
(2015) 04 MAD CK 0109

In the Madras High Court

Case No : W.A. Nos. 952, 953 of 2014, M.P. Nos. 1 and 1 of 2014

The Managing Director, TWAD Board and Others

APPELLANT

Vs

V. Sathia Jacob and Others

RESPONDENT

Date of Decision : 24-04-2015

Acts Referred:

Evidence Act, 1872 — Section 114 (g)

Industrial Disputes Act, 1947 — Section 2(s), 25(B), 25(B)(2), 25B, 25B(2)(1)(a)(i)

Citation : (2015) 04 MAD CK 0109

Hon'ble Judges : Satish K. Agnihotri, J; M. Venugopal, J

Bench : Division Bench

Advocate : S. Thamizharasi, for the Appellant; P. Selvaraj, Advocates for the Respondent

Judgement

1. W.A. No. 952 of 2014: The Appellants/Respondents have preferred the instant intra Court Writ Appeal as against the order dated 30.08.2013 in W.P. No. 6109 of 2008 passed by the Writ Court.

W.A. No. 953 of 2014: The Appellants/Petitioners have projected the present intra Court Writ Appeal as against the order dated 30.08.2013 in W.P. No. 21408 of 2008 passed by the Writ Court.

2. The Writ Court while passing the Common Impugned Order on 30.08.2013 in W.P. Nos. 6109 of 2008 and 21408 of 2008 (filed by the 1st Respondent / Petitioner) in Paragraph Nos. 7 and 8 had observed the following:-

"....7. One another aspect to be pointed out is that when one of the above two writ petitions i.e., W.P. No. 6109 of 2008, was originally taken up by this Court in 2008, the Board did not even have the real interest in contesting the matter which resulted in passing of an ex parte order, dated 15.07.2008, with the following direction,

"...4. Considering the above facts and circumstances, I am inclined to direct the respondents -1 to 3 to absorb the petitioner as permanent employee and

implement the award passed by the Labour Court, Tirunelveli, made in I.D. No. 148 of 1997, dated 31.08.2007, within a period of six weeks from the date of receipt of a copy of this order."

It is quite unfortunate to note that the Board, an organization of the State, like the proceedings before the Labour Court, after allowing this Court to pass an ex-parte order against it, filed M.P. No. 3 of 2010, to set aside the above ex parte order and after the said petition was ordered on 11.01.2011, W.P. No. 6109 of 2008 filed by the Workman against the Board, came to be restored to file. From the conduct of the Board, one thing is clear that even though they are not interested in pursuing the proceedings, somehow or other, they desire to see that the workman does not get absorption. Such hard attitude is clearly apparent from the fact that even after the impugned award passed by the Labour Court, they did not choose to absorb the petitioner, however, to see the workman in pains, they have come up with the petition challenging the Award that too without any interest to prosecute it in time. This type of approach on the part of a governmental agency should be highly deprecated.

8. Therefore, this Court is of the view that the prayer in the writ petition filed by the workman in W.P. No. 6109 of 2008 deserves acceptance. Consequently, the Writ Petition is allowed with a direction to the TWAD Board/respondents to pass immediate orders absorbing the petitioner and disbursing the monetary benefit due to him in terms of the Award passed by the Labour Court preferably within a period of one week from the date of receipt of copy of the order...."

and resultantly allowed the Writ Petition No. 6109 of 2008 with a direction and dismissed the W.P. No. 21408 of 2008 as devoid of any merit.

3. The Appellants contentions (in Writ Appeal Nos. 952 and 953 of 2014. : The Learned Counsel for the Appellants/ Respondents/Petitioners submits that the Common Order dated 30.08.2013 passed by the Writ Court in W.P. No. 6109 of 2008 and W.P. No. 21408 of 2008 is against the Weight of Evidence, Contrary to Law and further is a Perverse one.

4. According to the Learned Counsel for the Appellants the Writ Court fail to appreciate that Kuzhithuraiyaru Combined Water Supply Scheme was conceived at a cost of Rs. Four Hundred Lakhs vide B.P. Ms.No. 87 dated 26.02.1985. Further, the Scheme was designed to provide water supply to Eight Town Panchayats, Seven Wayside Habitations and One Municipality. The said Scheme was executed by the TWAD Board. Moreover, almost 80% of the trial pumping and other constructions were completed on 17.08.1993 and the remaining testing of work and trial run of water supply to Eight Panchayats were almost completed during the month of October, 1993 and Pilot Water Supply to Eight Town Panchayats were effected, since November 1993 onwards.

