

(2012) 10 MAD CK 0073

In the Madras High Court

Case No : Writ Petition No. 25031 of 2011, M.P. No. 3 of 2012 and Contempt
Petition No. 965 of 2012

The Management, EIH Associated Hotels Ltd., (The Trident,
Chennai) Chennai - 600027

APPELLANT

Vs

The Presiding Officer, Principal Labour Court, Chennai and
Babaji Charan Kiillar
 Babaji Charan Kiillar Vs Mr.
Sharad Puri General Manager, EIH Associated Hotels Limited,
(The Trident, Chennai) No. 1/24, G.S.T. Road,
Meenambakkam, Chennai - 600027 and Mr. Manoj Kumar
Agnihotri Manager (HR) EIH Associated Hotels Limited, (The
Trident, Chennai) No. 1/24, G.S.T. Road, Meenambakkam,
Chennai - 600027

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Constitution of India, 1950 — Article 142, 226
Industrial Disputes Act, 1947 — Section 17B, 33C(2)

Citation : (2013) 136 FLR 743 : (2012) 4 LLJ 833 : (2013) 1 LLN 258

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : T.P. Manoharan in W.P. No. 25031/2011 and Mr. Balan Haridas in
Cont. P. No. 965/2012, for the Appellant; Balan Haridas for R2 in W.P. No.
25031/2011 and Mr. T.P. Manoharan in Cont. P. No. 965 of 2012, for the
Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice K. Chandru

1. The writ petition is filed by the Management seeking to challenge the
Preliminary Award dated 02.09.2010 and the final Award dated

27.05.2011 made in I.D. No. 203 of 2004 by the Principal Labour Court, Chennai.
By the impugned Award, the Labour Court set aside the

dismissal order passed against the second respondent workman dated

06.01.2004 and directed reinstatement with backwages and other attendant benefits. In the writ petition, notice of motion was ordered on 31.10.2011. Pending notice of motion, an interim stay was granted.

2. For the sake of convenience, parties are referred to as the Management and the Workman as the case may be.

3. The workman filed two applications viz., M.P. Nos. 1 and 2 of 2012 seeking for a direction to pay Rs. 9750/- every month to the workman in

terms of Section 17B of the I.D. Act and also for vacating the interim stay granted on 31.10.2011. Both applications were supported by a counter

affidavit filed by the workman dated 18.02.2012. This Court by an order dated 19.03.2012 held that the workman is entitled to get last drawn

wages in terms of Section 17B of the I.D. Act from 01.11.2011 and directed the Management to pay the same till the disposal of the writ petition

and made the interim stay absolute. This Court also directed the Management to deposit 30% of the amount due and payable to the workman to

the credit of I.D. No. 203 of 2004 within a period of eight weeks and on such deposit, the workman was permitted to withdraw 50% of the

amount and the balance 50% was directed to be deposited in a Nationalized Bank with liberty to the workman to withdraw quarterly interest and

the vacate stay petition was closed.

4. The Management instead of complying with the order passed by this Court on 19.03.2012 filed M.P. No. 3 of 2012 seeking for a direction

granted u/s 17B of the I.D. Act to be cancelled and the direction to withdraw quarterly interest on deposit to be deleted. It was stated by the

Management that the workman had already reached the age of superannuation on 09.04.2008 itself. Therefore, the question of his being reinstated

in service will not arise as his date of birth was 10.04.1950. The claim made by the workman that he was 57 years old in the counter affidavit was

erroneous and he was 61 years old and hence, the question of his drawing interest also will not arise. It was also stated by them if the workman

succeeds in sustaining the Award, he may be granted relief.

5. Aggrieved by the disobedience of the order passed by this Court, the workman filed Contempt Petition No. 965 of 2012. When the contempt

petition came up on 09.06.2012, this Court directed papers to be served on Mr. T.P. Manoharan, learned counsel appearing for the Management

in the writ petition and directed the main writ petition also to be listed along with the contempt petition. The Management at that stage had stated

that they have not disobeyed the order of this Court, on the contrary, their application for modification of the order in M.P. No. 3 of 2011 is

pending and that may also be listed. Accordingly, the said miscellaneous petition was also listed.

6. Heard the arguments of Mr. T.P. Manoharan, learned counsel for the Management and Mr. Balan Haridas, learned counsel for the workman.

