

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/08/2004

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE A.K. RAJAN

WRIT PETITION No.35209 OF 2003

D. Subramani .. Petitioner

-Vs-

1. The Union of India,
rep. by the General Manager,
Southern Railway,
Chennai 3.

2. The Divisional Railway Manager,
Personal Branch,
Chennai Division,
Park Town, Chennai 3.

3. The Senior Personal Officer,
Southern Railway, Madras Division,
Park Town, Chennai 3.

4. The Station Superintendent,
Southern Railway, Madras Division,
Arakkonam Junction,
Arakkonam 631 002.

5. The Registrar,
Central Administrative Tribunal,
Chennai 104. .. Respondents

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

For Petitioner : Mr.V. Nithyanandam

For Respondents 1-4 : Mr.S. Balaji

:O R D E R

(Order of the Court was made by P.K. MISRA, J.)

Heard the learned counsels appearing for the parties.

2. The present writ petition has filed against the order passed by the Central Administrative Tribunal, Madras Bench in O.A.No.392 of 200 3 dated 25.8.2003. The aforesaid Original Application had been filed by the present petitioner under the following circumstances.

The petitioner had joined service under the Union of India as a Portar in Railways on 9.1.1964. At the time of his appointment, his date of birth has been entered as 8.10.1935 and on the aforesaid basis, he was made to retire on 31.10.1993. However, the petitioner filed an appeal before the Railway Administration. At that time, he was asked by the Administration to rejoin duty on 12.11.1993 and the period from 1.11.1993 to 11.11.1993 was treated as leave on average pay. Subsequently, however, it was found that the date of birth as entered in the service records initially was correct and the petitioner was again terminated from service on 9.11.1995. At that stage, the petitioner filed O.A.No.1354 of 1995. During the pendency of O.A.No.1354 of 1995, the Tribunal had passed an interim order dated 2.7.1996, on the basis of which, the petitioner was being paid 50% of the salary last drawn by him for the period from 10.11.1995. In the interim order, it has been indicated that the payment would be finally adjusted after the disposal of the Original Application. Ultimately, O.A.No.135 4 of 1995 was dismissed by order dated 10.2.1997. While dismissing the Original Application, wherein the main contention was relating to date of birth, the Tribunal directed as follows :-

□ 7. It is seen that an interim order was passed by a Bench of this Tribunal on 2.7.1996, on the basis of which, the applicant is being paid 50% of the salary last drawn by him for the period from 10.11.199 5 onwards. The interim order states that this payment would be finally adjusted after the disposal of the OA. We hereby order that this payment be recovered as admissible under law from the amounts that may be due to the applicant on the termination of his services, since the O.A has been dismissed. . . .□

3. Thereafter, a circular dated 7.7.1999 was issued by the Railway Board, wherein it was indicated :-

□ 3. The matter has been considered in this ministry in the light of the judgment of the Supreme Court and it has been decided that, in all cases of irregular continuance in service beyond the age of superannuation, the period of over-stay will be treated as wholly irregular, for which the employee will be considered to be equally responsible and immediate action will be taken to recover the pay, allowances, etc. paid to the employee for the entire period of over-stay.

4. These orders will take effect from the date of issue and all the cases of erroneous retention which have not yet been decided will be decided in terms of these orders. The cases already decided otherwise need not be re-opened.□

4. On the basis of such circular, which was issued much after the second time retirement of the petitioner and dismissal of O.A.No.1354 of 1995, the order dated 26.11.2001 was issued directing that payment made to the

petitioner for the period from 1.11.1993 to 9.11.1995 has to be recovered as over payment. At that stage, the petitioner made a representation that he was entitled to salary for the aforesaid period, as he had actually rejoined duty as per the orders passed by the Railway authorities. However, the Railway authorities recovered the said amount and made payment towards pension for the period starting from 1.11.1993 on the ground that the petitioner had actually completed the age of retirement on 31.10.1993 and was not entitled to any salary thereafter. The petitioner, thereafter, filed O.A.No.392 of 2003 before the Central Administrative Tribunal, Madras Bench for quashing the proceedings No.M/P.3/500/PA.No.062/2001 dated 26.11.2001 and for refund of the amount already recovered, which was dismissed. Hence, the present writ petition.

5. The main contention of the petitioner is to the effect that the petitioner was directed to rejoin duty on 12.11.1993 and continued as such till 9.11.1995 and since he had already worked as per the directions issued by the Railway authorities, the salary paid to him should not have been recovered. Learned counsel has also contended that while O.A.No.1354 of 1995 was pending, as per the interim direction issued by the Tribunal, 50% of the salary payable was paid to the petitioner, which should not have been recovered.

6. So far as the amount which was paid to the petitioner pursuant to the interim direction in O.A.No.1354 of 1995 is concerned, we have no hesitation in holding that such recovery cannot be challenged by the petitioner at this stage. Payment had been made pursuant to the interim direction made by the Tribunal, wherein it was specifically indicated that payment would be finally adjusted towards the final disposal of the OA. At the time of the disposal of O.A.No.1354 of 1995, the Tribunal gave a specific direction for recovery of such amount. The petitioner, even though challenged such order in the High Court, his writ petition has been dismissed and thus the matter became final. In such view of the matter, the petitioner cannot raise any grievance at this stage and his claim regarding recovery of the amount paid to him as per the interim order passed in O.A.No.1354 of 1995 cannot be mitigated. The contention of the petitioner is required to be rejected.

