

(2013) 08 MAD CK 0250

In the Madras High Court

Case No : Writ Petition No's. 6109 and 21408 of 2008

V. Sathia Jacob

APPELLANT

Vs

Managing Director, T.W.A.D. Board and Others

Administrative Director, Tamil Nadu Water Supply and
Drainage Board and Others Vs V. Sathia Jacob and Others

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Citation : (2014) 1 LLJ 121

Hon'ble Judges : T. Raja, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

T. Raja, J.—The petitioner in W.P. No. 6109 of 2008 seeks for issuance of a writ of mandamus to direct respondents-1 to 3 to absorb him as their permanent employee from 10.9.2005 and to pay him the arrears of wages at the rate of Rs. 1,050/- per month from 10.9.1995 to 8.6.1997 i.e., the date of filing the claim petition in I.D. No. 148 of 1997 on the file of the Labour Court, Tirunelveli, as per the Award dated 31.8.2007 passed in the above I.D.

The petitioners in W.P. No. 21408 of 2008 against whom the petitioner in W.P. No. 6109 of 2008 seeks implementation of the Award, dated 31.8.2007, passed by the Labour Court in I.D. No. 148 of 1997, have come up with this Writ Petition for issuance of a Writ of Certiorari to quash the Award in question.

Since both the matters are interconnected, in that, one party seeking enforcement of the Award of the Labour Court and the other party challenging the correctness of the Award, they are heard together and given joint disposal by way of this Common Order.

For the sake of convenience, the parties are referred to as per the cause title given in Writ Petition No. 21408 of 2008, filed by the TWAD Board.

2. Ms. S. Thamizharasi, learned counsel appearing for the petitioners in W.P. No. 21408 of 2008/Tamil Nadu Water Supply and Drainage Board (hereinafter referred to in short as "TWAD Board"), in an endeavour to assail the impugned Award, dated 31.8.2007, passed by the Labour Court, Tirunelveli, in I.D. No. 148 of 1997, would submit that the first respondent-V. Sathia Jacob was neither engaged by the TWAD Board nor he was working under any of the petitioners at any point of time. According to her, he was engaged only by R-2/Contractor. He pointed out that Kulithuraiyaru Combined Water Supply Scheme, which was conceived at a cost of Rs. 400 lakhs and designed to provide water supply to 8 town panchayats, 7 way-side habitations and one municipality, was to be executed by the TWAD Board and, in order to execute the said Scheme, the task was entrusted to job-contractors, who engaged persons on daily-wage basis to control and maintain the water supply. Thus, at no point of time, the first respondent was engaged directly by the TWAD Board, therefore, he is not eligible either for absorption or direct employment into the services of the TWAD Board. While so, the first respondent, by alleging that he was appointed on 20.7.1993 in respect of the above Water Supply Scheme directly by the TWAD Board on a monthly salary of Rs. 1,050/- and that, all of a sudden, during November, 1993, Petitioner No. 2/Executive Engineer, Nagercoil Division of the TWAD Board created a situation to make payment through the Contractor/R2 which mode was purposely adopted against Section 9(a) of Industrial Disputes Act, 1947 (in short "Act") so as to prevent the workman from claiming permanent employment, started making a claim for absorption. The first respondent further alleged that, when Industrial Dispute Application No. 181 of 1995 was filed by 20 labourers before the Labour Court, without following the fair procedure contemplated u/s 25(F) of the Act, petitioner Nos. 2 and 3 removed the first respondent from service. Subsequently, the conciliation proceedings initiated before the Labour Officer ended in failure with submission of a Failure Report, giving rise to the Industrial Dispute. It was pleaded that the Labour Court, without even taking note of the apparent and clinching fact that there was nothing on record to show that the first respondent ever worked under the TWAD Board at any point of time and that he was engaged only by the Contractor/R2, instead of dismissing the I.D. in threshold, by accepting the wrong averments made by the first respondent-workman, erroneously passed the Award, directing the Board to absorb the petitioner as permanent employee with effect from 10.9.1995 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 10.9.1995 till the date of filing of the application.

