
(1968) 01 MAD CK 0044
In the Madras High Court

V. Narayanan

APPELLANT

Vs

Madura Company (P.) Ltd. Nagapattinam

RESPONDENT

Date of Decision : 19-01-1968

Acts Referred:

Tamil Nadu Shops and Establishments Act, 1947 — Section 41

Citation : (1970) 83 MLJ 1

Hon'ble Judges : M. Natesan, J

Bench : Division Bench

Judgement

M. Natesan, J.—This appeal has been preferred by the plaintiff, from the decision of the learned Subordinate Judge of Nagapattinam, varying the decree granted in his favour by the District Munsif of Nagapattinam. The plaintiff was an employee of the defendant-company and was dismissed from its Service on 18th June, 1962. He thereupon preferred an appeal u/s 41 of the Madras Shops and Establishments Act XXXVI of 1947, and on 14th November 1962 the order of dismissal was set aside. On the defendant-company refusing to entertain the plaintiff in service, after issuing notice, the plaintiff instituted the suit out of which this second appeal arises claiming reliefs, inter alia, for reinstatement in service, for salary from the date of dismissal till the date of plaint with interest thereon and, in the alternative, damages for wrongful dismissal in a sum of Rs. 2,000. The defendant-company raised various defences, inter alia challenging the validity of the order of the Additional Commissioner for workmen's Compensation, the appellate tribunal u/s 41 of the Act aforesaid.

2. It is unnecessary to consider whether the civil Court has not the jurisdiction to go behind the order and whether it is not open to a party affected to challenge the correctness of the order made u/s 41 in a civil Court, as on the merits the defendant-company has failed to establish that its order of dismissal was not wrongful. The trial Court which went into the merits of the case finds that it could be safely accepted that the order of dismissal of the plaintiff passed by the defendant-company was wrongful and that there was no proper enquiry before

the passing of the order. In that view, the trial Court; decreed in favour of the plaintiff the arrears of salary claimed and directed also his reinstatement. On appeal therefrom, the learned Subordinate judge of Nagapattinam set aside the order of reinstatement, and in my view, quite properly. He held that the plaintiff would, however, be entitled to damages for wrongful dismissal and he granted the plaintiff 9 months salary as damages. It is from this decision that the employee has come up on second appeal.

3. Clearly, the plaintiff cannot claim relief by way of reinstatement. The matter is before the civil Court under its ordinary jurisdiction, and the relationship between the parties is contractual. The law governing the matter is the ordinary law of master and servant. The special reliefs which can be granted by a Tribunal adjusting Industrial Relations cannot be availed of before the civil Court in a regular common law suit. To grant reinstatement would be to specifically enforce a contract of service. The right of an employee whose services is wrongfully terminated is to claim damages. ;

4. But what is the effect of the order u/s 41. In *Tata Iron and Steel Co. Ltd. v. Ramakrishna Iyer* (1950) 2 L. L.J. 1043, a Division Bench of this Court observed:

The employer passes an order dispensing with the services of an employee. That order is carried on appeal to a higher authority. That authority reverses the decision of the employer and the result is that the order of the employer is set aside. It is no longer in existence. It follows that the effect of the original order of the employer also disappears and. it is as if the order is *nor est*.

5. The dismissal order is no longer there and the employee, must be deemed to continue in service. What has happened in this case is, when the employee with the order in his favour required of the defendant "to be taken back and given his back wages, the defendant refused, to entertain him in its service. The company asserted that they would be agitating the validity of the order passed u/s 41 of the Act and that there was no question of their paying any wages to the plaintiff, or taking him back into service. They clearly declined to employ him. In my view, this again, in effect, is a breach of the contract between master and servant. In *Rubel Bronze and Metal Company and Vos, in re L.R.*(1918) 1 K.B. 315, it is stated:

Dismissal may be effected by conduct as well as words. A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil" his contract of employment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract.

