Madras High Court
Bears Cave Estate vs The Presiding Officer on 22 September, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2011

CORAM:

THE HON BLE MR. JUSTICE K.CHANDRU

W.P.No.802 of 2009

Bears Cave Estate
(Formerly known as Karadipoona Estate)
Kadukkamaram, Mines Post,
Yercaud, Salem District
Rep. By its Proprietor
O.Ulaganathan ... Petitioner

Vs.

1.The Presiding Officer,
Labour Court, Salem.

2.Baby .. Respondents

Prayer : Petition under Article 226 of the Constitution of India praying for a Writ of C

For Petitioner :: Mr.S.Ravindran for
M/s.T.S.Gopalan and Co.,

For Respondents :: Mr.R.Md.Nazrullah for
M/s.K.V.Shanmuganathan for R2

O R D E R

The petitioner is the management of Estate at Yercaud, Salem. They have come forward to challenge an award passed by the 1st respondent Labour Court, Salem in I.D.No.187 of 2003 dated 21.4.2008. By the impugned award, the Labour Court directed the reinstatement of the 2nd respondent workman on the ground that her termination on 2.9.2002 was illegal and against the principles of natural justice. Therefore, she was directed to be reinstated with full backwages and continuity of service.

2. The Writ Petition was admitted on 20.1.2009. Pending the Writ Petition, this Court granted an interim stay. Subsequently, the interim stay was made absolute on the ground that the 2nd respondent did not file any counter affidavit. On notice from this Court, the 2nd respondent appears through counsel.

3. Heard the arguments of Mr.S.Ravindran, learned counsel appearing for M/s.T.S.Gopalan & Co, learned counsel for the petitioner and Mr.R.Mohammed Nazrullah for Mr.K.V.Shanmuganathan, learned counsel for the 2nd respondent.

4. The facts leading to the filing of the case are as follows:

(4.i) The 2nd respondent was employed as an Estate Worker since 1987 in the petitioner estate. However, with effect from 2.9.2002, she was orally denied employment. It is also claimed that her last drawn salary was Rs.1,380/-. Even though she had put in more than 15 years of service, she has been unauthorisedly sent out of service and no charge memo was given to her and no departmental enquiry was conducted and the 2nd respondent was wholly depending on the said employment. Since her representation to the management both in person as well as through communication did not yield any result, she raised an industrial dispute before the Government Labour Officer at Salem. As the conciliation was not fruitful, a failure report was given. On the strength of the failure report, the 2nd respondent filed a claim statement before the 1st respondent Labour Court on 26.5.2003. The said dispute was taken on file as I.D.No.187 of 2003.

(4.ii) Notice was ordered to the petitioner management. The petitioner management filed a counter statement dated 23.12.2003. In the counter statement, it is stated that her period of service was disputed and it was claimed that she was paid only minimum wages as per the Minimum Wages Notification. The claim that she was orally stopped from work on 2.9.2002, was sought to be discredited by stating that she did not send any notice immediately after her so called stoppage from work and the notice was sent after five months. It is also stated that the 2nd respondent was present on 27.1.2001 and her presence was marked in the attendance register. The work on the day was allotted by one Murugesan, who was Manager. the 2nd respondent had quarreled with and assaulted one co-employee Rani with her chappels. This resulted in stoppage of the work for half-an hour. The 2nd respondent was pacified by the co-employee and she was sent off. It was the claim of the management that the co-employee would contend that she was mentally ill and no one was willing to work in the place where she was present. Her father was also called and also given suitable advice. He was also told that she should be treated by a Psychiatrist and she was told to come back after getting cured about the allegedly medical illness. It is also stated that even during August 2002, she was only present for 3 days. She started quarreling when she was not paid wages for the entire month. She was asked to come back with a medical fitness certificate about her medical illness. There was no necessity to issue any charge memo or conduct any enquiry, as she was not punished for any misconduct. If a person, who was mentally ill, was not allowed to work, it will not amount to any victimization. It is for the 2nd respondent to prove the same by producing any medical certificate. Non-employment cannot be held to be retrenched so as to qualify herself for any reinstatement.