7. So far as the recovery of the amount paid to the petitioner between 12.11.1993 and 9.11.1995 is concerned, the petitioner stands on a surer footing. It is to be noted that on the basis of the date of birth entered in the service register, the petitioner had actually retired with effect from 31.10.1993. In the appeal, the higher authority directed the petitioner to rejoin, which he did on 12.11.1993 and worked as such till 9.11.1995, when the Railway Board overturned the decision of the General Manager and observed that the petitioner should have retired with effect from 31.10.1993. It is obvious that the petitioner had rejoined duty on the basis of the direction issued by the Railway authorities and had actually worked and salary had been paid to him. When the petitioner had actually worked, even though it ultimately transpired that he had crossed the age of superannuation by then, salary already paid to him should not have been recovered. This view

of ours, receives considerable support from the decision of the Supreme Court reported in 2003(1) CTC 182 (STATE OF MADHYA PRADESH AND OTHERS v. MOHANLAL SHARMA), wherein it was observed :-

□ 3. In that view of the matter, the appeal deserves to be allowed and the order under challenge is set aside. Before we part with the case, we would like to observe that since the respondent has served on the basis of the judgment under challenge for six months, the appellants shall not recover the salary which has already been paid to the respondent during that period.□

8. Learned counsel appearing for the respondents has however submitted that in view of the fact that the date of birth had been found to be correctly recorded, the petitioner had no right to continue in service beyond 1.11.1993, and therefore, he was not entitled to any salary for the said period. It was further contended that since pension has been calculated and paid with effect from 1.11.1993, the petitioner cannot get the benefit of salary as well as the pension for the very same period.

9. Learned counsel appearing for the respondents has placed strong reliance upon the decision of the Supreme Court reported in 1997 SCC (L&S) 1185 (RADHA KISHUN v. UNION OF INDIA AND OTHERS). In the aforesaid case, there was no dispute regarding the date of birth of the employee working under the Telecommunication Department. On the admitted date of birth, namely 13.5.1933, the Government servant should have been made to retire on 31.5.1991. However, such person continued till 31.5.1994. Subsequently, steps were being taken to recover the amount paid to such person beyond 31.5.1991. Original Application was filed before the Central Administrative Tribunal, which having been rejected, the matter was brought to the Supreme Court by the quondam employee. It was observed :

□ . . . It would be an obvious case of absolute irresponsibility on the part of the officer concerned in the establishment in the section concerned for not taking any action to have the petitioner retired from service on his attaining superannuation. It is true that the petitioner worked during that period, but when he is not to continue to be in service as per law, he has no right to claim the salary etc. It is not the case that he was re-employed in the public interest, after attaining superannuation. Under these circumstances, we do not find any illegality in the action taken by the authorities in refusing to grant the benefits.□

10. After carefully going through the aforesaid decision, we are of the opinion that the said decision is not applicable to the peculiar facts and circumstances of the present case. Admittedly, after the petitioner had actually retired, there was a direction by the Railway administration asking him to rejoin and on that basis, the petitioner rejoined on 12.11.1993 and continued until he was again made to retire on 9.11.1995. It is not that the petitioner on his own, by some fraudulent methods continued in service, but he had rejoined after a few days gap by virtue of the order passed by the Railway Administration. The ratio of the aforesaid decision is not therefore applicable and in our opinion, the ratio of the subsequent decision of the Supreme Court reported in 2003(1)CTC 182 (cited supra) is more befitting.

11. It has to be noticed that the direction for recovery of the amount has emanated on the basis of the circular issued in 1999. Before such circular was issued, no steps were taken for recovery of the amount. As a matter of fact, the circular itself was made applicable only from the date of issuance of the circular and should not have been applied to the case of the petitioner, who had retired much before the issuance of the said circular. As indicated in the circular, cases already decided should not have been re-opened.

12. The Tribunal has referred to the earlier order made in O.A.No.1 354 of 1995. However, the Tribunal has missed the vital point that the earlier O.A. was directed against the order of retirement on the basis of the disputed date of birth. At that stage, the question of recovery of amount already paid had not arisen nor such question was raised before the Tribunal directly or indirectly. The direction of the Tribunal regarding recovery of the amount related to payment of 50 % of salary made pursuant to the interim direction of the Tribunal. There was no direction in O.A.No.1354 of 1995 that the amount which had already been paid to the petitioner prior to the date of his □ second retirement□ was to be recovered. The Tribunal, without noticing the aforesaid aspect, has observed that the question had already been decided in O.A.No.1354 of 1995. As a matter of fact, the question cropped up for consideration only after the Railway authorities issued the proceedings in 2001.

13. For the aforesaid reasons, we are inclined to allow the writ petition in part. While rejecting the contention of the petitioner regarding recovery of the amount paid to the petitioner as per the interim order passed by the Tribunal dated 2.7.1996 in O.A.No.1354 of 1995 , we observe that so far as the salary for the period from 12.11.1993 to 9.11.1995 is concerned, such period may be treated as reemployment and the salary paid to the petitioner should not have been recovered and such recovered amount should be refunded to the petitioner. Since the petitioner had been paid pension for the said period, the amount of pension paid for the period from 12.11.1993 to 9.11.1995 should be calculated and adjusted and the balance amount for the period from 12.11.1995 to 9.11.1995 should be paid. This may be done within a period of three months from the date of receipt of the order. If the petitioner is entitled to any other retirement benefits, the same should also be finalised within the said period.

14. The writ petition is accordingly allowed in part. There would be no order as to costs.

Index : Yes

Internet: Yes

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To

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