

HON'BLE SRI JUSTICE SURESH KUMAR KAIT

AND

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

WRIT PETITION No.24507 OF 2005

ORDER: (Oral, *Per* Hon'ble Sri Justice Suresh Kumar Kait)

Vide the present Petition, the petitioners (Railways) – respondents, have assailed the order, dated 30.06.2005, passed in O.A. No.815 of 2004 by the Andhra Pradesh Administrative Tribunal at Hyderabad (for short, 'the Tribunal'); whereby the O.A. filed by the 1st respondent - applicant, was allowed insofar as granting family pension is concerned and dismissed the Application insofar as providing compassionate appointment to the son of respondent herein.

The brief facts of the case in hand are that the husband of the respondent was appointed in the Railway Department as Casual Labour on 12.11.1976 and, later, his services were regularized from 01.01.1982. Subsequently, as he was medically unfitted in A-2 as Gangman and found fit in B-1, he was absorbed as Khalasi under IOW/Rajahmundry on 25.10.1991. Thereafter, he was transferred to Vijayawada on 26.10.1992. As the respondent failed to know the whereabouts of her husband, who was her sole breadwinner, since 01.08.2000, she lodged a complaint in F.I.R. No.9, dated 31.01.2002 in the Tuni Police Station. Later, the respondent submitted several representations to the petitioners, seeking family pension and appointment to her son on compassionate grounds, as her husband was missing from 01.08.2000; wherein, the respondent was informed by the 1st petitioner that due to the unauthorized absence of her husband from 23.03.1994 to 26.02.2000, he was removed from service *vide* proceedings dated 20.12.2000. Thereafter, the respondent submitted several representations to the petitioners to set-aside the penalty

proceedings dated 20.12.2000; for which, the 1st petitioner *vide* order dated 11.03.2004 rejected the representation of the respondent dated 11.10.2003, holding that as the husband of the respondent was unauthorizedly absent from 23.03.1994 to 26.02.2000 he was removed from service and as such pasted the order to the notice board on 22.12.2000 with two witnesses.

Aggrieved by the impugned order No.P/E/177/DPG/STMV/39/2003, dated 11.03.2004, the respondent approached the Tribunal by filing O.A. No.815 of 2004 and sought the following relief:

“(a). to set-aside the impugned order No.P/E/177/DPG/STMV/39/2003, dated 11.03.2004 of the 1st respondent, rejecting the case of the applicant for release of pension and pensionary benefits of her missing husband, grant of family pension to the applicant and compassionate ground appointment to her son on the ground that the applicant’s husband was already removed *vide* order dated 20.12.2000 for unauthorized absence for the period from 23.03.1994 to 26.03.2000 declaring the same as arbitrary, illegal, unwarranted, misconceived and in violation of Articles 14 and 16 of the Constitution of India;

(b) to direct the respondents to conduct review of the punishment imposed on the applicant’s missing husband, duly setting aside the punishment of removal, treating the case of the applicant’s husband as Man Missing and to grant the pension and pensionary benefits/Family pension to the applicant as per the Pension Rules in terms of provisions contained in Railway Board Serial Circular No.139/1991, communicated in Railway Board’s Lr. No.B/P.227/P&500/P, dated 09.12.1991 with all consequential benefits.”

After hearing the arguments of both the counsel and perusing the material available on record, the learned Tribunal allowed the O.A. to the extent of granting family pension to the respondent herein and dismissed the O.A. to the extent of providing compassionate appointment to her son.

Aggrieved by the order of the Tribunal in O.A. No.815 of 2004 to the extent of directing the petitioners herein to give family pension to the respondent herein, the petitioners – Railways are before this Court.

Heard the arguments of learned standing counsel appearing on behalf of the Railways and learned counsel appearing on behalf of the respondent.

Learned standing counsel for the petitioners submits that as per the record of the petitioners, husband of the respondent was unauthorizedly absent from 23.03.1994 to 26.02.2000. However, F.I.R. No.9 was registered with the Tune Police on 31.01.2002; whereas, the husband of the respondent was removed from service 20.12.2000. He submits that at the time of initiating disciplinary proceedings against the husband of the respondent, the Department was not aware about missing of her husband, however, proceeded on the un-authorized absence of her husband. When the respondent filed representations seeking the retiral benefits, pension and compassionate appointment of her son, even prior to that the petitioners removed the husband of the respondent from service. Therefore, the question of granting any retrial benefits or family pension to the respondent or compassionate appointment to her son does not arise in this case.

Learned standing counsel appearing for the petitioners has brought to the notice of this Court about a judgment of the Supreme Court in ***Union of India and others Vs. Geeta Devi***¹, wherein the facts therein are similar to the facts of the case on hand, where it was held as follows:

“2. The Tribunal by an order made on 27.10.1994 directed to give whatever dues were payable to the respondent treating her

¹ 2003 SCC (L&S) 86

husband to have died on 16.04.1998 and also directed to give a suitable employment to her in Class-IV as a dependant of the employee who died in harness and in addition the payment of compensation of Rs.50,000/-. This order is assailed in this appeal.