7. It is seen from the records that the workman was employed in the Hotel at their Front Office. He was dismissed from service with effect from

06.01.2004. The said dismissal was consequent upon a charge sheet cum show cause notice issued on 13.09.2003. The workman raised an

industrial dispute before the Assistant Commissioner of Labour, Conciliation I, Chennai vide his representation dated 13.01.2004. The Conciliation

Officer as he could not bring about mediation between the parties gave a failure report dated 29.03.2004. On the strength of the failure report, the

workman filed claim statement dated 26.04.2004.

8. The said dispute was taken on file as I.D. No. 203 of 2004 by the first respondent Labour Court. The Management filed a counter statement

dated 01.11.2004. Since the validity of the enquiry was attacked before the Labour Court, the Labour Court framed a preliminary issue regarding

the enquiry. It passed a Preliminary Award dated 02.09.2010 and set aside the enquiry conducted by the Management holding that the enquiry

was contrary to the principles of natural justice and it was not done in fair manner. Since the Management reserved its liberty to lead evidence in

case the preliminary Award goes against them, the matter was directed to be posted for further hearing on 13.09.2010.

9. Challenging the Preliminary Award, the Management filed a writ petition before this Court in W.P. No. 29073 of 2010. This Court held that the

question of interfering with the preliminary Award will not arise and if the final Award goes against them, there is time enough to challenge even the

preliminary Award and dismissed the writ petition by an order dated 23.02.2011.

10. Thereafter, before the Labour Court, evidence was let in. The workman examined himself as W.W.1 and on his side, 3 documents were filed

and marked as Exs. W1 to W3. The Management examined one Manoj Kumar

Agnihotri as M.W.1 and on their side 44 documents were filed and marked as Ex. M1 to M44.

11. The Labour Court based upon the materials, both oral and documentary came to the conclusion that charges leveled against the workman were not proved and the punishment of dismissal was shockingly disproportionate to the gravity of offence and held that the order of dismissal was not justified. Since the workman was not gainfully employed during the said period, the Labour Court also granted the relief of backwages. The contention of the Management that the workman had received the amount and gave full and final settlement receipts in terms of Exs. M35 and M37 and that the dispute was not maintainable was also rejected as the workman had received the payment without prejudice to his rights and hence, the question of estoppel will not arise.

12. Assailing the said Award, the Management contended that their hotel is one of the Star hotels in Chennai. The Workman was an employee of their Hotel. He was having direct contact with the guests of the Hotel all the time. On 06.09.2003 the Management organized a get-together for the staff of the Indian Airlines. The workman was on duty at that time. The Management had neither invited him for the get-together nor assigned duty to him in the party hall. There was no necessity for him to enter into the party hall or to participate in the said party. However, around 8.45 pm on that day, he entered into the Party Hall and started consuming alcohol. Thereafter, in an inebriated state, he started arguing and fighting with the Banquet staff in front of the guests and created problem. He went out of control and caused inconvenience to the guests. Hence, one Muralidharan, Front Office Executive, who was in charge of the Get-together party requested the workman to leave the party Hall In spite of such request, the workman refused to do so. When Muralidharan along with one Saravanan, another staff of the Management tried to take the petitioner to the banquet store area, he refused to go with them and pushed them away. He also torn the shirt of Saravanan and abused M/s. Muralidharan and Saravanan in filthy language. His unruly and violent behavior, which were very serious in nature had caused disturbance and inconvenience to the guests of the Management. Therefore, the workman was issued a charge sheet-cum-Show Cause Notice dated 13.09.2003 and explanation

was called for. The explanation submitted by the workman was not satisfactory. Hence, the Management decided to conduct a domestic enquiry

into the said charges. The representative of the Management was not a law graduate and also not a legally trained person. The workman was

permitted to have the assistance of a Co-employee.

13. In the domestic enquiry, 5 witnesses were examined on the side of the Management in the presence of the workman and the Co-employee

assisting him. Even during the enquiry proceedings, the workman and his co-employee behaved violently and used abusive words accusing the

representative of the Management. The Enquiry Officer tolerated such behaviors, accepted their requests and adjourned and posted the enquiry

according to their convenience and given opportunities to them to fully participate in the enquiry and to cross examine the Management witnesses.

The workman has also effectively cross examined the first 4 witnesses M.W.1 to M.W.4. When the last witness of the Management, M.W.5 J.

