Serial No. 19. His nature of job is described as Mazdoor and his date of appointment is 1.7.89. As a

matter of fact, in Ex.W.14-Communication dated 10.10.91 of the Inspector of Labour, Tiruvannamalai, the Petitioner-R. Munusamy and 14 others

have reportedly left from service etc.

25. In Ex.W.15-Communication of the Managing Director of the T.W.A.D. Board, Chennai dated 19.9.96, it is mentioned that 386 workers as

per Annexure, when they have completed 480 days, they will be made permanent and proper time scale will be given to them and thereafter for

every year of work as per Board's Rules annual salary increment notionally will have to be awarded and then the salary will be refixed from 1.8.96

in the minimum scale of pay. A perusal of Ex.W.15-Managing Director's Proceedings dated 19.9.96 together with the Annexure List of N.M.R.

Personnel of Northern Region shows that the Serial No. 1 to 78 persons names are found therein. But the 1st Respondent/Petitioner's name does

not find a place.

26. Though on the side of the 1st Respondent/workman, it is submitted that as per Section 12(3) Settlement under the Industrial Disputes Act,

1947, the 386 workers are agreed to be made permanent by the Writ Petitioner/ Management, yet, it is not clear as to whether the Petitioner's

name is included in the said Settlement or in Annexure List of N.M. Rs. attached to Ex.W.15-letter dated 19.9.96 of the Managing Director of the

Writ Petitioner office.

27. As per Ex.M.1-Board Proceedings Order M.S. No. 247, dated 9.10.1990 of the Tamil Nadu Water Supply and Drainage Board,

Secretariat, Madras-5 in paragraph vi, it is mentioned hereunder:

that the Executive Engineers shall have powers to engage N.M.Rs. only for such works which are not susceptible of measurements viz., for survey

and levelling operations, for conducting geophysical, survey etc., for period not exceeding 7 days at a time; that for any special reasons, if the

employment of N.M.Rs. become necessary for more than 7 days for maintenance of Pilot water supply scheme etc., Prior approval of concerned

Chief Engineers should be obtained for engaging N.M. Rs. that even in such cases, the employment of N.M.Rs. should not exceed more than 85

days and that any violation of these instructions shall be dealt with severely by imposing Punishment of removal from service without exception.

28. In Ex.M.1-Communication of the Joint Director of the T.W.A.D. Board dated 9.10.90, in last paragraph, it is mentioned as follows:

The Chief Engineers should collect the particulars of appointments made in violation of the Board's instruction with effect from 16.3.1974 and

furnish to the Board the name of officers who were responsible for such irregular appointments. Action should also be taken immediately to

discharge the Work Charged Establishment Personnel whose services are not required as well as those who were appointed after 31.12.1985.

29. In short, the T.W.A.D. Board has issued instructions as per Ex.M.1 dated 9.10.90 pertaining to the Appointment of Work charged

Establishment/N.M.R. and in paragraph 2 of the said instructions, it is mentioned thus:

The Board considered the question of stopping the appointment of Work Charged Establishment N.M.R. personnel as also the question of

awarding without exception, exemplary punishment, to the extent of removal from service, to the officers who made such appointments or who

authorised such appointments. The Board has approved the proposal.

30. As far as the present case is concerned, as per Ex.W.9 Xerox Copy of Muster Roll of the Petitioner's Chetpet Office, the 1st

Respondent/Petitioner is reported to have worked for 127 days. On behalf of the Petitioner/T.W.A.D. Board, Ex.W.9 there is a reference to the

xerox copy of Register. 1 No. (Page No 1 to 84) and xerox of m books page No. 1) 484 A, 2) 490 A, 3) 737 A, 4) 722 A Total Nos. 4.

31. At this juncture, the Learned Counsel for the 1st Respondent cites the decision of Hon"ble Supreme Court in Management of Standard Motor

Products of India Limited Vs. A. Parthasarathy and Another, , wherein it is held as follows:

In the present case, even if the period of illegal strike is excluded, the number of days during which the workman actually worked under the

employer would be found to be more than 240 days. That being so it has to be held that the workmen were in continuous service for a period of

one year immediately before the date of closure. The further submission of Shri Pai that the number of days on which the workmen actually

worked under the employer would be less than 240 days if Sundays and other holidays for which the workmen were paid wages were excluded

has already been answered by us in the case of The Workmen of American Express International Banking Corporation v. The Management of

American Express International Banking Corporation in which judgment has just been pronounced by us. In the circumstances, both the appeals

are dismissed with costs.