3. It is clear from the narration of the facts that the services of the husband of the respondent were terminated *w.e.f.* 23.09.1982. If that is so, question of giving any other relief as sought for by the respondent would not arise at all. The Tribunal ignoring these aspects of the case has given the relief in question, which we think is not in order. Therefore, the order made by the Tribunal is set-aside and the application filed by the respondent shall stand dismissed. The Appeal is allowed accordingly.”

Learned standing counsel, by drawing the attention of this Court to the above extracted portion, submits that the facts of the instant case are squarely covered by the judgment of the Supreme Court in **Geeta Devi**¹. However, learned Tribunal ignoring these facts allowed the O.A. filed by the respondent.

It is pertinent to note that the respondent filed O.A. No.815 of 2004 before the Tribunal seeking two reliefs *i.e.*, to grant family pension to the respondent and as such providing compassionate appointment to her son.

The respondent got registered F.I.R. No.9, dated 31.01.2002, in Tuni Police Station, where the respondent was staying and her husband used to come to that station. It is not in dispute that the husband of the respondent was posted at Rajahmundry, thereafter, he was transferred to Vijayawada, which is more than 130 Kilometers from Rajahmundry; the husband of the respondent used to come to her house at Tuni routinely from Vijayawada but the frequency of his visit was very less. When her husband did not come to her residence at Tuni for longer period, she made all efforts to trace out him; however, failed to trace out him and

having no other option, lodged F.I.R. No.9, dated 31.01.2002 in Tuni police station. Subsequently, she made several representations to the petitioners for the aforesaid two reliefs. The husband of the respondent while working as Khalasi was issued with major penalty charge memorandum dated 29.03.2000 proposing to hold an enquiry under Rule 9 of the Railway Servants (D&A) Rules, 1968 with imputation that he was unauthorizedly absent from duty without prior sanction of leave and without observing Railway Medical Attendance Rules from 22.03.1994 onwards.

The case of the petitioners is that the said proceedings were sent to the residential address of the husband of the respondent, available as per their records, on 29.03.2000, which was returned with an endorsement that the employee was not residing in the said premises.

It is pertinent to mention here if that was the position, the duty of the petitioners as employers was to trace out the husband of the respondent and thereafter they would have initiated the departmental proceedings. Contrary to that, the petitioners pasted the proceedings on the notice board at work spot of the employee, however, in the presence of two witnesses. Thereafter, the disciplinary authority appointed the Inquiry Officer to conduct enquiry into the charges framed against him. A copy of the enquiry report was sent to the employee by registered post on 17.11.2000, which was returned as 'not claimed by the addressee'.

It is important to note here that when the first correspondence addressed was returned stating that no one was staying at the address, then what was the purpose of sending another communication to the same address, however, the petitioners had to try all the modes, available under the Rules and procedures, however failed to do so.

It is not in dispute that when the respondent made representations for the aforesaid two reliefs, brought to the notice of the petitioners about lodging of F.I.R. No.9, dated 31.01.2002 and made all efforts to trace out her husband, no whereabouts of her husband were found. Thereafter, the respondent made representation to the petitioners for the death cum retrial benefits and pension along with appointment of her son. It is not in dispute that when a employee is removed from service, as per Rules, the family is not entitled to get family pension.

The charge memorandum and enquiry report were sent to the charged employee by registered post and, thereafter, the order was pasted in the notice board in the presence of two witnesses but at the time of communicating the order of removal to the charged employee, they have not adopted the first method *i.e.*, by sending the order by registered post. Therefore, as far as the issuing the removal order is concerned, the petitioners have not followed the due procedure and it amounts to denial of principles of natural justice. Therefore, it cannot be said that the order of removal from service could give its effect. The husband of the respondent was, therefore, not out of service till he deemed expired in terms of Section 108 of the Indian Evidence Act. Therefore, the respondent is entitled to get the family pension in terms of the Railway Board Instruction No.F(E)III/86/PN1/77 of 23.07.1991, the relevant portion of which is extracted below:

“Withholding of the benefits, due to the family has been causing a great deal of hardship to the families, therefore, the following course of action should be taken in such cases:

(a) When a employee disappears leaving his family, the family can be paid the first instance the amount of salary due, leave encashment due and the amount of Provident Fund pertaining to his own subscription in SRPF having regard to the nomination made by the employee.

(b) After elapse of one year period, other benefits such as Retirement Death Gratuity/Family Pension in respect of pensionary staff and Government Contribution/SC to P.F. in respect of staff governed by SRPF (Contributory) Rules may be granted to the family subject to the fulfillment of conditions prescribed.

