
(2007) 11 MAD CK 0003

In the Madras High Court

Case No : W.A. No. 871 of 2001 and W.A.M.P. No. 4714 of 2004

The Management of Madras Atomic Power Project Employees
Consumers Co operative Stores Limited

APPELLANT

Vs

The Deputy Commissioner of Labour (Appeal), The Appellate
Authority under Section 41(2) of the Tamil Nadu Shops and
Establishments Act, 1947 and A.L. Chidambaram

RESPONDENT

Date of Decision : 06-11-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 33(C)(2)
Tamil Nadu Shops and Establishments Act, 1947 — Section 41(2)
Tamil Nadu Shops and Establishments Rules, 1948 — Rule 9, 9(2)

Citation : (2007) 6 MLJ 1334

Hon'ble Judges : S.J. Mukhopadhaya, J;A.C. Arumugaperumal Adityan, J

Bench : Division Bench

Advocate : P. Anbarasan, for the Appellant; K. Balasubramanian, for R1 and V. Santhanam, for R2, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—The Management of Madras Atomic Power Project Employees Consumers Co-operative Stores Limited, having

unsuccessfully challenged the order passed by the appellate authority under Sub-section (2) of Section 41 of the Tamil Nadu Shops and

Establishments Act, 1947, (hereinafter referred to as "Shops Act") has preferred this appeal against the order passed by learned single Judge.

2. The case of the appellant management is that the 2nd respondent, who was working as Assistant Manager at the stores of the appellant,

admitted his guilt before the Board of Directors and took time to pay the amount and submitted a bearer cheque for Rs.15,000/= on 1st July,

1991. In such background, the order of termination was issued on 6th July, 1991, giving one month's wages in lieu of notice period. The 2nd

respondent challenged the order of termination by filing a suit on 10th July, 1991 in the Court of District Munsif, Chengalpet, in O.S. No.224/91.

After some time, the said suit was withdrawn and an appeal under Sub-section (2) to Section 41 of the Shops Act was preferred before the 1st

respondent, Deputy Commissioner of Labour (Appeals)-cum- Appellate Authority u/s 41(2) registered in TSC No.21/92. The said appeal was

filed against the order of termination on 30th June, 1992, with a delay of about one year. The 1st respondent condoned the delay, entertained the

appeal and allowed the appeal on the ground that the order of punishment was issued without any enquiry and giving liberty to the 2nd respondent.

Against the said order, writ petition, W.P. No.2050/94 was preferred, which gave rise to the present appeal.

At this stage, it is pertinent to mention that the order was not implemented and so the 2nd respondent preferred Cont. Petition No.190/94 u/s

33C(2) of the Industrial Disputes Act, 1947, on the file of the Labour Court, Madras. A second writ petition, W.P. No.4459/96 was also

preferred for stay of the said proceeding, which has also been decided by common order dated 18th Oct., 2000, but no separate appeal has been

preferred against the order passed in W.P. No.4459/96.

3. Before learned single Judge, the appellant mainly raised two issues to assail the appellate order, viz.:

(i) that the 2nd respondent is a "person employed" in a position of management (Assistant Manager) within the meaning of Section 4(1)(a) of the

Shops Act, hence, he cannot invoke the provisions of Section 41(2) of the said Act.

(ii) there being delay in preferring the appeal, in absence of a petition for condonation of delay and without notice to the appellant, the delay could

not have been condoned by the appellate authority.

On the other hand, according to the 2nd respondent, he is a "person employed" within the meaning of Section 2(12) of the Shops Act and as such

he is entitled to claim the benefit u/s 41(2) of the said Act. Further, according to him, the delay having been explained and appeal having been

preferred along with petition for condonation of delay, it was rightly condoned by

the appellate authority, being satisfied with the ground that the 2nd respondent was pursuing the remedy before the civil court.

4. We have heard the counsel for the parties who have again taken similar plea as was taken before learned single Judge and noticed above.

