

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/04/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION No.13153 OF 1998

AND

WMP.NO.19992 OF 1998

The General Manager,
Southern Railway,
rep. by its Divisional Superintendent,
Southern Railway, N.G.O. Annexe,
Madras 600 003. .. Petitioner

-Vs-

1. T.M. Dayanandan,
2, New Street,
Chetput, Madras 31.

2. The Presiding Officer,
The Central Government
Labour Court,
Madras 600 104. .. Respondents

Petition filed under Article 226 of the Constitution of India for
issuance of a Writ of Certiorari as stated therein.

For Petitioner : Mr.M. Sekar

For Respondents : Mr.C. Rajan

:J U D G M E N T

This writ petition is directed against the order passed by the
Presiding Officer, Central Government Labour Court, Madras dated 12.8.96 in
Claim Petition No.11/1981. Said Claim petition was filed under Section
33-C(2) of the Industrial Disputes Act, 1947 by the respondent No.1 against
the petitioner. The respondent No.1 was appointed as a Commercial Clerk in
Southern Railway with effect from 1.10.1964. On the basis of the disciplinary
proceedings, he was removed from service on 29.2.1969. Against the penalty,
appeal was preferred by him. Since the appeal had remained pending for a long
period, the first respondent preferred W.P.No.3171 of 1971 for disposal of the
appeal and by order dated 18.11.1971 such a direction. Thereafter the
appellate authority set aside the penalty imposed and directed the

disciplinary authority to take disciplinary action from the stage of issue of show cause notice. By a subsequent Memorandum dated 24.11.1971 the first respondent's absence was treated as neither on duty nor on leave. Thereafter, on 28.2.1972, a notice was issued to the first respondent to show cause as to why he should not be removed from the service. The Divisional Personnel Officer issued a fresh penalty advice dated 4.10.1972 once again removing the first respondent from service with effect from 8.10.1972. The first respondent filed W.P.No.2874 of 1972 challenging the said order. The said writ petition was allowed on 21.1.1977 with the observation that it would be open to the Divisional Personnel Officer to rehear the matter after giving opportunity of hearing to the first respondent. The subsequent proceedings resulted in an order being passed appointing the first respondent as Commercial Clerk afresh for all purposes in the existing pay scale of Rs.260-430 in accordance with the orders passed by the Divisional Superintendent and the first respondent reported for duty making it clear that he was reporting for the duty without prejudice to his rights. Though he had reported for duty on 10.8.1977, no posting was given till 1.5.1978, on which date, the respondent No.1 was posted as a Leave Reserve Commercial Clerk. It is the grievance of the petitioner in the petition under Section 33-C(2) that even though it was indicated in the memorandum of the Divisional Personal Officer that previous service would not be counted for any purpose, on being reinstated, he must be deemed to be in continuous service and eligible to the salary he would be entitled to with all due increments and allowances and it must be deemed that he did not suffer any break of service for any purpose whatsoever. It was also claimed that he was entitled to the salary and allowance from 22.12.1969 till 13.5.1978. The arrears of salary amounting to Rs.58,454/-, was claimed.

2. A counter affidavit was filed by the present petitioner in the claim petition. While recounting the history of various litigations, it was indicated that the present respondent NO.1, on compassionate ground was ordered to be taken as Commercial Clerk afresh for all purposes and he having been accepted such appointment, is not entitled to the salary for the period claimed by him. It was further indicated that during the period of suspension, the respondent No.1 was paid suspension allowance and by earlier order, the period was directed to be neither on duty nor on leave, and therefore, for the said period no amount would be payable.

3. By order dated 20.12.1988 passed by the Presiding Officer, Central Government Labour Court, the present petitioner was directed to pay a sum of Rs.58,454/-. O.A.No.42/90 directed against the said order was disposed of on 17.7.1992. The Administrative Tribunal set aside the order and remanded the matter for fresh disposal. Thereafter, the Presiding Officer has passed the impugned order directing payment of Rs.58,454/-.

