

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 08.03.2018
CORAM
THE HONOURABLE Mr.JUSTICE V.PARTHIBAN
W.P.No.18227 of 2012

P.Chellappa Udayan

... Petitioner

Vs

1.The Managing Director,
Tamil Nadu State Transport Corporation,
(Salem) Ltd.,
Head Office,
Salem 636 007.

2.The General Manager,
Tamil Nadu State Transport Corporation,
(Salem) Ltd.,
Salem 636 007.

.... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for the records connected with the proceedings of the 2nd respondent including the order of discharge issued in Memo.No.E5/9548/STC/94, dated 07.09.1994 and the consequential order appointing the petitioner as Helper on new pay scale vide Proc.No.E1/00173/STC/95, dated 28.01.1995 and also the latest impugned order dated 19.03.2012 passed in Proc.No.E1/25124/STC (Salem)/2012, quash them all and also direct the respondent to enhance the pay and the pensionary benefits thereon payable to the petitioner by granting the service benefits including continuity of service with pay protection and other attendant benefits as per Section 47, Person with Disabilities (Equal Opportunities Protection of Right and Full Participation) Act, 1995.

For Petitioner : Ms.S.Girija

For Respondents : Ms.Rajeni Ramadoss

O R D E R

Heard Ms.S.Girija, learned counsel for the petitioner and Ms.Rajeni Ramadoss, learned counsel appearing for the respondents.

2. The petitioner has approached this Court, seeking the following relief:-

"To issue a Writ of Certiorarified Mandamus, to call for the records connected with the proceedings of the 2nd respondent including the order of discharge issued in Memo.No.E5/9548/STC/94, dated 07.09.1994 and

the consequential order appointing the petitioner as Helper on new pay scale vide Proc.No.E1/00173/STC/95, dated 28.01.1995 and also the latest impugned order dated 19.03.2012 passed in Proc.No.E1/25124/STC (Salem)/2012, quash them all and also direct the respondent to enhance the pay and the pensionary benefits thereon payable to the petitioner by granting the service benefits including continuity of service with pay protection and other attendant benefits as per Section 47, Person with Disabilities (Equal Opportunities Protection of Right and Full Participation) Act, 1995. "

3. The case of the petitioner is as follows:-

The petitioner was originally employed as Conductor under the respondent Corporation, having been recruited as such on 09.08.1973, he continued as such till 1994. In 1994, the petitioner was found unfit to perform the duty as conductor. He was eventually discharged from service on medical grounds by proceedings dated 07.09.1994. On being discharged on medical grounds, the petitioner submitted a representation seeking alternative employment. In response to his request, an order was passed on 28.01.1995, by the second respondent providing alternative employment to the petitioner as Helper, but, treated him as a fresh appointment from that date.

4. The petitioner had accepted the offer as fresh entrant, in view of the desperation to sustain himself and his family and therefore, he continued to work as Helper and stood retired from service on attaining the age of superannuation with effect from 31.04.2005, as Helper. The petitioner completed little over ten years of service. In the said circumstances, the petitioner on his retirement in 2005, was paid pension only counting the period of service as 10 years as Helper and not the earlier service as Conductor from 1973.

5. After his retirement, the petitioner had been making numerous representation seeking for counting the earlier service rendered by him as Conductor and provide him appropriate pensionary benefits. However, initially, there was no response to his representation and finally, the request of the petitioner came to be rejected by proceedings of the second respondent dated 19.03.2012. Two reasons were stated in the order of rejection which is impugned in the present writ petition viz.,

1. The petitioner had entered into the settlement under Section 18(1) of the Industrial Disputes Act and he had accepted the alternative employment offered to him as Helper on the basis of G.O.Ms.No.746, Transport Department, dated 02.07.1991.

2. The persons with disabilities (Equal Opportunities Protection of Right and Full Participation) Act 1995, came into effect only from 1996 and therefore, he was not entitled to the benefit of the provisions of the said Act.

6. Upon notice, learned counsel appearing for the respondents, entered appearance and filed a detailed counter affidavit.

7. The learned counsel appearing for the respondents reiterated the reasons as set forth in the impugned rejection order and contended that in view of the stated reasons, the petitioner is not entitled to count his earlier service rendered as Conductor.

8. Per contra, the learned counsel for the petitioner would submit that even before coming into force of the Persons with Disabilities Act, the employee ought to be treated fairly and right to livelihood was a fundamental right enshrined under Article 21 of the Constitution of India. Therefore, such right cannot be violated by adopting a technical objections raised by the Transport Corporation, stating that Persons with Disabilities Act had come into force only in 1996.