(4.iii) Before the Labour Court, on the side of the 2nd respondent, one M.Ramasamy was examined as P.W.1 and on her side 3 documents were filed and marked as Ex.P.1 to Ex.P.3. On the side of the management, one A.Murugesan was examined as R.W.1. No document was filed on the side of the management.

(4.iv) During the pendency of the dispute, the petitioner management filed an application in I.A.No.78 of 2006. The application was for sending the 2nd respondent to be examined by a qualified Psychiatrist about her mental illness. The said application was dismissed by the 1st respondent Labour Court by order dated 19.6.2006. As against the said dismissal, the petitioner management filed W.P.No.31417 of 2006 before this Court challenging the interim order passed by the Labour Court. This Court, however, dismissed the said Writ Petition by stating as follows:

"4. The application taken out by the writ petitioner management is totally misconceived, as the workman who had raised the dispute, cannot be sent to face a mental test to prove the case of the management. Such a plea can never be countenanced by any court. In any event, the question whether a person is mentally ill or not cannot be decided by any doctor working in the Government Hospital. Such question can be decided only by the specialised body and by the competent authority constituted under the Mental Health Act, 1987."

(4.v) On the basis of the evidence, the Labour Court (both oral and documentary) came to the conclusion that the 2nd respondent's non-employment was illegal. The Labour Court framed two issues, namely, (i) whether the 2nd respondent workman was suffering from any mental illness so as to be disqualified for employment and (ii) whether the denial of employment with effect from 2.9.2002 was justified or legal or against the principles of natural justice and whether she was entitled for reinstatement with service continuity and backwages.

(4.vi) Both issues were tried together. The Labour Court rendered a finding that the very fact, that the 2nd respondent herself raised a dispute not through any guardian shows that she was not suffering from any mental illness. The Labour Court also found that on the day of the arguments, the worker was present in the court and her physical appearance also showed that she was perfectly all right and appears to be a normal person except that she was deaf and dumb. If the behaviour of the 2nd respondent was abnormal, the management should have taken appropriate steps to refer her to a Psychiatrist attached to the estate if any and it was also stated that in case of mental sickness, it is open to the court to ascertain the questioning capacity of the said person and only when that person does not respond or unable to understand the question, the question of ascertaining the mental condition will arise. In the absence of any medical certificate, it is not for the court to declare her status of mental illness.

(4.vii) The Labour Court after referring to the two instances pointed out by the management in the counter statement held that if her behavior was abnormal, then she should have been dealt with departmentally and there must be evidence to show that misconducts were committed. In the absence of any evidence, the court cannot declare any person as mentally ill. The Labour Court also found that she has been working in the estate from 1987 and living in the estate with her father. Therefore, the contention of the petitioner management that non-employment of the 2nd

respondent made by the management was due to her mental illness cannot be believed and even before her discharge, the management should have taken appropriate steps to get her examined.

(4.viii) It is in that view of the matter, the Labour Court held that the 2nd respondent's non-employment was not justified and she was entitled for the relief that was set out in the award dated 21.4.2008. Challenging the said award, the Writ Petition has been filed.

5. the learned counsel for the petitioner management contended that the 1st respondent was erroneous in shifting the burden of proof on the management in holding that the 2nd respondent as mentally ill. When the 2nd respondent had not produced any evidence to prove about her disorderly behavior in the premises, that itself will prove that she was suffering from mental illness. Since under the provisions of the Mental Health Act, 1987, it has to be certified by a competent authority and the 2nd respondent has not come forward for examining herself, it has to be presumed that she was avoiding examination of her mental health. Therefore, it must be proceeded that she should be mentally ill. However, this Court do not accept any one of the contentions raised by the management.