One year will be reckoned from the date first information report with police and the period of one year after which the benefits of family pension and gratuity will also reckoned from this date.

The conditions to be fulfilled are prescribed in Railway Board instruction No.F(E)III-86/PN-1/17 of 19.09.1986 and No.F(E)III/89/PN-1/4 of 11.05.1989 given as under:

(a) The family must lodge a report with the concerned police station and obtain a report that the employee has not been traced after all efforts had been made by the police.

(b) An Indemnity Bond should be taken from the nominee/dependants of the employees that all payments will be adjusted against the payments due to the employee in case he appears on the scene and make any claim."

It is pertinent to mention here that, in similar circumstances, the Railway Board issued Serial Circular No.139/91, Circular letter No.P(R) 227/X, dated 27.09.1991, wherein mentioned as under:

"2. The Board have considered the matter and it is clarified that in cases of the type mentioned above where it is established that the railway employee was really missing and not unauthorizedly absent, the disciplinary action should be treated as initiated on invalid premises and the on-going disciplinary action or the punishment order should be annulled. While the annulment of the on-going disciplinary proceedings in such cases may be made by the disciplinary authority, in the case of punishment orders already issued, the annulment may be made by the appellate/revisionary authority, as the case may be. For this purpose, it is not necessary to follow any '**Revision**' or '**Review**' procedure since the charges/punishment are obviously based on invalid premises. After the dropping of the disciplinary action and annulment of the punishment of removal, as the case may be, the relevant benefits like grant of leave encashment, salary dues, retirement benefits

etc., may be extended as outlined in Board's letter No.F(E)/86/PN1/17, dated 19.09.1986.

3. In cases of the aforesaid type, the question of giving compassionate appointments to wards may also be considered after a period of 7 years/3 years as provided in item (iii) of Para 1 of Board's letter No.E(NG)III/78/RC1/1, dated 07.04.1983."

When the respondent made several representations to the petitioners, by which time the petitioners were aware about the missing of her husband, which is evident from F.I.R. No.9, dated 31.01.2002. At that point of time, the petitioners should have reviewed or revised the punishment awarded to the husband of the respondent, however, the petitioners failed to do so. Thus, removal from service is in nullity.

In case of *Union of India, represented by its Secretary Vs. Polimetla Mary Sarojini and another*², this Court, in similar circumstances, held as follows:

"(40) But the conclusion that we have come to in the preceding paragraph would not take us to our destination. Admittedly, there are executive instructions in the form of government of India's decisions issued under Rule 54 of the CCS (Pension) Rules. Since these decisions are issued under the statutory rules, they are binding upon the Departments. One of the decisions of the Government of India could be found in Circular Letter No.4-52/86-Pen., dated 03.03.1989. The circular reads as follows:

"Payment of retirement gratuity and family pension to the family, in case an official's whereabouts are not known:-

1. A number of cases are referred to this Department for grant of family pension to the eligible family members of employees who have suddenly disappeared and whose whereabouts are not known. At present, all such cases are considered on merits in this department. In the normal course, unless a period of 7 years has elapsed since the date of disappearance of the employee, he cannot be deemed to be dead and the retirement benefits cannot be paid to the family. This

² 2017 Law Suit (Hyd)16

principle is based on Section 108 of the Indian Evidence Act which provides that when the question is whether the man is alive or dead and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

In view of the above facts and circumstances of the case, and decision of this Court in ***Polimetla Mary Sarojini***², the Railway Board instruction No.F(E)III/86/PN1/77 of 23.07.1991, Railway Board instruction No.F(E)III/86/PN-1/17, dated 19.09.1986, and F(E)III/89/PN-1/4, dated 31.05.1989, we find no illegality or perversity in the order passed by the Tribunal.

Moreover, the above mentioned instructions issued by the petitioners were not brought to the notice of the Supreme Court in case of ***Geeta Devi***¹. Therefore, the decision of the Supreme Court in ***Geeta Devi***¹ is not applicable to the facts of the case in hand.

Accordingly, finding no merit herein, the Writ Petition is dismissed. Consequently, we hereby direct the petitioners to take appropriate action in terms of Railway Board Instructions cited supra and pass appropriate orders within a period of six (6) weeks from the date of receipt of a copy of this order. No order as to costs.

As a sequel to dismissal of the Writ Petition, *interim* order shall stand vacated and W.P.M.P. No.31483 of 2005 and W.V.M.P. No.1423 of 2006 shall stand closed.

SURESH KUMAR KAIT, J

Dr. JUSTICE SHAMEEM AKTHER, J

Date: 29-06-2017.

Note:

Issue C.C. in three (3) days.

B/o.Dsh

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C.C. IN THREE (3) DAYS

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(Order of the Division Bench delivered by
Hon'ble Sri Justice Suresh Kumar Kait)

Date. 29-06-2017

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