9. The learned counsel for the petitioner has also on this aspect, relied upon the decision passed by this Court in W.P.Nos.11874 and 11875 of 2012 dated 26.04.2012. In the said decision, the learned Judge as he then was considered the similar objection raised on behalf of the same Corporation and discountenanced the same by following various orders passed by the Hon'ble Supreme Court of India on the said issue. All the objections which were sought to be raised by the Corporation before this Court had been considered and repelled by this Court in the above said decisions. The operative portion of the order as found in paragraph Nos.6 and 7, are extracted hereunder:-

"6. In the decision reported in (2008) 8 MLJ 1079, (R.Mani v. Labour Court, Trichy and Another), in paragraphs 10 to 15 it is held as follows:

"10. The enactment of Act 1 of 1996, was made for giving effect to the proclamation of full participation and equality of people with disabilities in the Asian Pacific region held in Beijing in the first week of 1992 to which the Government of India is a signatory. Even prior to the enactment of Act 1 of 1996, similar issue came up before the Supreme Court in the decision Anand Bihari v. R.S.R.T. Corporation AIR 1991 SC 1003 : (1991) 1 SCC 731 : wherein it is held that in case of the

employees acquiring disability during employment, the employer should provide for adequate safeguards to remedy the situation by giving them alternate job or by compensating them in some form for the around loss they suffered for no fault of theirs. In that case, the drivers of the roadways buses of the respondent Corporation who have put in long years of service, during their routine medical examination were found to have developed defective eyesight and did not have the required vision for driving heavy motor vehicles like buses. The Corporation terminated their services since their eyesight was not of the standard required to drive buses. The Honourable Supreme Court held that the action of the Corporation was not proper and equitable and directed the Corporation to offer them alternative employment or grant compensatory relief for the loss they suffered on account of the premature retirement necessitated by their unfitness to work as drivers. The Court observed that the workmen are not denizens of an animal farm to be eliminated ruthlessly the moment they become useless to the establishment. They have not only to live for the rest of their lives, but also to maintain the members of their family and other dependents, and to educate and bring up their children. Their liability in this respect at the advanced stage at which they are thus retired stands multiplied. They may no longer be of use to the Corporation for the job for which they were employed, but the need of their patronage to others intensifies with the growth in their family responsibilities. In the circumstances of the case, the Court proposed a scheme to give relief to the workmen involved in that case.

11. Again in the decision Narendra Kumar Chandla v. State of Haryana AIR 1995 SC 519 : (1994) 4 SCC 460 i.e., prior to the enactment of the Disabilities Act, the Supreme Court considered similar issue and ordered to give alternate employment taking note of the fundamental right guaranteed under Article 21 of the Constitution of

India. The operative portion of the order reads as follows:

"Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since, he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs.1,400-2,300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary."

The said judgment is having binding force in terms of Article 141 of the Constitution of India.

12. In *A.Subramani v. Management of Tamil Nadu State Transport Corporation (Coimbatore Division-I) Limited, Udhagamandalam and Another* (2007) 6 MLJ 225 : 2007 (5) CTC 386 Division Bench of this Court held that even if a workman received compensation under the Workmen Compensation Act, 1923, still he is entitled to get benefit envisages under Section 47 of the Act 1 of 1996 and in fact the order of the single Judge directing the workman to refund the compensation received for getting the benefit under Section 47 of the Act was set aside.

13. The decision relied on by the learned counsel for the second respondent State, rep. by the General Manager, T.N.S.Transport Corporation, Madurai Division-IV, Dindigul v. K.Mohammed Mustafa

2008 (1) LLN 871 to support his contention that the petitioner is eligible to get benefit only under G.O.Ms.No.746, Transport Department, dated 2.7.1981 cannot be sustained since the above referred Supreme Court decisions Anand Bihari v. R.S.R.T. Corporation (supra) and Narendra Kumar Chandla v. State of Haryana (supra) were not brought to the notice of the Division Bench while deciding the said case.

14. Act 1 of 1996, even though came into force from February, 1996, the principles contained in the said Act can be applied to this case since the petitioner's right guaranteed under Article 21 of the Constitution of India has been violated and by enactment of the said Act, the pre-existing right available as fundamental right as well as human right was reiterated in the said Act. The petitioner is having a fundamental right to demand alternate employment even without reference to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Similar issue was considered by the Honourable Supreme Court in the decision M.Nagaraj and Others v. Union of India and Others AIR 2007 SC 71 : (2006) 8 SCC 212 and in paragraph 20, the Supreme Court held as follows:

"20. This principle of interpretation if particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. Every right has a content. Every

foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value..."

In the said judgment it is held that the enactment of the Constitution of India, particularly Part-III confirms the existing rights and the same cannot be treated as new rights to the citizens. Similarly, Act 1 of 1996 has not created any new right and it only recognised the pre-existing right.

15. Thus, the contention of the learned counsel for the second respondent that the petitioner having sustained disability prior to Act 1 of 1996 is not entitled to seek alternate employment, is unsustainable."