32. He also relies on the decision of this Court in Management, Malaysian Airlines, Karumuttu Centre, 498, Anna Salai, Chennai - 35 v. The

Presiding Officer, Principal Labour Court, Chennai and Anr. 2007 Writ L.R. 605 at page 606 wherein it is held that "Labour Court has applied its

mind to go into the provisions of Section 25B and, on a perusal of Ex.M.1, arrived at the proper conclusion that the workman is entitled to

reinstatement with all monetary benefits, by holding that the non-employment of the workman by the management is not justified."

33. He also seeks in aid of the decision of Hon"ble Supreme Court in Workmen of American Express International Banking Corporation Vs.

Management of American Express International Banking Corporation, wherein it is held hereunder:

The question there was not how the 240 days were to be reckoned; the question was not whether Sundays and paid holiday were to be included

in reckoning the number of days on which the workmen actually worked; but the question was whether a workman could be said to have been

actually employed for 240 days by the mere fact that he was in service for the whole year whether or not he actually worked for 240 days. On the language employed in Section 2(c) of the Payment of Gratuity Act, the court came to the conclusion that the expression "actually employed" occurring in Explanation I meant the same thing as the expression "actually worked" occurring in Explanation II and that as the workmen concerned had not actually worked for 240 days or more in the year they were not entitled to payment of gratuity for that year. They further question as to what was meant by the expression "actually worked" was not considered as apparently it did not arise for consideration. Therefore, the question whether Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workmen could be said to have actually worked was not considered in that case. The other cases cited before us do not appear to have any bearing on the question at issue before us.

34. At this stage, this Court worth recalls the decision of Hon'ble Supreme Court in Haryana State Electronics Development Corporation Ltd. Vs.

Mamni, wherein in paragraphs 12, 13, 14, 15 and 20, it is laid down as follows:

12. However, indisputably, the Respondent was appointed on an ad hoc basis. She, although qualified to hold the post of Junior Technician, when

the advertisement had been issued for filling up the said post, did not apply therefor. The services of the Respondent was terminated as far back as

in the year 1992. Even if she is reinstated in her service on an ad hoc basis, her services cannot be regularized in view of a recent Constitution

Bench decision of this Court in Secretary, State of Karnataka and Ors. v. Furthermore, she had absented herself for a period of 19 days from

20.1.1992 to 7.2.1992 and for a period of 11 days from 17.2.1992 to 27.2.1992.

13. We, therefore, are of the view that in the peculiar facts and circumstances of this case, interests of justice would be sub-served if in the place of

reinstatement with back wages, a lump sum amount is directed to be paid by way of compensation. This order is being passed keeping in view the

fact that the Respondent has not worked since 1992. The post on which she may have been working must have also been filled up.

14. It is wholly unlikely that Respondent in the meantime had not been working anywhere else, since the Respondent had not placed any material

on record to show that she had not been working.

15. This Court in a number of decisions has categorically held that the relief of reinstatement with full back wages is not to be given automatically.

Each case must be considered on its own merit.

....

20. In view of the settled legal position, as noticed hereinbefore, we modify the impugned order by directing that the Respondent shall be

compensated by payment of a sum of Rs. 25,000/- instead of the order for reinstatement with back wages.

35. In State of Rajasthan Vs. Sarjeet Singh and Another, at page 510 in paragraph 7 to 9 it is observed as follows:

7. Furthermore, Respondent No. 1 was appointed for a fixed period. His services might have continued but it appears that the same was to remain

in force till the Scheme was completed.

8. We may in the aforementioned backdrop notice the definition of "retrenchment" as contained in Section 2(oo)(bb) of the Industrial Disputes

Act, which is in the following terms:

2(oo) "'Retrenchment'" means termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment

inflicted by way of disciplinary action, but does not include -* * *

(bb) termination of the service of the workman as a result of the nonrenewal of the contract of employment between the employer and the

workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;....