5. The Learned Counsel for the Appellants submits that the maintenance of Water Supply Works were performed by job work contractors under original cost and the said work was entrusted to the Job Contractors by the TWAD Board. In

this connection, the Learned Counsel for the Appellants contends that the Job Contractor engaged 49 workmen on Daily Wage Basis and the said workmen received wages from the Contractors and the TWAD Board had not engaged the 1st Respondent/Writ Petitioner on daily wage basis as mentioned in the I.D. Petition.

6. The Learned Counsel for the Appellants contends that the 1st Respondent/Petitioner has no connection with the Board and in fact, the 4th Respondent, is one of the Job Contractor, who engaged the 1st Respondent/Petitioner in the week. Also that the 1st Respondent/Petitioner was working under the 2nd Respondent/Contractor and he was never engaged by the TWAD Board. Indeed, the 2nd Respondent had engaged the 1st Respondent/Petitioner in certain works and added further, the 2nd Respondent is a registered Contractor.

7. The Learned Counsel for the Appellants proceeds to take a stand that the Board, as per B.P. No. 4 dated 13.01.1994 had decided to maintain the aforesaid Water Supply Scheme through contractors by calling tenders on trial basis. That apart, arrangements were made for calling of tenders to maintain the said Water Supply Scheme through Contractors. In fact, the 1st Respondent/Petitioner's Union have obtained a Stay Order through this Court and the Scheme costing Rs. 400 Lakhs to benefit Two Lakhs People was effected badly for want of maintenance staff.

8. Continuing further, it is represented on behalf of the Appellants that the Government of Tamil Nadu vide G.O. Ms.No. 85/MA and WS dated 10.03.1994 had decided to maintain the Combined Water Supply Scheme by getting resolutions from the local bodies. As per the said Government Order, TWAD Board would maintain the Water Supply Scheme by the derived funds from the Government directly.

9. The grievance of the Appellants is that at no point of time, the Board engaged twenty individuals for the maintenance work of the Pilot Water Supply Scheme. In reality, the 1st Respondent/Writ Petitioner and Nineteen others were engaged in the portion of the said maintenance work by the Job Contractor. Therefore, the 1st Respondent/Petitioner cannot be considered as a employee of the TWAD Board.

10. Yet another submission of the Learned Counsel for the Appellants is that the 1st Respondent/Petitioner had worked as N.M.R. only for 35 days from 30.08.1993 to 24.10.1993 and therefore, he is not entitled to claim any relief against the Board, much less his claim for reinstatement with back wages.

11. At this stage, the Learned Counsel for the Appellants brings it to the notice of this Court that the Writ Court had attributed malafides on the part of TWAD Board for non filing of Counter by the Board, which was remedied by this Court by directing the Board to deposit a sum of Rs. 1,50,000/- to the credit of I.D. No. 148 of 1997 on the file of the Labour Court, Tirunelveli. Also that, a cost of Rs.10,000/- was also paid by the Board to the 1st Respondent.

12. The Learned Counsel for the Appellants projects an argument that the Writ Court had wrongly held that the Labour Court was right in holding that the "N.M.R. Register" was not produced despite the same was within the custody of the Board. Apart from that, the evidence of M.W.2 was very clear that the workman worked only as a workman under the Contractor and therefore, no malafide intention can be attributed to the Board. Further, the Writ Court had failed to appreciate the contention of the 1st Respondent/Petitioner in his I.D. Petition that he worked only under the Contractor, who paid him the salary. As such, the finding of the Writ Court in this regard is without any basis and non appreciation of relevant facts.

13. The Learned Counsel for the Appellants contends that as per Section 25B(a) (ii) of the Industrial Disputes Act, 1947, a workman has to work for not less than, 240 days. Also that, the Labour Court had blindly framed the issues whether the 1st Respondent/Workman had worked on the pay role of the 2nd and 3rd Respondents (The Appellant Nos. 2 and 3 in Writ Appeals) either as casual labour or temporary labour continuously for 190 days. Moreover, 190 days is not specified in Section 25B of the Industrial Disputes Act. Unfortunately, these vital aspects were not taken into account by the Writ Court in proper and real perspective.

14. The Learned Counsel for the Appellants takes a plea that the Writ Court had failed to consider that the onus of establishing an Employer-Employee relationship is on a person, who sets up the existence on such relationship.