It is pointed out that, during his engagement as Pump Operator, the first respondent received a sum of Rs. 700/- from Thiru. B. Mohan, Contractor, towards his wages for the period from 1.1.1994 to 31.4.1994 for the services rendered in connection with the work of maintenance of Kulithuraiyaru CWSS in full and final settlement of all dues. One another receipt acknowledged by the

first respondent is also pointed out to show that he received a sum of Rs. 800/- from Thiru. B. Mohan, Contractor, towards his wages for the period from 1.6.1994 to 30.6.1994 for the services rendered in connection with the work of maintenance of the Water Scheme in full and final settlement of all dues. According to the learned counsel, when the case of the petitioners/Board that there was no direct employment of the first respondent by the Board at any point of time is clearly corroborated by such receipts, the said vital aspect has been very conveniently overlooked by the Labour Court. Without any semblance or iota of evidence to accept the case of the first respondent that he was employed directly by the TWAD Board, by pointlessly relying upon Section 114 of the Evidence Act which deals with "adverse inference" so as to draw such inference against non-production of Nominal-Muster Roll despite the direction issued by the Labour Court against the petitioners/Board to produce the same, the Labour Court erroneously allowed the dispute in favour of the first respondent holding that the first respondent worked under the Board on Daily-wage Basis as NMR for more than the required number of 190 days continuously even though there was not a single piece of evidence at least by the first respondent himself to suggest that, at any point of time, the Board paid salary or wages to him. According to the learned counsel, the Labour Court was not alive to the legal position that it is only that person, who claim that he was employed by a particular agency, should discharge the onus that he was employed so. When such burden has not been discharged by the first respondent, who did not even produce a single material to show that salary or wages were paid ever by the petitioners/Board, allowing his wrong claim by relying upon Section-114 of the Evidence Act in not producing the NMR record pertaining to the first respondent is totally unjustified and untenable in law. On that basis, he sought for interference by this Court with the Award passed by the Labour Court.

3. Mr. P. Selvaraj, learned counsel appearing for the first respondent in W.P No. 21408 of 2008/petitioner in W.P. No. 6109 of 2008 would submit that the workman was appointed as NMR for the Kulithuraiyaru Composite Drinking Water Scheme commissioned by the TWAD Board in the year 1986. Such direct appointment of the petitioner was on 20.7.1993 and the said fact is clearly evidenced from the Nominal Muster Roll which would undo all the claims and contentions now raised by the petitioners/Board and that is why, till date, the Board is not coming forward to produce the vital document standing against them. Even though the workman performed the works in the Board by availing all benefits available u/s 25(b) of the Act, all of a sudden, during November 1993, the Executive Engineer, Nagercoil Division of the Board, created a situation to see that the wages are disbursed through the contractor with a view to defeat any prospective claims of the workmen for absorption. The first respondent was ultimately terminated on 10.9.1995 in breach of Section 25F of the Act and the consequent conciliatory proceedings resulted in failure, giving rise to the industrial dispute. Even before the Labour Court, when such a deceptive argument stating that the workman was never appointed by the Board and that

the engagement was only by a private contractor was advanced, to discern the actuality, the Labour Court directed for production of the NMR Record which is in the exclusive custody of the Board. Only after the deliberate failure on the part of the Board in not producing the record despite repeated directions, the Labour Court was constrained to rely on Section 114 of the Evidence Act to draw adverse inference and to hold that when the first respondent worked much beyond the required number of 190 days, it is the bounden duty of the Board to absorb him. According to the learned counsel, inasmuch as the Labour Court discussed all the objections of the Board by giving clear-cut findings and recording unassailable factual conclusions in the light of all available materials, hardly there is any scope for interference. So submitting, he prayed to allow the writ petition filed by the workman.

4. I have carefully considered the rival submissions advanced on either side.

Even at the first instance, this Court hastens to add that the submissions made on behalf of the Board do not merit acceptance for handful of reasons. It must be pointed out that, immediately after termination, when the workman raised industrial dispute by filing I.D. No. 148 of 1997 on the file of the Labour Court, Tirunelveli, admittedly, for about five full years, the TWAD Board did not choose to file any counter statement projecting their stand before the forum. Ultimately, the inaction on the part of the Board resulted in the Labour Court passing an ex parte Award on 10.5.2002 in favour of the workman. Complaining non-compliance despite the Award, again, the first respondent had to move this Court by filing W.P. No. 34532 of 2003. By order dated 13.8.2003 passed in WPMP No. 41937 of 2003 and WVMP No. 1047 of 2004 in W.P. No. 34532 of 2003, this Court directed Petitioner No. 3/Executive Engineer, TWAD Board, Maintenance Division, Tuticorin, to implement the Award and give benefits in terms of the award to the workman within a period of three months from the date of receipt of a copy of the order. Consequent thereto, at the instance of the Board, operation of the Award, dated 10.5.2002, came to be stayed by this Court on 02.12.2003. Challenging the stay order, a vacate stay petition was filed and by order, dated 03.12.2004, this Court vacated the stay and dismissed the stay petition. Aggrieved by the said order, dated 3.12.2004, the TWAD Board filed Writ Appeal No. 2076 of 2005. While disposing of the said Writ Appeal along with W.P. No. 34532 of 2003, by judgment dated 6.9.2006, a Division Bench of this Court observed and directed thus:

