

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2686 OF 2008

Shri Chandrakant S. Dalvi (since deceased))
through his legal heir)
Smt.Devyani Chandrakant Dalvi)
B-203, Sai Mandir CHS Ltd.,)
S.V. Road, Dahisar (E),)
Mumbai 400 068.) .. Petitioner

Versus

Mumbai Port Trust)
Administration Office Building)
Ballard Estate, Mumbai 400 038.) .. Respondent

Mr.Ashok Shetty for the petitioner.
Mr.R.S. Pai a/w Mr.Anand Pai, Ms.Kavita Anchan and Mr.Misra i/by
M/s.M.V. Kini for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 3rd August 2017

Judgment :-

. By this petition filed under Article 226 of the Constitution of India, the original petitioner prayed for issuance of writ of certiorari inter alia praying for quashing and setting aside the order dated 7th July 2008 passed by the Labour Court in the Application filed under Section 33 C (2) of the Industrial Disputes Act, 1947 and praying for various reliefs. During the pendency of the petition, the original petitioner who

was an employee of the respondent expired. (Hereinafter referred to as the said employee). Some of the relevant facts for the purpose of deciding this writ petition are as under :-

2. The said employee had joined the respondent as an Assistant Goods Clerk on 18th November 1968. It was the case of the said employee that on 28th April 1982, the respondent terminated his services arbitrarily from 28th April 1982 on the ground of abandonment of services. He challenged the said termination order before the Labour Commissioner. The Labour Commissioner directed him to move to the Labour Commissioner under the Central jurisdiction. The matter was thereafter referred to the Central Government Industrial Tribunal, Mumbai for adjudication in the year 1994 (For short 'the said Tribunal').

3. On 11th November 1998, the said Tribunal passed an award thereby quashing the termination order and directing the respondent to reinstate the said employee without any back wages and other benefits.

4. It was the case of the said employee that he thereafter called upon the respondent to implement the award passed by the tribunal and to allow him to report to duty. Some time in the year 2000, he filed a writ petition (333 of 2000) before this Court for various reliefs. The said writ petition came to be rejected by this Court on 23rd February 2000.

5. Being aggrieved by the said order, the said employee filed an appeal (430 of 2000) in the month of June, 2000. Division Bench of this Court passed an order dated 22nd August 2000 thereby dismissing

the said appeal. Division Bench, however, made it clear that as a consequence of the award of the said Tribunal, the said employee shall be deemed to have been continued in service with continuity, but shall not be entitled to wages for the period from his removal till reinstatement.

6. On 1st May 2001, the said employee obtained Special Voluntary Retirement Scheme (VRS) and was paid various amounts under the said scheme by the respondent.

7. Some time in the year 2000, the petitioner filed an application under Section 33 C (2) of the Industrial Disputes Act, 1947 before the said Tribunal inter alia praying for an amount of Rs.5,83,428.85 towards the difference between the amount claimed and the amount paid. The said employee examined himself as a witness. The respondent did not lead any oral evidence before the tribunal. On 7th July 2008, the said Tribunal rejected the application filed by the said employee merely on the ground that there was no continuity of service awarded by the tribunal in the award in question.

8. Being aggrieved by the the said order and judgment dated 7th July 2008, the said employee filed this petition under Article 226 of the Constitution of India.

9. Mr.Shetty, learned counsel for the petitioner invited my attention to the order passed by the Division Bench of this Court on 22nd August 2000 in Appeal No.430 of 2000 and would submit that though the Division Bench had clarified that the petitioner shall be deemed to

have been continued in service with continuity, the application filed under Section 33 C (2) by the said employee came to be dismissed on the ground that there was no continuity of service.

10. Learned counsel invited my attention to various findings rendered by the tribunal while rejecting the application filed by the said employee. Learned counsel also invited my attention to various calculations made by his client in the application filed before the tribunal under Section 33 C (2) and making claims under various heads. He submits that in so far as the claim for pension is concerned, the respondent has not paid pension in accordance with the VRS Agreement entered into between the parties. He submits that on the basis of clarification issued by the Division Bench of this Court that the said employee shall be deemed to have been continued in service with continuity, the number of years of the service for the purpose of computation of the pension was in dispute and the said employee was not paid the pension properly under the said VRS Agreement entered into between the parties read with the order passed by the Division Bench. He submits that the tribunal, however, has not considered this crucial aspect raised by the said employee in the application filed under Section 33 C (2) of the Industrial Disputes Act, 1947 and has rejected the application merely on the ground that there was no continuity of service.