6. It is the admitted case of both sides that the 2nd respondent is employed in a Plantation covered by the Plantation Labour Act, 1951. Under Section 7 of the said Act, the State Government may appoint qualified medical practitioners to be certifying surgeons for the purpose of the Act within such local limits or for such plantation or class of plantations as it may assign to them respectively. The Certifying Surgeon shall carry out such duties as may be prescribed in connection with the examination and certification of workers. Under Rule 5 of the Tamil Nadu Plantation Labour Rules, 1955, the Certifying Surgeon shall examine the worker on the request of the Chief Inspector and for the purpose of examination, the plantation management will have to provide an appropriate place for conducting the examination. In case where the Plantation itself was having medical facilities in the form of an hospital/doctor and any orders are passed by the said Hospital/Doctors, the Certifying Surgeon appointed by the State Government will be considered as an appellate authority. Therefore, the Act provides for hierarchy of officers to determine the health of the workers. It is not the case that the management had taken steps either to examine the 2nd respondent by their Doctors, who were supposed to be employed under the said Act/ or by the Certifying Surgeon.

7. Disqualifying a worker on medical grounds came to be considered by a Division Bench of this Court in Anglo French Mills, Pondicherry vs. Muniammal reported in 1966 (1) LLJ 695. This Court after referring to the Labour Code of Puducherry, (evolved as per the International Labour Organization (ILO) norms), held that if the worker is incapacitated due to illness, she was entitled to special medical leave for 6 months. Her employer can terminate the service only after 6 months after giving an opportunity for cure and rehabilitation for the worker to be restored. The data obtained by the management in the form of medical report should be a satisfactory report. If the report is unsatisfactory, it cannot be accepted as forming a reasonable basis for the action taken. In case the doctors report do not give any reason, then the relief cannot be accepted as the basis for the discharge of an employee. In such circumstances, the matter will have to be referred for an expert opinion. In no case, the employer, in the absence of material, can resort to the extreme step of terminating the service of an employee.

8. The facts involved in the said judgment are more or less similar to the facts of the present case. In that case it was found that there was a vulgar brawl between the two women workers. One of the worker was a permanent worker and in the course of the brawl, the accused worker pronounced cannibalistic curse on her opponent. It was suspected that she was of unsound mind. The matter was referred to two medical officers, who stated that she was of an unsound mind and it was not desirable to keep her in employment. On the basis of that report, she was terminated. The matter was taken on appeal and it finally reached this Court. This Court held that even assuming that a person was having ill health or of an unsound mind, then the procedure for declaring her unfit for employment must be followed. If the initial medical opinion is found unsatisfactory, then the employer must send the case for detailed elucidation upon this aspect before taking the extreme step of terminating the service of the workman. The Division Bench after setting out the facts found the action taken by the employer was wrong and dismissed the Writ Appeal filed by them.

9. Hence, this is not impressed with the argument that if person is employed on contract or unspecified period, he can be terminated. Under the Standing Orders, there must be a good and sufficient reason for terminating an employee. Therefore, the argument made by the learned counsel for the petitioner that the burden of proof is on the worker and she had failed to discharge the onus of proof, cannot be accepted. On the contrary, as held by the ILO, in cases of medical unfitness, there must be creditworthy materials in the hands of the management and only upon the said material, the question of any dispensing with the service of the workman will arise.

10. The Labour Court correctly found that after the enactment of the Mental Health Act,1987, the cases of mental illness will have to be certified in terms of Section 21 of Mental Health Act, 1987. The Labour Court also held that if she was really facing unsound mind, then she would have to be regretful before the court by her guardian and no such application was ever taken out.

11. This Court had an occasion to consider the effect of certifying a person for the mental unsound in terms of the Mental Health Act, 1987 vide its judgment in Ramachandran, Chinna Anaicut Village, Vellore District vs. Chinnaraj Chettiyar reported in (2006) 4 MLJ 77. In that case, it was held that the Principal District Judge is the competent authority under Sections 52, 53 and 54 of the Mental Health Act, 1997 for appointing a person as a guardian for a person, who is unsound mind and the Mental Health Act is a special enactment and unless an order was passed by the Principal District Judge and the provisions of the Civil Procedure Code provided under Order 32 Rule 15 will stand modified in terms of the Mental Health Act, 1987.