5. ...Taking note of the grievance expressed and considering the fact that there is no fault on the part of the workman, the matter is being kept pending for nearly 10 years and in order to resolve the issue one way or other, we direct the Tamil Nadu Water Supply Board to deposit a sum of Rs. 1,50,000/- to the credit of I.D. No. 148 of 1997 on the file of Labour Court, Tirunelveli, within a period of six weeks from today.

6. The said deposit is without prejudice to their stand before the Labour Court, Tirunelveli. On such deposit being made, the Labour Court is directed to invest

the entire amount in a nationalised Bank initially for a period of one year. In addition to the above condition, the appellants-TWAD Board are directed to pay a cost of Rs. 10,000/- to the workman V. Sathia Jacob by way of pay order within the same period. It is made clear that failing compliance of any one of the conditions, the ex parte award passed on 10.5.2002 shall stand. On compliance of both the conditions, they are permitted to file their counter statement/objection within a period of two weeks. On counter being filed, the Labour Court is directed to dispose of the main I.D. No. 148 of 1997 on merits and in accordance with law after affording an opportunity to both parties within a period of three months thereafter.

7. The writ appeal and writ petitions are disposed of on the above terms....

5. In the above background, the matter was re-opened by the Labour Court which conducted a full-fledged trial by affording opportunities to both sides and in fact, the Board was given respite repeatedly to produce a very crucial document i.e., NMR register, which is exclusively in their custody. However, for the reasons best known to the Board, they never came forward to produce the document to substantiate their stand that the workman was never engaged by them. In fact, Exhibit W-1/xerox copy of the letter addressed by Assistant Executive Engineer of Kulithuraiyaru Division to the Executive Engineer of Rural Drinking Water Scheme, Nagercoil, marked before the Labour Court, contains annexure No. 6, wherein, the Board detailed the particulars of workman and as regards the first respondent/workman, it is noted that he joined duty on Daily wage Basis with the TWAD Board on 30.8.1993 and it is further shown therein that, after working so with the Board for 35 days, he started to work with the contractor on 1.11.1993. When the petitioner raised objection over the veracity of Exhibit W-1, in that, the notings are very slight rather than in specific terms about the employment of the workman with the Board, the Labour Court recorded a finding that the workman joined the work on 30.8.1993 on daily wage basis and only thereafter, he worked under the contractor from 1.11.1993 to 10.9.1995. The Labour Court further clarified the said aspect with the statement of the Contractor, a Management Side Witness viz., M.W.2 Mohan, who deposed clearly that no labour contractor had been nominated by the Board insofar as Kulithuraiyaru Combined Drinking Water Scheme in which the workman was engaged. That is why, the allegation of the workman that the officials of the Board played a foul game by diverting the disbursal of wages through the contractor so as to deprive his claim for absorption was weighed much with the Labour Court. The Labour Court further recorded a specific finding based on the evidence of M.W.2/Contractor that he did not take up such a big work so as to engage a person like the workman for the duration he worked as per the records beyond the required period of 190 days. By referring to Exhibit W-2, the Labour Court further observed that only a set of workers employed similar to the workman herein were made permanent suiting the choice of the Board and workers like the first respondent herein were sidelined. All these factors rightly prompted the Labour Court to call for the NMR Record to find out the reality, but,

to hide their foul play, the Board did not choose to come up with the record. Therefore, this Court does not find any substance in the argument of the learned counsel for the Board that the Labour Court is not justified in drawing adverse inference due to non-production of the NMR Record. When some of the similarly placed workers, who worked for 679 days like that of the petitioner, were selectively absorbed, rightly, the Labour Court, after restoration of the matter, by conducting a full-fledged trial and giving deliberate discussion on all aspects, rightly proceeded to issue a direction in favour of the workman and such decision does not call for any interference at all. 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 hide 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.

6. 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 15.7.2008, 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 31.8.2007, 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 11.1.2011, 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.

7. 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. Net result, Writ Petition No. 6109 of 2008 is allowed with the above direction and W.P. No. 21408 of 2008 is dismissed as devoid of any merit. No costs.