Venugopal was presented for cross examination, the Workman evaded the cross examination and asked for repeated adjournments. Finally, when

the enquiry was posted on 20.11.2003, the Co-employee has made a false complaint that he was not allowed to work in peace and made a big

noise. Both the workman and the co-employee refused to cross examine M.W.5 and walked out of the enquiry. Due to the circumstances, the

Enquiry Officer had no occasion to ask the workman to lead evidence on his side and give his explanation to the evidence led against him. The

Workman has also not sent any letter to the Enquiry Officer stating that he is willing to cross examine M.W.5 and adduce oral and documentary

evidence. Therefore, the Enquiry Officer after considering the charges and the materials on record, recorded detailed reasons and findings and filed

a report dated 04.12.2003 stating that the charges framed against the Workman were proved. The Management satisfied with the findings given in

the Enquiry report sent a second show cause notice dated 12.12.2003 along with Enquiry Report to the Workman. After considering his reply and

documents, the order of dismissal came to be passed.

14. However, in the preliminary Award, the Labour Court found that when workman sought for adjournment for bringing a co-employee, his

request was rejected and on the same day, one Muralidharan was examined as

Management witness and it was adjourned to 08.10.2003 for his cross examination and on that date, Workman demanded the assistance of an Advocate, but he was allowed to have the assistance of a co-employee. Even though he sought for postponement of the enquiry by half an hour, the enquiry continued from 12.45 pm and the said Muralidharan was cross examined. When the enquiry further started on 10.11.2003, the Management wanted to make some corrections in recording the evidence of the first witness and the workman objected to the same, but his objection was not recorded in the daily sheet. The Labour court recorded a finding that during the enquiry proceeding, the workman's objections were not recorded properly by the Enquiry Officer. The Labour Court also extracted a portion from the Enquiry Minutes and held that Management was giving pinprick to co-employee in helping the workman and that statement was also refused to be recorded in the enquiry minutes. Even after demanding of the cross examination, they were not allowed to participate in the enquiry and they were edged out of the enquiry. The letter of request for re-opening the enquiry was also rejected. Even assuming the workman and the Co-employee were raising their voice in the enquiry and were misbehaving, the Enquiry Officer should have taken appropriate action and cannot bring the enquiry to an abrupt ending. The non-examination of the evidence of the workman and supporting evidence clearly shows that the proceedings initiated by the Enquiry Officer was unjustified. Therefore, sufficient opportunities were not given to the workman.

15. Mr. T.P. Manoharan, the learned counsel appearing for the Management, referred to the following judgment of the Supreme Court reported in Pepsu Road Transport Corp. Vs. Rawel Singh, for contending that inspite of service of show cause notice, the workman failed to appear in the enquiry.

16. He further referred to the judgment of the Supreme Court reported in (2008) 11 SCC 502 [Board of Directors, Himachal Pradesh Transport Corporation and another v. K.C. Rahi] for contending that if the workman has not chosen to participate in the enquiry proceedings at his own risk and in such event, the plea of principles of natural justice is deemed to have been waived and he is estopped from raising the question of non-

compliance.

17. The learned counsel further referred to the judgment of the Supreme Court reported in (1997) 10 SCC 386 Ranjan Kumar M ITR a v.

Andrew Yule and Co. and Ors. for contending that if the workman did not participate in the enquiry but he was terminated after the enquiry, then

he cannot assail the termination on merits.

18. It is not clear as to how these judgments will have any assistance to the case of the Management when the Labour Court has given a specific

finding that the enquiry was vitiated making elaborate reference to the findings recorded by the Enquiry Officer. The Labour Court has full power

to appreciate the evidence and also to come to a different conclusion. Even before doing so, the Court can even go into the procedure adopted by

the Enquiry Officer. In this case, not only the workman was denied legal assistance on the ground that the Presenting Officer of the Management

was a non-lawyer, but the co-employee who was permitted to appear was given pinpricks thereby depriving a fair opportunity of the workman

participating in the enquiry. These finding of facts cannot be disturbed in this writ petition. This Court after going through the Enquiry Report is of

the opinion that the findings recorded by the Labour Court in its Preliminary Award dated 02.09.2010 does not call for any interference and thus,

the Preliminary Award dated 02.09.2011 stands sustained.