12. Yet in the present case, the finding of the Labour Court was to the effect that the 2nd respondent was present during the final argument and the Labour Court did not find anything abnormal in her behavior. No doubt, the Labour Court found that she was a physically challenged person and she was deaf and dumb. But, that physical condition will not make a person of having mental illness.

13. As per the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, if a person acquires disability during her employment, that cannot be a reason for dispensing with her service. Under Section 47 of the Act, there is an embargo in terminating the service of a person, who gets disabled during the service. As to what constitutes a

disability is also defined under Section 2 of the said Act, and includes mental illness under Section 2(i) of the Act.

14. This Court vide its decision in A.Tamilarasi vs. District Collector, Tuticorin and others reported in (2007) 6 MLJ 425, when found an employee was terminated by the order of a District Collector on the ground that she was of unsound without any material and on the basis of mere hearsay and with the consent of the said employee got her examined by a team of experts in Psychiatry for the Government Rajaji Hospital. On an examination, the doctors certified that she did not suffer from any mental illness. Therefore, this Court took exception to the authorities' action being callous and indifference to the established norms. After setting aside the order of termination, also imposed costs on the District Collector, Tuticorin. In paragraph 26, this Court observed that even in cases of mental illness, if a Government servant develops disability during the service, it is too late for the Government to label a person as insane on their own and declare that persons for unfit for Government employment without any factual material and this attitude makes a sad commentary. It only showed utter ignorance of the officials in understanding the special legislation occupying the field. Such cased require greater sensitivity on the part of the administration. Even in case a person was suffering from mental illness, under Section 47 of the Act such persons were directed to be given an alternate employment, failing which the second proviso to Section 47 says that if it is not possible to adjust any employee against any post, she may be kept in a supernumerary post until a suitable post is available or that person attains the age of superannuation, whichever is earlier.

15. Though it may be contended that the provisions of the said Act will not apply to a private establishment, such a stand finds its justification in the decision of the Supreme Court in Dalco Engineering Private Limited vs. Satish Prahakar Padhye reported in (2010) 4 SCC 378. In paragraphs 24 to 26, 30 and 31, it was observed as follows:

"24. There is an indication in the definition of establishment itself, which clearly establishes that all companies incorporated under the Companies Act are not establishments. The enumeration of establishments in the definition of establishment specifically includes a government company as defined in Section 617 of the Companies Act, 1956 . This shows that the legislature took pains to include in the definition of establishment only one category of companies incorporated under the Companies Act, that is, the government companies as defined in Section 617 of the Companies Act. If, as contended by the employee, all companies incorporated under the Companies Act are to be considered as establishments for the purposes of Section 2(k), the definition would have simply and clearly stated that a company incorporated or registered under the Companies Act, 1956 which would have included a government company defined under Section 617 of the Companies Act, 1956. The inclusion of only a specific category of companies incorporated under the Companies Act, 1956 within the definition of establishment necessarily and impliedly excludes all other types of companies registered under the Companies Act, 1956 from the definition of establishment .

25. It is clear that the legislative intent was to apply Section 47 of the Act only to such establishments as were specifically defined as establishment under Section 2(k) of the Act and not to other establishments. The legislative intent was to define establishment so as to be

synonymous with the definition of State under Article 12 of the Constitution of India. Private employers, whether individuals, partnerships, proprietary concerns or companies (other than government companies) are clearly excluded from the establishments to which Section 47 of the Act will apply.

