IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/07/2004

CORAM

THE HON'BLE MR. JUSTICE P.K. MISRA
AND
THE HON'BLE MR. JUSTICE F.M. IBRAHIM KALIFULLA

WRIT PETITION NO.1099 OF 2001
and
WPMP.NO.1526 OF 2001 & WVMP.No.8638 OF 2001

1. Union of India,
represented by the Secretary,
Railway Board, Rail Bhavan,
New Delhi.

2. Union of India owning the
Southern Railway, rep. by the
General Manager, Southern Railway,
Park Town, Chennai 3.

3. The Divisional Railway Manager,
Southern Railway,
Tiruchirapalli 620 001. .. Petitioners

-Vs-

1. The Registrar,
Central Administrative Tribunal,
Chennai Bench, Chennai 104.

2. I. Govindaswamy,
S/o. Sri Ayyanar .. Respondents

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

For Petitioner : Mr.V.G. Suresh Kumar

For Respondent-2 : Mr.A. Thirumoorthy

:J U D G M E N T

P.K. MISRA, J

The aforesaid writ petition has been filed by the Union of India (Railway Ministry) and two others challenging the orders passed by the Central Administrative Tribunal, Madras in R.A.No.44 of 2000, rejecting such application and refusing to review the order in O.A.No.290 of 1998. In the said O.A.No.290 of 1998, the Tribunal had directed the present petitioners to settle the retired benefits due to the applicant (present Respondent No.2).

2. In order to appreciate the questions raised, it would be appropriate to notice the facts in some detail.

For convenience, the present Respondent No.2, who had filed O.A.No.2 90 of 1998, is hereinafter referred to as the employee and the present petitioners, who were the respondents before the Tribunal, are referred to as the employer.

The employee was in service under the Southern Railways. As per the resolution of All India Loco Running Staff Association dated 28.1.19 81, there was an agitation with effect from 1.2.1981. The employee was removed from service on 2.2.1981 as per the order issued by the Divisional Railway Manager, Southern Railway, under Rule 14(ii) of the Railway Servants (Discipline and Appeal) Rules, without holding any enquiry. Many such matters were challenged in the Court and ultimately the Supreme Court disposed of the matters in judgment reported in AIR 1985 SC 1416 (UNION OF INDIA AND ANOTHER v. TULSIRAM PATEL). As per the observation of the Supreme Court, the appeal preferred by the employee was considered, but it was rejected by order dated 10.11.198 6. The employee challenged the order in O.A.No.363 of 1987. The Central Administrative Tribunal, Madras Bench, by order dated 5.12.1989, directed for fresh consideration in respect of the punishment. The Divisional Railway Manager, Southern Railway by order dated 15.6.1990 modified the order of removal from service to one of compulsory retirement with effect from 2.2.1981. It is claimed in the O.A., by the employee that a provisional pension was ordered with effect from 1.12 .1991. Taking heart from the fact that punishment in respect of other employees of the very same Trichy Division had been modified to reduction to the minimum of grade for 6 months and certain orders of removal had been set aside by Kerala and Karnataka High Courts, the employee filed a representation dated 5.1.1992 requesting to accord the same treatment to him and to reinstate him in service. However, since no reply was forthcoming from the authority concerned, the employee filed O.A.No.856 of 1993 before the Central Administrative Tribunal, Madras Bench. However, such application was dismissed by order dated 26.7.1995. The Special Leave Petition filed by the employee is stated to have been rejected on 6.8.1997. In the Original Application filed by the employee it was claimed that, but for the order of removal from the service/compulsory retirement, the normal date of retirement of the employee would have been on 30.11.1988. It was also indicated therein that while the matter was pending before the Supreme Court on the earlier occasion, the employee was being paid salary from 2.2.1981 to June, 1985, obviously pursuant to the interim order passed by the Supreme Court in the said case. It was further claimed that the employee had opted for pensionary benefit on 3.12.1982 before the Loco Foreman, Southern Railway, Trichirapalli. However, subsequently the benefit of pension was

denied to him on the ground that he had not opted for pensionary benefits before he had been removed from service, which was subsequently changed to one of compulsory retirement with effect from 2.2.1981. It was claimed in the Original Application that the persons who were removed from the service along with the employee, particularly one Duraikannu and one Pitchaikannu, have been given pension, but he was treated differently without any justification. With the aforesaid basic allegations, the employee had claimed before the Tribunal that he should be granted pension from 30.11.1988 and he should be given gratuity, leave salary, LIC money recovered from his salary and commutation pension.