4. The Presiding Officer after noticing the events, which culminated the order dated 21.1.1977 in W.P.No.2874 of 1972, has observed as follows :-

□ . . . While making the writ nisi absolute the High Court was pleased to observe that it would be open to the Divisional Superintendent to

rehear the petitioner's appeal dated 4.2.70 after giving the petitioner a reasonable opportunity of being heard. Subsequently the Divisional Superintendent has reinstated the petitioner with all benefits as a Commercial Clerk in the existing scale of Rs.260-430, in accordance with the orders stated to have been passed by the Divisional Superintendent. However, in spite of many requests, a copy of the alleged order of the Divisional Superintendent on the said appeal was not furnished. It should be noted specifically that he has approached the High Court, which in turn transferred the same to the Central Administrative Tribunal. In all these courts the respondent specifically suppressed the order of the Divisional Superintendent, Madras, who has passed favourable orders reinstating the petitioner in service with all backwages and other attendant benefits. It should be noted specifically in this petition also the respondent has not produced the order of the Divisional Superintendent which specifically deserves adverse remarks. Thus looking at the point from many angle, it is clearly seen that the petitioner is entitled to the benefits asked for by him in this petition. Hence, I answer the point accordingly in favour of the petitioner and against the respondent.

8. In the result, the petition is allowed and the respondent is directed to pay a sum of Rs.58,454/- to the petitioner within a period of 6 months, failing which the respondent is liable to pay 18% interest on the abovesaid amount. In the circumstances of the case, there will be no order as to costs. an order is passed accordingly on merits.□

5. A perusal of the aforesaid concluding portion makes it clear that the only basis for allowing the claim petition seems to be the drawal of adverse inference against the present writ petitioner for the non-production of the appellate order. The non-availability of the appellate order had been disclosed on previous occasion. Even assuming that the

appellate order was not available, the conclusion reached by the Presiding Officer must be taken as without jurisdiction as well as based on no material on record.

6. While considering the application under Section 33-C(2), the Presiding Officer is not authorised to decide as to whether a particular person is entitled to any benefit. Law on this aspect is very clear and concluded by several decisions of the Supreme Court. It is unnecessary to refer all the decisions and I rest content by referring to the decision of the Supreme Court reported in 1995 (I) LLJ 395 (MUNICIPAL CORPORATION OF DELHI v. GANESH RAZAK AND ANOTHER) wherein it was observed :

□ 12. The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workman to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under section 33 C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to

compute the benefit so adjudicated on that basis in exercise of its power under Section 33 C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.

6. In the present case, it is apparent that the Presiding Officer of the Labour Court in the garb of computing the amount claimed by the applicant has tried to assert the entitlement of the applicant, which is not permissible. On this short point, the impugned order is liable to be quashed and the writ petition is bound to succeed.

7. Even assuming that the Presiding Officer could have delved into the question, the reasonings given cannot be sustained at all. The primary reason seems to be the drawal of adverse inference for nonproduction of the order of the appellate authority. If in fact there had been no order passed by the appellate authority, the respondent No.1 could have and should immediately challenged the order directing him to be appointed as a fresh appointee before the appropriate forum. The High Court had given direction for reconsideration of the appeal. Even the respondent No.1 could have approached the High Court for giving a suitable direction for compliance of the order, if the same had not been complied with.

8. Be that as it may, during pendency of the writ petition to allay any misgivings in the matter, I had called upon the counsel for the writ petitioner to produce the entire record. A perusal of the aforesaid records indicate that at Page No.470, a note of the Divisional superintendent is available, wherein after referring to all the materials, it has been indicated as follows:

“ . . . Normally, the charge having been proved, he has no case for mitigation of the penalty of removal from service imposed by the disciplinary authority viz. the Divisional Personnel Officer. However, taking into account the other facts of the case viz. the two other Clerks apprehended along with him have been exonerated of the charges which were raised in the same incident, the case occurred in 1965 when Shri Dayanandan had put in only 8 months service on the Railway, the value of the materials being very trivial and the mental agony that has been caused to the delinquent during the pendency of the proceedings of this case for nearly 12 years and to give him a chance once again to rehabilitate himself, purely as a measure of compassion, I hereby order that he may be taken as a Commercial Clerk afresh for all purposes.”

As already indicated, pursuant to the aforesaid direction, the petitioner was taken as a fresh appointee.

9. For the aforesaid reasons, the writ petition is allowed.
No costs. Consequently, WMP.NO.19992 of 1998 is closed.

Index : Yes
Internet : Yes
dpk

To

1. T.M. Dayanandan,
2, New Street,
Chetput, Madras 31.

2. The Presiding Officer,
The Central Government
Labour Court,
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