9. It is a case which attracts Clause (bb) of Section 2(oo) of the Industrial Disputes Act.

36. Apart from the aforesaid decisions, this Court aptly points out the following Decisions:

(a) In Pramod Kumar Tiwari v. Hindustan Fertilizers Corporation Limited 1995 1 L.L.J. 192, it is held as follows:

In the facts and circumstances of the case, the project could be said to be an industry within the meaning of Section 2(j) of the Act, but was the

impugned termination a retrenchment within the meaning of Section 2(oo) attracting the provisions of Section 25F of the Act. Termination of

service of workman on transfer or closure of an undertaking is treated as "deemed retrenchment" after introduction of Section 25FFF which

provided that compensation shall be payable to workman in cases also of transfer of undertaking or closure, as if the workman had been

retrenched. The result is termination due to transfer or closure of undertaking is treated as deemed retrenchment and to such deemed retrenchment

provisions of Section 25FF & 25FFF, as the case may be, are attracted, but not the provisions of Section 25F.

In the instant case the project is an undertaking. The provisions of Section 25FFF are squarely attracted. In addition to notice pay, compensation

at the rate of 15 days average pay for every completed year of continuous service or any part thereof in excess of six months, as provided in

Section 25F(b) read with Section 25FFF, should have been paid to the Petitioner on account of termination. We can direct payment of that

money, but the termination in question being u/s 25FFF was not invalid or inoperative on account of non-payment.

(b) In *Shushil Kumar Pandey v. Director, Bal Vikas Seva Evam Pausht Ahar, Lucknow and Ors.* 1998 3 L.L.J. 140

Upon termination of his services as a junior Clerk on daily wage basis by the third Respondent, the Petitioner filed the present writ petition

impugning the termination. The Court dismissed the writ petition. It observed the order of termination was on the basis of the conditions contained

in the appointment letter according to which the Petitioner's services could be terminated without prior notice. It was a temporary arrangement

which ceased to be effective in terms of the conditions given in the appointment letter.

(c) In *Haryana State F.C.C.W. Store Ltd. and Another Vs. Ram Niwas and Another*, the Hon'ble Supreme Court has held as follows:

The Supreme Court observed that the engagement/appointment of the Respondent-workmen was for a specific purpose and for a particular

period. Their disengagement on the completion of the purpose and expiry of the period, was in terms of the contract of service and therefore not a

"retrenchment" within the meaning of Section 2(oo) of the Industrial Disputes Act, 1947.

(d) In *Nuclear Fuel Complex, Hyderabad V.K. Petna Reddy and Ors.* 2002 (2) L.L.N. 966, it is held, inter alia, that "The contract labour

engaged by a contractor for a particular period for a particular job are not "workmen" under Industrial Disputes Act and further that such an

employment comes to an end automatically as soon as the time is over and the job is over and moreover, the disengagement of contract labour

does not amount to retrenchment and does not attract Section 25F of Industrial Disputes Act, 1947 and as such, they are not entitled to the

absorption in the service of the company in respect of whose work, they were engaged by contractor." (e) In *Batala Co-operative Sugar Mills*

Limited v. Sowaran Singh 2005 (6) SLR 413 at page 414 in paragraph 4 to 8 the Hon'ble Supreme Court has laid down as follows:

4. In support of the appeal, learned Counsel for the Appellant submitted that both the Labour Court and the High Court fell in grave error by

acting on factually and legally erroneous premises. The definite stand of the Appellant was that the workman was engaged on casual basis on daily

wages for specific work and for specific period. Details in this regard were undisputedly filed. Therefore, the provisions of Section 2(oo)(bb) of the

Act are clearly applicable. In addition, the onus was wrongly placed on the employer to prove that the workman had not worked for 240 days in

12 calendar months preceding the alleged date of termination. No material was placed on record by the workman to establish that the workman

had offered himself for job after 12.2.1994. The award of the Labour Court does not speak of the requirement to maintain the muster roll. This

point was taken up suo moto by the High Court without any opportunity to the Appellant to have its say.

5. In response, learned counsel for the Respondent submitted that in the factual scenario as noticed by the Labour Court the award was made and

the High Court has rightly refused to interfere with it.

6. We find that the High Court's judgment is unsustainable on more than one count. In *Morinda Co-op. Sugar Mills Ltd. Vs. Ram Krishan and*

others etc., it was observed as follows:

4. It would thus be clear that the Respondents were not working throughout the season. They worked during crushing seasons only. The

Respondents were taken into work for the season and consequent to closure of the season, they ceased to work.