3. The aforesaid O.A.No.290 of 1998 was allowed on 9.12.1999. The matter was decided ex-parte on the said date. The Tribunal noted the fact that the order dated 15.6.1990, modifying the order of removal to one of compulsory retirement, had become final as O.A.No.856 of 19 93 filed by the employee had been rejected and the Supreme Court had refused to grant leave. The Tribunal further noted the submission of the employee that he was willing to refund the Provident Fund of Rs.18,829/-. Thereafter the Tribunal observed that the employer should have settled the retiral benefits due to the applicant (employee). Accordingly, the Tribunal issued a direction to settle the retiral benefits of the employee.

4. It appears that thereafter the employer filed a miscellaneous application for recalling the exparte judgment, but such application was rejected by the Tribunal with the observation that it would be open to the applicant to file a review application. Thereafter, the employee filed Review Application No.44 of 2000 before the Tribunal seeking to review the aforesaid order dated 9.12.1999. In the Review Application filed on behalf of the employer it was contended that the employee is not entitled to any pensionary benefit as he was governed by the State Railway Provident Fund Rules and had not given option to come over to Pension Scheme on or before 22.8.1981. In the Review Application it was also indicated that the option exercised on 3.12 .1982 was not a valid option as the last date for giving such option was 22.8.1981. Incidentally it may be noted that in the reply statement also a similar stand has been taken.

5. The Review Application of the employer was dismissed on 10.10.20 00. It was observed by the Tribunal that the order of removal had been subsequently modified into one of compulsory retirement on 15.6.19 90 and therefore, the applicant had become eligible for the benefits under the pension scheme. The Tribunal also observed that since the order of removal has been changed only on 15.6.1990 into one of compulsory retirement, the employee may be given the option to switch over to the pension scheme after the said date. It was also noted that the employee had in fact given an option on 31.12.1982. The Tribunal proceeded to observe Thus in all fairness and applying the principles of equity, the applicant ought to have been given the benefit of pension scheme.

6. Learned counsel appearing for the employers has contended with much vehemence and may be with some amount of justification that as per

the modified order of punishment, the employee is deemed to have been compulsorily retired from 2.2.1981 and such order of modified punishment has become final as the O.A., and the Special Leave Petition filed by the employee had been dismissed. It is further submitted that since the employee had not given option to come over to pension scheme before 22.8.1981, the benefit of the pension scheme should not be made available to him. It is also contended that since the employee had received the benefits under the State Railway Provident Fund Scheme, he is not entitled to the benefit of the Pension Scheme.

7. Learned counsel appearing for the employee has submitted that as a matter of fact the employee was receiving the salary till July, 19 85, albeit as per the interim orders of the Supreme Court, and therefore, it must be taken that he was continuing in service at least till July, 1985. It is also contended that as a matter of fact, the ratio of the decision reported in (1993) 4 SCC 269 (UNION OF INDIA AND OTHERS v. R. REDDAPPA AND ANOTHER), which is a general order, applicable to the Railway employees who had been dismissed by applying Rule 14 (ii). Those who had been dismissed were directed to be reinstated and the employee was in fact entitled to the benefit of such decision, and therefore, it should be taken that he had retired only in 1988, his normal age of retirement. Learned counsel for the employee has also indicated that several other persons had been given the benefit of pension even though option was exercised in 1983 and there is no reason to treat the present Respondent No.2 (employee) on a different footing.