26. There is yet another indication in Section 47 that private employers are excluded. The caption/marginal note of Section 47 describes the purport of the section as non-discrimination in government employment. The word government is used in the caption broadly to refer to State as defined in Article 12 of the Constitution. If the intention of the legislature was to prevent discrimination of persons with disabilities in any kind of employment, the marginal note would have simply described the provision as non-discrimination in employment and sub-section (1) of Section 47 would have simply used the word any employer instead of using the word establishment and then taking care to define the word establishment . The non-use of the words any employer and any employment and specific use of the words government employment and establishment (as defined), demonstrates the clear legislative intent to apply the provisions of Section 47 only to employment under the State and not to employment under others. While the marginal note may not control the meaning of the body of the section, it usually gives a safe indication of the purport of the section to the extent possible. Be that as it may.

30. The learned counsel next relied upon the following observations in Kunal Singh v. Union of India, where this Court, referring to the very section under consideration, observed thus: (SCC pp. 529-30, para 9) 9. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. The language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

31. We agree that the socio-economic legislations should be interpreted liberally. It is also true that courts should adopt different yardsticks and measures for interpreting socio-economic statutes, as compared to penal statutes and taxing statutes. But a caveat. The courts cannot obviously expand the application of a provision in a socio-economic legislation by judicial interpretation, to levels unintended by the legislature, or in a manner which militates against the provisions of the statute itself or against any constitutional limitations. In this case, there is a clear indication in the statute that the benefit is intended to be restricted to a particular class of employees, that is employees of enumerated establishments (which fall within the scope of State under Article 12). Express limitations placed by the socio-economic statute cannot be ignored, so as to include in its application, those who are clearly excluded by such statute itself."

16. The principles behind suffering a person with disabilities are that providing equal opportunities cannot be left only for the mercy by the Government in relation to its servants alone. It is high time the principles behind the Disabilities Act, 1955 must be extended in relation to private employments also and it must be made as part of Corporate Social responsibility of every employee.

17. However, in the present case, the application for such principle did not come for consideration. This Court is satisfied that the impugned Award passed by the Labour Court does not suffer from any illegalities or infirmities. On the other hand, the specific finding rendered by the Labour Court was that there was no material before it to hold the 2nd respondent was a mentally unsound person to be kept out of the employment in the petitioner's plantation. The learned counsel for the petitioner states that though an attempt was made to send her for medical opinion, such attempts cannot be made after the order of the termination. On the other hand, as held by this Court in Anglo French case (cited supra), such materials should be made available before and not afterwards. The provisions of the Plantation Labour Act takes note of the health aspects of the workers to be determined by the Company doctors and an appellate authority has also been provided in the form of a Certifying Surgeon. When the petitioner had not discharged their obligation, they cannot blame the worker or the Labour Court in refusing to send for medical examination of the 2nd respondent.

18. But, at the same time, in the present case, since the management do not want to employ the 2nd respondent and the 2nd respondent also is not averse to receive a lumpsum compensation, in lieu of her illegal termination, this Court decides to modify the award. Though the management had stated that the 2nd respondent was only paid daily wages as minimum wages to the worker, even as per the minimum wages notification, she would be entitled to get daily rated but monthly paid salary of Rs.1380/- per month as the last drawn wages. Her non-employment was pending from 2.9.2002 and even after the Writ Petition was admitted, the 2nd respondent was not paid her last drawn wages in terms of Section 17-B of the Industrial Disputes Act.

19. Under the said circumstances, this Court considers that the petitioner may be directed to pay Rupees One Lakh towards full and final settlement of all claims of the 2nd respondent in lieu of reinstatement and in replacement of the terms of the award. The legal contentions of the petitioner management though was rejected, but in respect of the relief given by the Labour Court found in paragraph 7 of the impugned award will stand modified. The petitioner management is directed to give Rs.1,00,000/- (Rupees One Lakh) within a period of four weeks from the date of receipt of the judgment. On such receipt, the 2nd respondent will have no further claims in respect of her employment in the petitioner estate. The Writ Petition is disposed of accordingly. No costs.

ajr To The Presiding Officer, Labour Court, Salem