15. The Learned Counsel for the Appellants contends that the Labour Court had passed the Impugned Award erroneously and further wrongfully gave a direction to issue proper order absorbing the 1st Respondent/Petitioner as permanent employee with effect from 10.09.1995 and post him in the vacancy in which he was working on the date of termination of his employment in the TWAD Board of Kanyakumari District and also to pay arrears of wages at the rate of Rs. 1,050/- per month from 10.09.1995 till the date of filing of the petition.

16. During her last leg of argument, the Learned Counsel for the Appellants submits that the I.D. Petition was filed belatedly, viz., after 21 months of the 1st Respondent/Petitioner's purported termination, even without ascertaining who is his employer.

Submissions of 1st Respondent/Petitioner:-

17. Per contra, it is the submission of the Learned Counsel for the 1st Respondent/Petitioner that the Labour Court, Tirunelveli, in I.D. No. 148 of 1997 on 31.08.2007 had rightly passed an award by observing that there was some purpose in not producing N.M.R. relating to Kulithuraiyaru Combined Drinking Water Scheme pertaining to 1993 to 1995 and drew adverse inference against the Appellants in not producing N.M.R relating to the aforesaid Drinking Water Scheme for the years 1993-1995 and accordingly declared that the 1st Respondent/Petitioner to have worked under 2nd and 3rd Appellants/2nd and 3rd

Respondents as N.M.R for more than required number of days, viz., 190 days continuously etc., and held that the 1st Respondent/Petitioner had required qualification to be observed as Regular Employee in TWAD Board, Kanyakumari Division etc.,

18. Apart from the above, the Learned Counsel for the 1st Respondent brings it to the notice of this Court that the Labour Court, Tirunelveli in its award in I.D. No. 148 of 1997 dated 31.08.2007 had ultimately issued a direction to the Appellants/Respondents to issue proper order absorbing the 1st Respondent/Petitioner as permanent employee with effect from 10.09.1995 and post him in the vacancy in which he was working on the date of termination on his employment in the TWAD Board of Kanyakumari District and further directed the Appellants to pay arrears of wages at the rate of Rs. 1,050/- per month from 10.09.1995 till the date of filing of the application.

19. At this juncture, the Learned counsel for the Respondents contends that the Writ Court while passing the Common Order in W.P. Nos. 6109 and 21408 of 2008 in Paragraph No. 6 had among other things observed the following:-

"When the employer, a mighty Institution like the Board, played foul game to deprive a poor employee of his right of employment and even went to the extent of withholding a vital document to hid the actuality, if the factum of employment of the worker is substantiated through the materials available and the circumstances are impelling to draw adverse inference against the employer, in a case like this, even if the workman does not discharge the burden it will not affect his case"

and ultimately allowed W.P. No. 6109 of 2008 filed by the 1st Respondent/Petitioner by issuing a direction to the TWAD Board/Appellants to pass immediate orders absorbing him and disburse the monetary benefits due to him in terms of the award passed by the Labour Court preferably within a period of one week from the date of receipt of copy of the order.

Analysis:

20. At the outset it is to be pointed out that the 1st Respondent/Petitioner filed W.P. No. 6109 of 2008 praying for passing of an Order by directing the Respondents 1 to 3 (Appellants 1 to 3) to absorb him as their permanent employee from 10.09.1995 and to pay him the arrears of wages at the rate of Rs. 1,050/- per month from 10.09.1995 to 08.06.1997, viz., the date of filing the petition in I.D. No. 148 of 1997 on the file of the Labour Court, Tirunelveli as per the award dated 31.08.2007.

21. Also that, the Appellants/Petitioners filed in W.P. No. 21408 of 2008 to quash the award dated 31.08.2007 passed in I.D. No. 148 of 2007 by the Labour Court, Tirunelveli.

22. It is to be borne in mind that the 1st Respondent / Writ Petitioner filed a petition under Section 2A(2) of the Industrial Disputes Act, which was taken on

file by the Labour Court, Tirunelveli as I.D. No. 148 of 1997. In the said petition, the 1st Respondent/Petitioner had stated that he joined the Kuzhithurayaru Combined Water Supply Scheme from 20.07.1993 on Daily Wage Basis and he was directly appointed by the Tamil Nadu Water Supply and Drainage Board. Further, his stand is that he worked continuously as per Section 25(B) of the Industrial Disputes Act. His last drawn monthly wages was Rs. 1,050/-. Moreover, he was paid a salary once in a month, though it was stated as "Salary Per Day".