From the detailed order passed by learned single Judge, it will be evident that the learned single Judge noticed the factual position of the 2nd

respondent and came to a definite conclusion that the 2nd respondent falls within the definition of "person employed" within the meaning of Section

2(12) of the Shops Act. Referring to Section 2(6), it was also held that the establishment in question also falls within the meaning of "establishment"

and, thus, the appellate authority had jurisdiction to entertain the appeal under Sub-section (2) to Section 41 of the Shops Act.

5. Learned single Judge also noticed Tamil Nadu Shops and Establishments Rules, 1948, framed by the Governor of Tamil Nadu in exercise of

power conferred by Sub-section (1) to Section 49 of the Shops Act, particularly Rule 9, which reads as follows:

Rule 9. Appeals u/s 41(1). - (1) The Deputy Commissioners of Labour in their respective areas assigned to them by the Commissioner of Labour

shall be the authorities for the purposes of hearing appeals under Sub-section (2) of Section 41 of the said Act:

Provided...(2) Any appeal under Sub-section (2) of Section 41 shall be preferred by the person employed within thirty days from the date of

service of the order terminating the service with the employer, such service to be deemed effective if carried out either personally or if that be not

practicable, by prepaid registered post to the last known address when the date of such service shall be deemed to be the date when the letter

would arrive in ordinary course of post. Provided that an appeal may be admitted after the said period of thirty days if the appellant satisfies the

appellate authority that he had sufficient cause for not preferring the appeal within that period. (3) The procedure to be followed by the appellate

authority (Deputy Commissioner of Labour), when hearing appeals preferred to him under Sub-section (2) of Section 41 shall be summary. He

shall record briefly the evidence adduced before him and then pass orders giving his reasons therefor. The result of the appeal shall be

communicated to the parties as soon as possible. Copies of the orders shall also

be furnished to the parties, if required by them.

Having noticed Sub-rule (2) to Rule 9 including the proviso thereto, learned single Judge held that the appellate authority was well within

jurisdiction to entertain the appeal, being satisfied with the sufficient cause for not preferring the appeal in time.

It is not in dispute that the respondent had shown sufficient cause for not preferring the appeal in time, as noticed by the appellate authority and the

fact that the respondent was pursuing the matter before a court of law, in such a case, if delay has been condoned, no interference is called for

merely on the ground that a separate petition was not filed for condonation of delay. In fact, there is no law laid down under the provisions of the

Shops Act or Rules framed thereunder that a separate petition for condonation is to be filed or filing of separate petition is mandatory.

6. So far as the jurisdiction is concerned, we have noticed the detailed reasoning given by learned single Judge to come to a definite conclusion that

the appellate authority had jurisdiction to decide the appeal u/s 41(2) of the Shops Act. In the present case, in fact, it is not necessary to decide

such issue as admittedly the order of termination was not passed in accordance with law. It has already been noticed that the order of termination

was issued by way of punishment. It has been alleged that he had admitted his guilt, though no charge was framed nor any proceeding was initiated

against the employee. In absence of any charge, it cannot be accepted that the employee had accepted the guilt and thereby enquiry was dispensed

with.

Now it is settled law that if setting aside an order of High Court gives rise to revival of another illegal order, in such case, the High Court should not

exercise its discretionary jurisdiction under Article 226 of the Constitution of India. In this background, the order of termination being penal in

nature, having been passed without giving opportunity to the respondent, we are not inclined to interfere with the appellate order or the order

passed by learned single Judge, as otherwise it will revive the illegal order of termination.

7. So far as backwages is concerned, the management had not taken any plea before the appellate authority or before learned single Judge that the

respondent is not entitled for backwages, being in job in some other organisation

during the intervening period. No such plea having been taken

before the appellate authority or before the learned single Judge, or before this Court, we are not inclined to give any finding in this regard.

8. In the circumstances, no interference is called for in this appeal. There being no merit, the writ appeal is dismissed. Consequently, connected

miscellaneous petition is also dismissed. However, there shall be no order as to costs.