11. It is submitted that though the tribunal referred to an appeal proceeding filed by the petitioner, the said tribunal has totally overlooked the clarification issued by the Division Bench of this Court. He submits that the finding rendered by the tribunal are thus totally perverse and deserves to be set aside by this Court.

12. Mr.Pai, learned counsel for the respondent, on the other hand, invited my attention to the calculations made by the petitioner in the application filed under Section 33 C (2) and would submit that the substantial part of the claim was made by the said employee for notional increment which the said employee was not entitled to. Learned counsel for the petitioner states that whatever amount of pension was payable to the said employee under the VRS Agreement executed between the parties had been already paid.

13. In so far as the amount claimed by the employee in his application filed under Section 33 C (2) claiming benefits of notional increment is concerned, learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Laxman Reddy Vs.A.P.S.R.T.C. and Ors., reported in 2008 II CLR 767*** and in particular paragraph 5 and the another judgment of the Supreme Court in the case of ***Andhra Pradesh State Road Transport Corporation & Ors. Vs. Abdul Kareem, reported in 2005 III CLR 207*** and in particular paragraphs 5 and 10 to 12 thereof.

14. The next submission of the learned counsel for the respondent is that the application filed by the petitioner under Section 33 C (2) for various reliefs itself was not maintainable. He submits that the application could have filed such application only if the respondent would not have paid any amount out of the existing entitlement of the petitioner under the industrial award or under the VRS and not otherwise. He placed reliance on various paragraphs of the affidavit-in-reply filed by the respondent before this Court and would submit that entire amount of pension due to the said employee was already paid. The said employee

had not produced VRS agreement before the industrial tribunal along with the application under Section 33 C (2) of the Industrial Disputes Act, 1947.

15. In support of the submission that the industrial tribunal had no power to adjudicate upon the entitlement of the petitioner for payment of pension, learned counsel placed reliance on the judgment of the Supreme Court in the case of ***State Bank of India Vs. Ram Chandra Dubey and Ors., reported in (2001) 1 SCC 73*** and in particular paragraphs 7 and 8 thereof. It is submitted that since the findings rendered by the tribunal are not perverse, this Court cannot interfere with such order passed by the tribunal by exercising the jurisdiction under Articles 226 and 227 of the Constitution of India.

16. It is not in dispute that the Central Government Industrial Tribunal had passed an award dated 11th November 1998 thereby quashing the termination order and directing the respondent to reinstate the said employee without any back wages and other benefit. Writ petition filed by the said employee challenging the said order came to be rejected by this Court some time in the year 2000. Appeal No.430 of 2000 filed by the said employee came to be dismissed in the month of August 2000. However, a perusal of the said order passed by the Division Bench clearly indicates that it was clarified by the Division Bench that as a consequence of the award of the said Tribunal, the said employee shall be deemed to have been continued in service with continuity. Division Bench also clarified that the said employee shall not be entitled to wages for the period from his removal and reinstatement.

17. A perusal of the application filed by the said employee under Section 33 C (2) before the tribunal indicates that several claims were made by the said employee under various heads and mainly on the premise that the respondent ought to have given benefits of notional increment to the petitioner. The total amount claimed by the petitioner before the tribunal was Rs.5,83,428.85 as and by way of difference of various dues.

18. In so far as the submission urged by Mr.Pai, learned counsel for the respondent that since there was no specific direction that the said employee would be entitled to all the consequential benefits though directed to be reinstated by the tribunal, the said employee would not be entitled to claim any benefit of increments notionally earned during the period when he was not on duty or during the period when he was out of service. Supreme Court in the cases of ***Andhra Pradesh State Road Transport Corporation & Ors. Vs. Abdul Kareem (supra)*** and ***Laxman Reddy Vs.A.P.S.R.T.C. and Ors. (supra)*** has categorically held that in the absence of any specific direction, merely because an employee has been directed to be reinstated without back wages, he could claim a benefit of increments notionally earned during the period when he was not on duty or during the period when he was out of service. In my view, in absence of specific direction in that regard, merely because an employee has been directed to be reinstated without back wages, he could claim a benefit of increments notionally earned during the period when he was not on duty or during the period when he was out of service.

19. Mr.Shetty, learned counsel for the petitioner fairly does not dispute the propositions of law canvassed by the learned counsel for the respondent. He however submits that though his client had made various claims for notional increments and other related claims based on notional increments, he would not press such claim before the tribunal. He however submits that in so far as claim of the said employee for pension is concerned, the tribunal has not considered the claim made by the said employee in the application filed under Section 33 C (2) on merit and particularly whether the number of years of the service computed by the respondent for the pension was correct or not. He submits that such difference in payment based on the rights accrued in favour of the petitioner under Voluntary Retirement Scheme read with order of the Division Bench can be adjudicated upon by the tribunal under Section 33 C (2) of the Industrial Disputes Act, 1947. He submits that since the tribunal has proceeded on an erroneous premise that there was no continuity of service, the tribunal did not go into the dispute arising out of the calculations made by the petitioner.