23. The prime stand of the 1st Respondent/Petitioner is that the 2nd Respondent/4th Respondent (Contractor) was inducted with a view to prevent 1st Respondent/Petitioner and other daily wagers from demanding permanent status. Also that it is the plea of the 1st Respondent that the 2nd Appellant/2nd Respondent without any notice and in contravention of Section 9(A) of the Industrial Disputes Act, 1947 made an arrangement that the salary was paid through the 2nd Respondent/4th Respondent from November 1993 onwards. Indeed, the work at Kuzhithuraiyaru Combined Water Supply Scheme and Drainage Board was done under the supervision of the Board Officers.

24. Before the Labour Court, Tirunelveli, in I.D. No. 148 of 1997, the 2nd Appellant/2nd Respondent took a stand among other things mentioning that the maintenance of water supply works were performed by Job Work Contractors under original cost and the work in question was entrusted to the Job Contractors by the TWAD Board and in fact, the Job Contractor engaged 49 workmen on daily wage basis and the workmen received wages from the Contractors.

25. The categorical stand of the 2nd Appellant / 2nd Respondent is that the Board had not engaged the 1st Respondent/Petitioner on daily wage basis and in fact, he had no connection with the Board. Apart from that, the 2nd Respondent/4th Respondent (Contractor) is one of the Job Contractor, who engaged the 1st Respondent/Petitioner. Also that the 1st Respondent/Petitioner and 19 others were engaged for a portion of the maintenance work in the Pilot Water Supply Scheme by the Job Contractor and therefore, he cannot be considered as an employee of the TWAD Board. Moreover, the 1st Respondent/Petitioner had worked as his NMR only for 35 days from 30.08.1993 to 24.10.1993. As such he is not eligible to claim any relief against the Board.

26. It is the further case of the 2nd Appellant/Respondent that the Kuzhithuraiyaru Combined Water Supply Scheme was installed by the TWAD Board and the work was completed within a specific period from 1993 to 1995. As a matter of fact, the work was entrusted to the Job Contractors and the Contractors also had entered into an agreement with the Board in connection with the said worker. In as much as the 1st Respondent/Petitioner had not worked with the Board, he is not entitled to claim reinstatement with back wages.

27. In this connection, this Court significantly points out that it is evident from the perusal of the award in I.D. No. 148 of 1997 passed by the Labour Court,

Tirunelveli dated 31.08.2007 that the Appellants/Respondents had failed to establish a major aspect or fact that the 1st Respondent/Petitioner was either an employee under the Contractor, Argentek or M.W.2, Mohan or Subbiah. Moreover, the Appellants had not proved by way of production of N.M.R Registers for the year 1993 to 1995 in respect of the Kuzhithuraiyaru Combined Drinking Water Scheme. To put it precisely, the Appellants had not established that the 1st Respondent/Petitioner was employed as "Coolie" under the Contractors and not under the TWAD Board.

28. At this stage, it is to be pointed out that Section 114 (g) of the Indian Evidence Act, 1872 refers to presumption raised from withholding of available evidence. The destruction or suppression of useful evidence leads to an inference of the evidence if produced would go against a litigant who withholds it. At this stage, this Court aptly points out that the well known maxim is "Omnia Praesumuntur Contra Spoliatores". It is to be remembered that if a person wrongfully withholds evidence, every transaction is disadvantage consistent with the facts admitted or proved will be adopted as per decision of *Williamson v. Rover Cycle Co*, 1901, 2 IR Page 619. Further more, an adverse inference can be drawn only if there is withholding of evidence.

29. It is the duty of a litigant to produce the best evidence in his possession, who could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw an adverse inference under Section 114 (g) of the Indian Evidence Act, 1872, notwithstanding that the onus of proof did not lie on such person and it was not called upon to produce the said evidence as per decision of the Hon'ble Supreme Court in *Musauddin Ahmed Vs. The State of Assam*, AIR 2010 SC 3813 : (2009) 9 JT 69 : (2009) 9 SCALE 155 : (2009) 14 SCC 8541 : (2009) 9 SCR 1135 .

30. At this stage, this Court relevantly points out that the facts of the decision of *Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and Others*, AIR 2007 SC 1370 : (2007) 4 JT 278 : (2007) 2 LLJ 393 : (2007) 4 SCALE 237 : (2007) 4 SCC 94 : (2007) 1 SCC(L&S) 961 : (2007) 3 SCR 783 : (2007) AIRSCW 1712 : (2007) 3 Supreme 553 are that the workmen claim to have been appointed by the petitioner between the years 1987 - 1991 and it was their stand that they worked continuously from the date of their appointment till they were retrenched for the years 1994 - 1995 respectively. The categorical plea of the respondents was that although they had worked continuously from the date of their appointment for more than 240 days in a calendar year, they had been illegally retrenched from service in violation of the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. The workmen produced documents relating to their attendance in their possession. The Respondents/Employer had not filed the attendance register and the muster rolls for the years 1991, and onward, but produced only records of 12 months immediately preceding the date of retrenchment. Since the best evidence was not filed, it was held by the Hon'ble Supreme Court that the High Court was justified in drawing adverse inference

against the Respondents.