8. A perusal of the decision reported in (1993)4 SCC 269 (cited supra) indicates that in normal course, the present respondent No.2 (employee) would have been entitled to the benefit of reinstatement by applying the ratio of the said decision. Unfortunately for the employee, however, the subsequent events, so far as he is concerned, would stand on the way in getting the benefit of the said decision regarding reinstatement in service. As already noticed, after the punishment was modified to one of compulsory retirement, the employee filed a representation for modifying the punishment and for reinstating him in service. However, such representation had been rejected and thereafter the employee had filed O.A.No.856 of 1993 before the Tribunal, which was rejected and the Special Leave Petition filed by the employee was also rejected. The doctrine of res judicata is therefore attracted and the employee cannot claim that he should have been reinstated in service. The order of compulsory retirement with effect from 2.2.1981 had thus become final, and there is no merit in the submission of the employee that by virtue of the subsequent Supreme Court decision, the employee should be deemed to have been reinstated in service. The principle of res judicata remains a stumbling block, which cannot be overcome by the employee, and therefore, it must be taken that the employee had been compulsorily retired with effect from 2.2.1981.

9. Next question is as to whether the employee is entitled to claim pension. Here again, if the matter is examined strictly on a technical basis, possibly the contention of the employee may not stand scrutiny inasmuch as he had not given the option before the stipulated date i.e., 22.8.1981, to come over to the pension scheme and examined from the said angle, the order of

the Tribunal may not be strictly speaking correct. However, in the peculiar facts and circumstances of the present case, we are not inclined to set aside the direction given by the Tribunal for the following reasons.

10. First of all it is noticed that at the time of modifying the punishment, the Departmental authorities had observed :

 However, considering that he had put in 30 years of service and on purely humanitarian consideration, I decided to modify the punishment as compulsory retirement with effect from 2.2.1981 so that Shri Govindasamy and his family are not denied the terminal financial benefits for the service rendered by him. (emphasis added).

It is thus evident that even at that stage, the appropriate authority was apparently of the view that the employee should get the terminal benefits. By the date of the said order, it is quite well known that all the employees had come under the protective umbrella of the pension scheme and it is thus quite evident that the authority concerned intended to benefit the employee.

11. Apart from the above, the learned counsel for the employee has brought to our notice that on few occasions, pension had been made available even though option has not been given before the stipulated date. Learned counsel for the employee has drawn our attention, particularly, to the order issued by the Southern Railway in O.O.NO.G.179/0/Admn/77-95 dated 12.10.95 relating to Sri K. Marikrishnan. It appears that the aforesaid Marikrishnan was appointed as a clerk under the Southern Railway on 17.4.1943 and another person by name Sri.Karuppanan was similarly appointed on 6.7.1943. Both had been dismissed in 1950. Several other employees who were similarly terminated by invoking Rule 3 of Railway Services (Safeguarding of National Security) Rules, 1949/1954 had filed Writ Petition before the Madras High Court which had set aside such order of termination of other employees and ultimately, the Supreme Court in AIR 1964 SC 600 (MOTI RAM DIOKA v. N.E. FRONTIER RAILWAY) found such Rule to be invalid. Ultimately, the Railway Board has decided to reinstate those employees whose services had been terminated within a period of six years from the date of the judgment of the Supreme Court. However, other employees who had been terminated before six years period were not given such benefit. Ultimately, as per the direction of the Supreme Court in SLP. Nos.19154 and 19155 of 1994, relating to the aforesaid two persons, the departmental authorities took the decision of reinstating those persons and given the benefit of pension. From the order passed by the Departmental authorities it is apparent that in those cases option had been exercised only in 1983, that is to say, much after the due date, namely 22.8.1981.

12. Even from the materials on record it is apparent that the Railway Authorities were extending from time to time the last date for giving option. In such peculiar circumstances, particularly, keeping in view the fact that option has been given on 31.12.1982 and keeping in view the fact that the Railway Authorities themselves had extended the scheme keeping in view the financial nature, it would be most unjust to deprive the employee of

such a benefit merely on the basis of technicality to the effect that he had given the option beyond the stipulated date.

13. Law is now fairly well settled that even where a inferior Tribunal has passed an erroneous order or even an illegal order, the High Court while exercising jurisdiction under Article 226 of the Constitution may not interfere with such order if substantial justice has been rendered. In the present case, we find that even though there may be some technical flaw in the order passed by the Tribunal, since substantial justice has been done, it

would be most inequitable to deprive the employee the benefit of the order. Therefore, we do not consider it as a fit case where the order passed by the Tribunal calls for interference.

14. For the aforesaid reasons, the writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : Yes
Internet: Yes

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To

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