19. It is important to note that once an enquiry is set aside by the Labour Court and fresh evidence is let in before the Labour Court for the first

time, the entire matter is at large before the Labour Court. The Management will have to convince the Labour Court with necessary evidence to

support their action of dismissing the workman. But on the contrary, in the present case, the Management did not lead any worthwhile evidence. It

had examined one witness by name Manoj Kumar Agnihotri, who was not an eye witness. The Management also failed to examine other witness

M/s. Muralidharan, Saravanan, Venugopal and Siva, who are supposed to be the eye witnesses. Even Ex. M1, which was marked is only for the

purpose of the case and there was no reference to Ex. M1 in the Charge memo. The Labour Court held that subsequent to the fresh opportunity

given to the Management, they have not let in any satisfactory evidence and even the question of past record cannot be considered since the issue

itself is at large before the Labour Court. The Labour Court also held that the workman was not gainfully employed and no satisfactory evidence

was let in regarding the same. A perusal of the documents marked subsequent to the Preliminary Award shows that the Management wanted to

rely upon the very same documents which were marked during the vitiated enquiry.

20. The Supreme Court in *Neeta Kaplish v. Presiding Officer, Labour Court* reported in *Neeta Kaplish Vs. Presiding Officer, Labour Court* and

Another, has held that if an enquiry is held to be vitiated by the Labour Court, the Management cannot rely upon any part of the past evidence in

the subsequent proceedings. Hence, the Management is at fault and had not satisfied the Labour Court at the stage of fresh enquiry. Therefore, this

Court do not find any infirmities in the Award passed in I.D. No. 203 of 2004 dated 27.05.2011.

21. Assailing the grant of full wages, Mr. T.P. Manoharan, learned counsel appearing for the Management referred to the judgment of the Supreme

Court reported in 2005 (4) Supreme 31 [*Allahabad Jal Sansthan v. Daya Shankar Rai and another*] for contending that for granting back wages,

several factors will have to be taken note of. Though normal rule is of full backwages, in the passage of time, the Courts have realized that a

pragmatic approach should be developed in the matter of grant of backwages. In that case, the Court granted 50% of the back wages.

22. He also referred to the judgment of the Supreme Court reported in *Executive Engineer, Public Health Div. Vs. Kumesh*, wherein the Court

exercised its power to reduce the 50% backwages to that of 25%.

23. Similarly, reference was made to the judgment of the Supreme Court reported in *Fazilka Coop. Sugar Mills Vs. Jatinder Kumar Gupta* and

Another, wherein, the Supreme Court held that keeping in view the peculiar facts of the case, compensation of Rs. 2 lakhs was paid to the

workman.

24. A further reference was made to the judgment of the Supreme Court reported in *Executive Engineer, Water Services Div. Haryana Vs. Kartar*

Singh, wherein the Supreme Court reduced the backwages from 50% to 25%.

25. Once again it is not clear as to how these judgments will have any relevance to the case on hand. The Management not only failed to prove the

charges subsequent to the Preliminary Award by leading satisfactory evidence before the Labour Court but the question of gainful employment,

they failed to prove it. Therefore, the normal rule of relief cannot be denied by this Court. Three out of four decisions cited by the Management

referred to above were all exercise of power by the Supreme Court under Article 142 of the Constitution, which power is not available to the High

Court under Article 226 of the Constitution. The binding precedent is one where the law is settled by the Court and not passing observations made

by the Court in the peculiar facts of that case can be shown as a precedent.

26. In view of the above, W.P. No. 25031 of 2011 stands dismissed. Since there is controversy regarding the age of the workman, this Court is

not inclined to decide the exact backwages to be paid to the workman. However a direction is given to the Management to comply with the

Award within 8 weeks failing which the workman can proceed to compute the amount as he has already filed claim petition before the Labour

Court u/s 33C(2) of the I.D. Act being C.P. No. 1882 of 2011 as well as invoke the power of execution u/s 11B of the I.D. Act. No costs.

Connected miscellaneous petition is closed.

Contempt Petition No. 965 of 2012

Since the contempt petition arose out of an interim order passed by this Court and now that the main writ petition itself has been dismissed, it is for

the workman to work out his rights in term of execution proceedings vested with the Labour Court u/s 11B of the I.D. Act. In view of the remedy

available, this Court is not inclined to deal with the contempt petition, especially when the petition filed by the management in M.P. No. 3 of 2012

seeking for modification was pending. Hence, Contempt Petition No. 965 of 2012 will stand dismissed with liberty to the workman to pursue his

case before the appropriate forum for executing the Award.