31. There is no two opinion of an very vital fact that to be an "Workman" within the definition of Section 2(s) of the Industrial Disputes Act, 1947, he should be employed to do the work in an Industry. To put it differently, there should be an Employer-Employee or Master and Servant Relationship.

32. In fact, the Workman is to prove that he had worked for 240 days in last 12 months. Also, for reckoning of continuous service of 240 days by a workman, the sunday"s and other paid holidays will be taken into account as clarified by Apex Court as per decision in Municipal Corporation of Delhi V. Sanjay Kumar reported in (2004) LLR Page 162 (Delhi High Court). As a matter of fact, the onus of proving the employment, lies on the workman and he has to discharge the same by leading a cogent and reliable evidence.

33. Moreover, the Definition of Section 25B of I.D. Act requires that the workman should have been in "continuous service" under an employer. It is not necessary that the workman should work in the same capacity during the relevant period with a view to earn "continuous service" as defined in Section 25(B). If an individual is a workman as defined in the I.D. Act, and the employer is the same, he earns "continuous service" by working for 240 days within a period of 12 calender months preceding the date of retrenchment as per decision in Prabhu Dayal Jat Vs. Alwar Sahakari Bhumi Vikas Bank Ltd. and Others, (1990) 60 FLR 9 : (1991) 2 LLJ 130 : (1989) 2 WLN 280 .

34. A perusal of the ingredients of Section 25(B)(2) of the I.D. Act indicates that it introduces a fiction to the effect that even if a workman is not in "continuous service" within a meaning of Clause (i) for a period of one year or six months he shall be deemed to be in continuous service for that period under an employer if he had "actually worked" for the days specified in Clauses (a) and (b) thereof. By fiction of Section 25B(2)(1)(a)(i) even if an individual has not been in "continuous service" within the meaning of sub clause (1) for a period of one year, he shall be deemed to be in "continuous service" under an employer for that period if he has "actually worked" under the employer for 190 days in case he is employed underground in a mine or 240 days in any other case.

35. It cannot be denied that in the interest of N.M.R. Workers, who had spent a long/considerable period with the concerned authorities, possibility of their absorption on regular basis ought to be explored in the considered opinion of this Court.

36. In the instant case, this Court on looking through the Award dated 31.08.2007 in I.D. No. 148 of 1997 of the Labour Court, Tirunelveli opines that the Appellants/Respondents were provided with opportunity time and again in regard to the production of muster rolls concerning 1st Respondent/Petitioner for the period from 20.07.1993 to 10.09.1995. However, the said opportunities were not availed off by the Appellants/Respondents. Therefore, the Tribunal ultimately declared in its award that the 1st Respondent/Petitioner had worked under the

2nd and 3rd Appellants/Respondents 2 and 4 on daily wage basis as N.M.R etc., for more than the required number of days.

37. In fact, the award passed by the Labour Court issuing direction to the Appellants to issue proper order absorbing the 1st Respondent / Petitioner as permanent employee with effect from 10.09.1995 and post him in the vacancy in which he was working on the date of termination of his employment in TWAD Board of Kanyakumari District and also to pay arrears of wages at the rate of Rs. 1,050/- per month from 10.09.1995 till the date of filing of the petition in I.D. No. 148 of 1997 does not suffer from any material irregularity or illegality in the Eye of Law. Further more, on going through the Impugned Common Order dated 30.08.2013 in W.P. Nos. 6109 and 21408 of 2008 passed by the Writ Court on 30.08.2013, this Court is of the considered opinion that the view taken by the Writ Court in allowing the Writ Petition No. 6109 of 2008 filed by the 1st Respondent/Petitioner does not suffer from any illegal infirmity in the Eye of Law. Moreover, the view taken by the Writ Court in dismissing the Writ Petition No. 21408 of 2008 (filed by the Appellants/Writ Petitioners) also is a fair, proper and valid one in the Eye of Law. Resultantly, the Writ Appeals fail.

In fine, the Writ Appeal Nos. 952 and 953 of 2014 filed by the Appellants are dismissed leaving the parties to bear their own costs. Consequently, connected Miscellaneous Petitions are also closed.