

(2009) 11 MAD CK 0129

Madras High Court (Madurai Bench)

Case No: Writ Petition (MD) No. 926 of 2004 and W.P.M.P. (MD) No. 9762 of 2005

Management of Tamil Nadu
Mercantile Bank Ltd., Tuticorin

APPELLANT

Vs

Appellate Authority Under T.N.
Shops and Establishments Act
and Another

RESPONDENT

Date of Decision: Nov. 12, 2009

Citation: (2010) 124 FLR 764

Hon'ble Judges: D. Murugesan, J

Bench: Single Bench

Advocate: M.E. Ilango, M. Elumalai, for the Appellant; D. Sasikumar, E.V.N. Siva and for S. Xavier Rajini, for the Respondent

Final Decision: Allowed

Judgement

D. Murugesan, J.

This writ petition is at the instance of the Management of the Tamil Nadu Mercantile Bank Ltd., Tuticorin.

The second respondent, who was, initially, appointed as appraiser in the Bank rose to the post of Branch Manager. While he was working as a Branch Manager at Pottireddiapatti between May, 1990 and April, 1994, he was transferred to Thadepalligudem, Andhra Pradesh, by an order dated 3.5.1994. According to the petitioner, the second respondent did not join in the transferred place and he was absent from 11.5.1994. A Charge Memo dated 12.12.1997 was issued for insubordination and unauthorised absence and the explanation offered by the second respondent was not acceptable. An enquiry was conducted and ultimately, an order of discharge was passed on 4.2.1999. The said order of discharge was questioned by the second respondent before the Tamil Nadu Shops and Establishments Appellate Authority, who by an order dated 16.4.2004 set aside the order of dismissal. That order came to be questioned in this petition.

2. I have heard Mr. M.E. Ilango, learned Counsel appearing for the petitioner, Mr. D. Sasikumar, learned Additional Government Pleader appearing for the first respondent and Mr. E.V.N. Siva, learned Counsel appearing for the second respondent.

3. The Shops and Establishments Appellate Authority, to allow the appeal, has relied upon three factors. Firstly, on the basis of Ex. P. 18-A to Ex. P.18-G. The Shops and Establishments Appellate Authority came to the conclusion that the second respondent had applied for medical leave and therefore, the case of the bank that the second respondent was unauthorisedly absent, cannot be accepted. Secondly, the Shops and Establishments Appellate Authority found that the letter of the second respondent dated 8.10.1996 expressing his willingness to join duty was not only acknowledged by the bank but also the contents were admitted by RW.1 and RW.2 In view of the above willingness of the second respondent, it cannot be said that he was unauthorisedly absent. Thirdly, the second respondent was granted gratuity upto 4.2.1999 and therefore, during the period for which the gratuity was sanctioned and paid, it cannot be said that the second respondent was unauthorisedly absent.

4. As far as the reliance of Ex. P 18-A to Ex. P18-G are concerned, the finding of the appellate authority is contrary to the facts. Except pleading that those exhibits concerning medical certificates were sent, there are no materials available on record that the second respondent had either sent the certificates or applied for medical leave. Even assuming that those medical certificates were sent and applications were also made for leave, the bank had hardly ever accepted those certificates and granted leave. In the circumstances, the finding of, the appellate authority that the claim of unauthorised absent was not correct is contrary to the record and evidence, which would be, otherwise, perverse.

5. Insofar as the letter dated 8.10.1996, Ex. P.21 is concerned, again the evidence of RW.1 and RW.2 show that though the contents were admitted, both the witnesses did not accept the acknowledgement of the said letter. That apart, this letter Ex. P.21 was produced only for the first time before the enquiry and it was not relied upon by the second respondent in any of the prior litigations. A perusal of the said Ex. P.21 also shows that the petitioner had relied upon the previous letter dated 22.6 1995 wherein, he claimed to have applied for medical leave from that date onwards. There was no explanation for his failure to attend duty till 8.10.1996. The finding of the appellate authority for acknowledgement of Ex. P.21 by the bank is also contrary to the records.

6. The last finding of the appellate authority is that the payment of gratuity to the second respondent upto 4.2.1999 would indicate that he was not considered out of employment. The appellate authority has failed to consider the fact that the Payment of Gratuity was pursuant to the order of the controlling authority dated 27.9.2002, which the management had complied with. That apart, in terms of

Section 2-A of the Payment of Gratuity Act, 1972, the management is bound to pay the gratuity even for the period where the employee is absent from duty without leave. Therefore, the finding that the payment of gratuity would indicate continuous service of the second respondent and on the other hand, it cannot be considered to he unauthorised absent, is also contrary to the above provision. On the above grounds, the findings are liable to be interfered with and accordingly, they are interfered.

7. The next question that falls for consideration is whether the punishment of discharge would be justified.

8. The Appellant has not placed any record before the appellate authority as to the records relating to adverse remarks against the second respondent. The second respondent had entered into service in the year 1971 as an appraiser and later on rose to the position of a Branch Manager. The second respondent has produced Ex. M.35. These certificates are for the period from 1991 to 1992 just prior to the controversy arose. A perusal of those Certificates show that the bank had commented upon the second respondent as an energetic officer. of course, the second respondent had not obeyed the order of transfer. But, an explanation was sought to be made by the second respondent on the ground that he had requested for transfer to any one of the place in Kanyakumari District, preferably, Nagercoil, Edalakudy and Thalakulam. That request came to be made pursuant to the earlier communication of the Management to the second respondent dated 22.1.1994 that officers could opt for transfer to any of the Branches within the Tamil Nadu if they had already served other States. For the said requisition, a charge memo proceedings was issued, for which an explanation was also made and this created a discontent between the petitioner and some officers of the bank. Apparently, because of the above, after the transfer, the petitioner could not join the said post. Even he had not applied leave as per the rules.

9. In these circumstances, having regard to his past records and having regard to the peculiar circumstances that the petitioner could not join duty and had resorted to file a suit though unsuccessful, in my opinion, the punishment of discharge could be modified into one of compulsory retirement and such punishment would serve the purpose.

10. In view of the above, the writ petition is partly allowed and the order of the first respondent/Shops and Establishments Appellate Authority is set aside and the punishment of discharge imposed by the bank on the second respondent is modified into one of compulsory retirement. Learned Counsel appearing for the second respondent has submitted that in view of the modified order, the second respondent would not claim the back-wages to which he is, otherwise, entitled to. Connected W.P.M.P. (MD) No. 9762 of 2005 is closed. No order as to costs.