In the instant case there is a clear repudiation of the relationship of master and servant by the reply notice Exhibit A-3 dated 23rd February, 1963 given by the

defendant. The learned Subordinate Judge in this case, following the decision in Mohana Krishna Naidu v. National Bank of India Ltd ILR (1960) Mad. 377 : (1960) 1 M.L.J, awarded nine months wages as damages. This award of damages is attacked by learned Counsel for the appellant as error neous on principle. Learned Counsel would state that having regard to the numerous decisions u/s 41, at any rate till there was a repudiation by the employer of his obligation to entertain the plaintiff in service on the employee securing an order in his favour u/s 41 of the Act, he must be deemed to have been in service and so entitled to salary for the period. The question of damages will arise only on the refusal to take back in service when the employee : presented himself. In support of the contention that he is entitled to the salary for the period, learned Counsel referred me to the decision in Dhandapani v. Salem Co-operative wholesale Stores (1959) 1 M.L.J. 108,. Following the earlier decision of this Court in Balasundara Mudaliar v. Ellappa Mudaliar (1957) 1 M.L.J. 7, the learned Judge Ramachandra Iyer, J., as he then was, held that the effect of setting aside the order of the employer terminating the service of the employee was that he continued to be in service and that if he continued to be in service he should be paid his salary. The learned Judge remarked.

It is not the case of the respondent (employer) that they terminated his service by any other order except the impugned one...I am of opinion that the termination in the present case being wrongful the employee must be deemed to have continued in service without a break and that he would be entitled to the salary for which he filed the suit.

The amount claimed in that suit was the salary for the period till he was re-entertained by the employer. If this ruling is followed, the plaintiff would be entitled to claim arrears of salary from 8th June, 1962 till 23rd February, 1963 when there was a repudiation of the obligation to entertain the plaintiff in service. The learned Subordinate Judge has ignored that under the law, as it stands, the plaintiff would be entitled as of right to salary till 23rd February, 1963. The plaintiff may claim damages for wrongful dismissal if he is so minded, as and from 23rd February, 10,53. Reference in this connection may be made also to the decision in Iska Subbarami Reddy Vs. The Nellore District Co-operative Wholesale Stores Ltd., . where it was said:

His (employee"s) services must be treated as having continued tilt the date when the Co-operative Stores, notwithstanding the order of the Commissioner refused to entertain him in service which they did in the teeth of that order. This action on their part would expose them to criminal prosecution u/s 45 of the Madras Shops and Establishments Act, but that is a different matter. At any rate, the salary claimed is for a period upto a date prior to 29th March, 1954. viz., till 7th March, 1954. The employee was left in no doubt that as from 29th March, 1954 he would not be entertained in service.

In that case the employee filed the suit claiming salary from the date of termination of service till 7th March, 1954 with interest at 6 per cent per annum

on the salary claimed from the date of plaint.

6. It is manifest, therefore, that the computation of damages awarded by the learned Subordinate Judge in this case cannot be sustained. The plaintiff will be as of right entitled to salary for a period of eight months and 15 days, that is, till 23rd February, 1963, and damages for wrongful dismissal has to be treated as an independent claim. The refusal to reinstate in this case was after the employee had been able to obtain an order in his favour that the dismissal was wrongful. The defendant has not succeeded in the Courts below in impugning the validity of the order. In the circumstances, learned Counsel for the plaintiff would contend that the damages must be adequate and substantial and that as it is, if what he is entitled to as of right is deducted, he gets as damages only 15 days salary. There is considerable force in this contention. Of course, on the refusal to reentertain, the employee could have prosecuted the employer. That is quite a different matter. Here, he is claiming damages for wrongful dismissal and in the plaint he has, in the alternative to his claim for salary and reinstatement, claimed damages. Having regard to all aspects of the matter, I think rather than send the case back for reassessment of damages, this will be a fit case where the plaintiff should be given a decree for an amount equal to 12 months salary made up of arrears of salary for a period of 8 months and 15 days, that is, from 8th June, 1962 till 23rd February, 1963, and damages at the rate of the salary for a period of 3 1/2 months. Thus, the plaintiff becomes entitled to a sum of Rs. 467.50 as arrears of salary, and a sum of Rs. 192-50 as and for damages for wrongful dismissal. I have fixed the damages having regard to several matters discussed by the Courts below as to the nature and character of the plaintiff's employment. The sum of Rs. 467.50 will carry interest at 6 per cent from the date of plaint till decree in the trial Court and from the date of the decree the entire amount of Rs. 660 will carry interest at 6 per cent till realisation. The decree of the lower appellate Court will be modified accordingly.

7. As regards costs, the order of the lower appellate Court as to costs in that Court and in the trial Court will stand. In this Court, the plaintiff will be entitled to counsel fee and the defendant besides bearing its own costs, will pay the Court-fee due and payable here to the Government that is, right through, the Court-fee payable will be borne by the defendant.