5. The question is whether such a cessation would amount to retrenchment.

Since it is only a seasonal work, the Respondents cannot be said to have been retrenched in view of what is stated in Clause (bb) of Section 2(oo) of the Act. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is illegal. However, the Appellant is directed to maintain a register for all workmen engaged during the seasons enumerated hereinbefore and when the new season starts the Appellant should make a publication in neighbouring places in which the Respondents normally live and if they would report for duty, the Appellant would engage them in accordance with seniority and exigency of work.

The position was re-iterated by a three-Judge Bench of this Court in Anil Bapurao Kanase Vs. Krishna Sahakari Sakhar Karkhana Ltd. and another, . It was noted as follows:

The learned Counsel for the Appellant contends that the judgment of the High Court of Bombay relied on in the impugned order dated 28.3.1995

in Writ Petition No. 488 of 1994 is perhaps not applicable. Since the Appellant has worked for more than 180 days, he is to be treated as

retrenched employee and if the procedure contemplated u/s 25-F of the Industrial Disputes Act, 1947 is applied, his retrenchment is illegal. We

find no force in this contention. In Morinda Coop. Sugar Mills Ltd. v. Ram Kishan, in para 3, this Court has dealt with engagement of the seasonal

workman in sugarcane crushing; in para 4 it is stated that it was not a case of retrenchment of the workman, but of closure of the factory after the

crushing season was over. Accordingly, in para 5, it was held that it is not 'retrenchment' within the meaning of Section 2(oo) of the Act. As a

consequence the Appellant is not entitled to retrenchment as per Clause (bb) of Section 2(oo) of the Act. Since the present work is seasonal

business, the principles of the Act have no application. However, this Court has directed that the Respondent management should maintain a

register and engage the workmen when the season starts in the succeeding years in the order of seniority. Until all the employees whose names

appear in the list are engaged in addition to the employees who are already working, the management should not go in for fresh engagement of new

workmen. It would be incumbent upon the Respondent management to adopt such procedure as is enumerated above.

Section 2(oo)(bb) reads as follows:

(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a

punishment inflicted by way of disciplinary action, but does not include-(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman

concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the

workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

The materials on record clearly establish that the engagement of the workman was for specific period and specific work.

7. In view of the position as highlighted in Morinda Coop. Sugar Mills and Anil Bapurao's cases (supra), the relief granted to the workman by the

Labour Court and the High Court cannot be maintained.

8. So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in The Range Forest Officer

Vs. S.T. Hadimani, the onus is on the workman. It was noted in the said judgment as follows:

2. In the instant case, dispute was referred to the Labour Court that the Respondent had worked for 240 days and his service had been terminated

without paying him any retrenchment compensation. The Appellant herein did not accept this and contended that the Respondent had not worked

for 240 days. The Tribunal vide its award dated 10.8.1998 came to the conclusion that the service had been terminated, without giving

retrenchment compensation. In arriving at the conclusion that the Respondent had worked for 240 days the Tribunal stated that the burden was no

the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that

he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the Appellant is an "industry" or not, though reliance is

placed on the decision of this Court in State of Gujarat and Others Vs.

Pratamsingh Narsinh Parmar, . In our opinion, the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the Respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was so denied by the Appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde, appearing for the Department states that the State is really interested in getting the law settled and the Respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today.

(f) The termination of a workman appointed for a fixed period will not amount to retrenchment even if such a workman has continued to work after stipulated period in anticipation of the sanctioned post as per decision Ram Prasad v. State of Rajasthan 1993 1 L.L.N. 601.

(g) In Pradeed Kumar v. The Secretary, Ganga Nagar Sugar Mills Limited 1994 1 L.L.J. 1139, it is held that "the non-payment of retrenchment compensation will not violate the provision of the Section since such a termination of a adhoc/temporary employee due to closure of establishment does not amount to retrenchment." (h)A termination of a contractual appointment though made thrice in 18 months, will not be an illegal retrenchment as per decision Municipal Council, Samrala Vs. Sukhwinder Kaur, .

(i) The termination of a workman who has worked on a project for more than 4 years will be legal if the management fails to pay the retrenchment compensation at the time of termination as per decision Gujarat State Construction Corporation v. Indravadan Ambalal Soni 2003 (99) FLR 850 (Guj HC).