The said findings was confirmed in W.A.No.482 of 2009 dated 18.03.2010. In paragraph 8, it is held as follows:

"8. We have considered the rival submissions as well as the law on this aspect. The rights of the disabled have been spelt out in the Disabilities Act which is only an expansion of the rights enshrined in Article 21 of the Constitution of India. Our Country has also signed the UN Convention on the Rights of Persons with Disabilities. Therefore, a person who had suffered disability is entitled to be employed without any loss financially and in fact, the Act provides that ad hoc posts must even be created so that he is not kept out of employment. When this is the legal position, the appellant - Corporation ought to have come-forward to calculate the amount that is due to him, had he been employed right from the day of his accident. They could have excluded the period when he has been on leave. They should have given him a lighter job, a desk job which he could have discharged on receiving the Certificate from the Medical Board. This was their duty under the Act. Therefore, the order of the learned Single Judge with regard to the direction for giving alternate employment with seniority and pay protection is confirmed.

Even with regard to the direction to pay 75% of backwages, we are accepting here to the request made to the learned counsel, only because he pleads financial inability and that to ask them to pay the entire amount would impose a burden on them. We are really reluctant to interfere with the discretion exercised by the learned Single Judge in reducing the backwages to only 75%. But considering the appellant's plea, we modify the award of 75% of backwages to a lumpsum of Rs.12,00,000/-. This shall be paid within a period of twelve weeks from the date of receipt of a copy of this order in the following manner:

Rs.4,00,000/- should be paid within four weeks (15-04-2010) and the next four lakhs within the next four weeks (13-05-2010) and the remaining four lakhs on 10-06-2010. If this amount is not paid as per this direction the appellant is bound to pay interest on Rs.12,00,000/- at the rate of 12% till the full payment is made.

9. The appeal is partly allowed as above."

7. In the present writ petitions, even though the impugned orders were passed on 24.9.1994 and 2.8.1993, the petitioners have not chosen to challenge the same all these years and there is a delay of more than 17 years. The petitioners are also given the post of Helpers as fresh entrants from 13.2.1995 and 8.10.1993 respectively and the petitioners are serving and receiving salary as Helpers all these years. The petitioners having been allowed to serve as Helpers, they are not entitled to get any backwages/difference in salary. However, the period from the date of discharge i.e. from 24.9.1994 and 2.8.1993 respectively is to be counted for the purpose of notional increment and all other benefits other than difference in wages.

10. At this, learned counsel appearing for the respondents has also cited the decision passed in W.P.No.27979 of 2006 dated 23.12.2008, by the Hon'ble Division Bench of this Court. The facts of the case which came up for consideration before the Hon'ble Division Bench was entirely different from the facts of the present case and therefore, the same cannot be relied upon for deciding the issue raised in the writ petition.

11. As far as the decision relied on by the learned counsel for the petitioner, the learned Judge as he then was in extenso dealt with the same issues as raised in the present writ petition and allowed the claim of the petitioners therein, they were also the workmen of the Corporation like the petitioner herein. In fact, the learned Judge as he then was relied on various rulings of the Hon'ble Supreme Court of India and followed the law declared by the Apex Court which is binding on this Court.

12. The learned counsel appearing for the respondents would also raised an objection of delay in filing the writ petition by the petitioner. In fact, the learned Judge in the above said decision, has also dealt with the delay in that case, wherein, the petitioners therein had approached this Court after 17 years and had ultimately held that the employees therein were not entitled to differential back wages, however, entitled to other benefits which are otherwise admissible to them. Therefore, the objections regarding the delay has to be rejected outright, particularly, in view of the fact that the payment of proper pensionary benefit is the continuous cause of action and therefore the delay is not fatal to the issues raised by the petitioner herein. However, the delay can be considered in respect of denial of differential back wages to the petitioner as held by this Court in the aforesaid decision.

13. In view of the above, this Court has not hesitation in allowing the writ petition and the impugned orders in Memo.No.E5/9548/STC/94, dated 07.09.1994, Proc.No.E1/00173/STC/95, dated 28.01.1995 and Proc.No.E1/25124/STC (Salem)/2012, dated 19.03.2012, are hereby set aside. The respondents are directed to count the service of the petitioner rendered by him as Conductor from 09.08.1973, for all benefits including grant of notional increment etc., and recalculate the pension as admissible as such to the petitioner and pay the same to the petitioner. It is made clear that the petitioner is not entitled to differential back wages during the relevant period, in view of the delay on the part of the petitioner in approaching this Court. It is also represented by the learned counsel for the petitioner that the contribution of the employee towards Provident Fund may also be adjusted with the amounts which are due and payable while implementing the above direction passed by this Court. The respondents are directed to comply with the directions passed by this Court, within a period of eight weeks from the date of receipt of a copy of this order.

14. With the above direction, the writ petition stands allowed. No costs.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

gsk

To

1.The Managing Director,
Tamil Nadu State Transport Corporation,
(Salem) Ltd.,
Head Office,
Salem 636 007.

2.The General Manager,
Tamil Nadu State Transport Corporation,
(Salem) Ltd.,
Salem 636 007.

+ 1 cc to Ms.Rajeni Ramadoss Advocate,SR.17736

+ 1 cc to Ms.S.Girija Advocate,SR.17713

W.P.No.18227 of 2012

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