20. There is no dispute about the propositions of law laid down by the Supreme Court in the case of ***State Bank of India Vs. Ram Chandra Dubey and Ors. (supra)*** holding that the benefit sought to be enforced under Section 33C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. It is held that a pre-existing benefit or one flowing from a pre-existing right falls within jurisdiction of the Labour Court exercising powers under Section 33C(2) of the Industrial Disputes Act, 1947.

21. Mr.Pai, learned counsel for the respondent does not dispute that under VRS agreement entered into between the parties, the petitioner was entitled to claim pension. He also does not dispute that in view of the clarification issued by the Division Bench that there would be continuity of service, pension is required to be paid to the petitioner.

22. Though in the application under Section 33 C (2) of the Industrial Disputes Act, 1947 filed by the said employee before the tribunal, the said employee had calculated pension on the premise that the said employee was also entitled to take into account the notional increment, promotional increment etc., the learned counsel for the petitioner has fairly stated that while calculating the pension amount, the respondent was not required to take into consideration the notional increment, promotional increment etc. In my view, Mr.Shetty, learned counsel for the petitioner is right in his submission that the tribunal was required to consider the effect of the order passed by the tribunal while setting aside the order of termination and the order of the Division Bench clarifying that there would be continuity of service of the petitioner though such issue was specifically raised in paragraph 11 of the application made by the petitioner while considering the said application under Section 33 C (2). The tribunal has rejected the entire claim merely on the premise that there was no continuity of service.

23. In my view, the tribunal has totally overlooked the order passed by the Division Bench in the impugned order and has rendered a perverse finding. The tribunal also has not considered whether the payment made to the petitioner under VRS was paid in accordance with the said agreement or not. There was also no adjudication on the issue

whether the calculations of the petitioner for pension considering the period of 33 years was correctly made or not. The learned counsel for the respondent is not able to tell this Court as to what would be the correct amount of pension if payable after considering the period of 33 years or lesser period which according to the respondent is correct for computation of pension. In my view, the dispute for payment of pension based on the calculations made by the said employee in paragraph 11 of the application and on the basis thereof would squarely fall under Section 33 C (2) of the Industrial Disputes Act, 1947. The said employee is not seeking any fresh adjudication in the said application made by him and thus the tribunal had jurisdiction to entertain the said application. In my view, there is thus no merit in the submission of Mr.Pai, learned counsel for the respondent that the application made by the petitioner under Section 33 C (2) itself was not maintainable. Supreme Court in the case of ***State Bank of India (Supra)*** has held that whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach the Labour Court under Section 33 C (2) of the Industrial Disputes Act, 1947. In my view, these principles of law laid down by the Supreme Court would apply to the facts of this case.

24. In these circumstances, I am of the view that since the tribunal has dismissed the application filed by the petitioner on wrong premise that there was no continuity of service, the matter is required to be remanded back to the tribunal on limited issues set out in this judgment.

25. I therefore pass the following order :-

- (i) The impugned order dated 7th July 2008 passed by the tribunal is set aside;
- (ii) Application (IDA) No.L.C.-2/83/02 is restored to file;
- (iii) The tribunal is directed to decide whether the calculations for payment of pension made by the said employee in the application filed under Section 33 C (2) for payment of pension being the differential amount alleged to have not been paid under the Voluntary Retirement Scheme to the said employee after considering the fact that there was continuity of service as directed by the Division Bench of this Court is correct or not and to pass a consequential order;
- (iv) It is made clear that the parties are at liberty to lead additional evidence before the tribunal including on the issue as to whether the VRS was fully implemented by the employer and as to whether the said employee was entitled to claim any pension as claimed by the petitioner in the said application under Section 33 C (2) of the Industrial Disputes Act, 1947 or not;
- (v) The tribunal shall pass an order after giving an opportunity to the parties including the opportunity of leading the oral and documentary evidence and shall pass an order within six months from the date of first hearing.

- (vi) Rule is made absolute in aforesaid terms.
- (vii) Writ petition is disposed of.
- (viii) There shall be no order as to costs.
- (ix) Parties as well as the tribunal to act on the authenticated copy of this order.

R.D. DHANUKA, J.