(j) The non-renewal of contract of an employee who was engaged on a daily wage basis will not amount to retrenchment as per decision Surendra

Kumar v. Labour Court Uttarpradesh, Agra and Anr. 2005 LLR 84 (All HC).

(k) If a workman has not rendered continuous service for 240 days, the provisions of Section 25H of the Industrial Disputes Act providing for the right of re-employment to a retrenched workman will not be attracted as per decision State of Gujarat v. Ramesh Mopabhai Rathod 2004 LLR 255 (Guj HC).

(l) If an employee has not worked for 240 days, his termination will not amount to retrenchment as per decision Har Nath Singh Yadav v. The

Administration/Chairman Provincial Cooperative Federation, Lucknow and Ors. 2004 LLR 741 (All HC).

(m) A termination of a workman on completion of project will not be a retrenchment as per decision Telecom District Manager and Ors. v. A.A.

Angali and Ors. 2000 LLR 219 (Ker HC).

37. It is to be borne in mind that the proof of establishing a fact is on the person who substantially asserts the affirmative of the subject matter in

issue and not upon the individual who denies the same. In short, the individual who asserts a particular fact as to prove the same by means of the

ingredients of Sections 101 and 102 of the Indian Evidence Act. Ordinarily, the persons in whom rests the onus of proving any of the issues has the

right to begin. Further, Section 102 of the Indian Evidence Act provides a test in regard to the question of whom does the burden of proof lie, i.e.

that the burden lies on the person who will fail if no evidence has been adduced on either side.

38. Suffice it for this Court to make a significant mention that the burdens of "proof" and "presumptions" will have to be considered together.

Section 102 of the Indian Evidence Act provides a test for ascertaining on whom the burden of proof lies. The term "burden of proof" as a matter

of law and pleading means it is establishing a case. This rests on the party whether Plaintiff/Petitioner or Defendant/Respondent who substantially

asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, or their equivalent, and it is settled as a

question of law, remaining unchanged under any circumstances whatsoever and this is enshrined u/s 101 of the Indian Evidence Act. The burden of

proof as a matter of adducing evidence in this sense is not static and may shift constantly, throughout the trial, according to one scale of evidence or

the other preponderates as per decision Pickup v. Thames Insurance Company, 3 QBD 594 600; Radhakrishun V.Jagsahu, 47 MLJ 329 : 80 IC

791 PC.

39. As per Section 106 of the Indian Evidence Act, when a fact to be proved (whether positive or negative) is peculiarly within the knowledge of a

party, it is for him to prove it. The fixed proof prescribed u/s 101 or 102 of the Indian Evidence Act, cannot be shifted by the use of Section 106

of the Indian Evidence Act, though the particular onus of proving facts and circumstances lie specially within the knowledge of the person. Also,

the term "especially" refers to facts that which exceptionally or preeminently within ones knowledge. As a matter of fact, the knowledge ought to

be in the nature of something peculiar.

40. The Labour Court has opined that there is a possibility that the 1st Respondent/Petitioner would have worked for more than 240 days in a

year accordingly, instead of ordering his reinstatement, has ordered a compensation of Rs. 15,000/- to be paid by the Petitioner.

41. Further, the Labour Court can substitute the relief with compensation when retrenchment is invalid as per decision Lala Ram v. State of

Rajasthan and Anr. 2001 LLR 802 (Raj HC).

42. The 2nd Respondent/Labour Court, Vellore has exercised its discretion and instead of ordering his reinstatement has awarded a compensation

of Rs. 15,000/- to the 1st Respondent/Petitioner and in this regard, the Labour Court, Vellore is quite competent to award compensation as per

law and in the present case, the compensation of Rs. 15,000/- cannot be said to be an illegal one in the eye of law. The award of the 2nd

Respondent/Labour Court, Vellore does not suffer from any material irregularity or patent illegality and as such, the Writ Petition filed by the Writ

Petitioner/T.W.A.D. Board is devoid of merits and consequently, the same fails.

43. In the result, the Writ Petition is dismissed, leaving the parties to bear their own costs. The Award passed by the 2nd Respondent/Labour

Court, Vellore in I.D. No. 207 of 1996 dated 24.6.2002 insofar as it relates to the 1st Respondent/Workman is affirmed by this Court for the

reasons assigned in this Writ Petition. Consequently, connected miscellaneous petitions are also dismissed.