

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.09.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.10846 OF 2013

1. R.Narayanaswamy (Decd.)
2. N.Vimala
3. S.Sujatha
4. N.Saravanan
5. N.Sathish ... Petitioners
(P-2 to P-5 impleaded as LR's of
1st petitioner, vide order of Court
dated 3.9.20 in W.M.P. No.2769/20)

- Vs -

1. The State of Tamil Nadu
rep. By its Secretary
Transport Department
Secretariat, Chennai 600 009.
2. The Tamil Nadu State Transport
Corporation (Vellore) Ltd.
(Old Name Pattukottai Azhagiri Transport
Corporation Ltd.)
rep. By its Managing Director, Vellore. .. Respondents

Writ petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of mandamus directing the 1st respondent to sanction and pay pension to the petitioner with effect from 1.1.1988 as per G.O. Ms. No.42, Transport (RW) Department dated 27.5.2005 and as per the provisions of the Tamil Nadu Pension Rules construing that the petitioner has completed the qualifying years of service of 10 years by following the order passed in W.P. (MD) No.3517 of 2008 dated 31.3.2010 confirmed by the Division Bench in W.A. (MD) No.381 of 2011 dated 9.4.11 and the Hon'ble Supreme Court of India in SLP (CC) No.1660 of 2012 dated 3.2.2012 and followed in issuing G.O. (3D) No.19, Transport (RW1) Department dated 25.6.12.

For Petitioners: Ms. Kirthana Mayuri, for
Mr. V.S.Jagadeesan

For Respondents: Mr. S.Thangavel, Spl. GP for R-1
Mr. C.S.K.Sathish for R-2

ORDER

It is the case of the petitioner that he was appointed in the erstwhile State Transport Department as Driver on daily wages basis on 25.10.1971 and his services were regularised w.e.f. 25.11.1972. Subsequently, the petitioner was absorbed in the newly formed Transport Corporation on 1.5.1975. The petitioner exercised his option to go on voluntary retirement in the year 1990 and, accordingly, he was retired under the said scheme on 31.8.1990.

2. It is the further case of the petitioner on the winding up of the State Transport Department, all the employees like the petitioner were absorbed in the various Transport Corporations. Various Government Orders were issued relating to the pension and other benefits that were earned by such of those employees, who stood absorbed in the Transport Corporation by fixing cut off date, against which litigations were preferred and ultimately, the Hon'ble Supreme Court, fixed the cut off date as 1.4.1982 for the purpose of exercising option by the employee. Pursuant to the said direction of the Hon'ble Apex Court, G.O. Ms. No.42, Transport (RW) Department, dated 27.5.2005 was issued prescribing that pension would be paid if an employee had put in qualifying service of 10 years as on 1.4.1982. By virtue of the said Government Order, the petitioner became eligible to receive the pension as he had put in a consolidated service of 10 years 5 months and 7 days from 25.10.1971 till 1.4.1982. It is the further case of the petitioner that Rule 11 (1) of the Tamil Nadu prescribes the date of first appointment as the date to be reckoned for calculating the qualifying service. Further, it is averred that Rule 43 (2) of the Pension Rules prescribe that a fraction of three months should be treated one half year, while calculating the qualifying service of the petitioner.

3. It is the further contention of the petitioner that counting of temporary service for the purpose of calculating the qualifying service as prescribed u/r 11 (1) of the Pension Rules was considered by this Court in W.P. (MD) No.3517 of 2008 vide order dated 31.3.2010 held that 50% of the the service of an employee on daily wage basis should be taken into account for the purpose of calculating the qualifying service, which was confirmed by the Division Bench of this Court in W.A. (MD) No.381 of 2011. Therefore, it is averred that counting 50% of

the daily wage period of the employee together with the balance service of the petitioner would make the petitioner eligible for pension, as he has put in a qualifying service of 10 years. Though various representations have been given by the petitioner for the purpose of sanction of pension, however, the same having not been considered, the present writ petition has been filed.

4. Pending the writ petition, the petitioner died and, therefore, W.M.P. No.2769 of 2020 has been filed by the legal heirs of the petitioner, to implead them as party petitioners, which was allowed by this Court by an order of even date.

5. Learned counsel appearing for the petitioner submitted that the date of appointment of the petitioner as daily wager is on 25.10.1971 and the date of regularisation is on 25.11.1972. The cut off date for the purpose of exercising the option for availing pension is 1.4.82. The petitioner would be eligible to have 50% of his daily wage service from 25.10.1971 to 25.11.1972 taken into account for the purpose of calculating his pension. On and from 25.11.1972 till 1.4.82, the full service of the petitioner would stand counted for the purpose of pension. In effect, the petitioner has put in full service of 9 years 4 months and 6 days. Calculating 50% service during the daily wage period, the petitioner has put in 6 months and 15 days of service. In all, the total service of the petitioner comes to 9 years 10 months and 21 days and applying Rule 43 (2) of the Pension Rules, fraction of a year equal to three months should be treated as one half year and that be the case, 10 months and 21 days should be reckoned as one year service and, therefore, the total qualifying put in by the petitioner would be 10 years and he would be eligible to pension. Therefore, it is prayed that this Court may allow the prayer sought for by the petitioner and, in view of the passing away of the petitioner pending the writ petition, family pension may also be directed to be paid along with the arrears of pension payable to the petitioner.

6. Per contra, learned standing counsel appearing for the 2nd respondent vehemently submitted that the petitioner has not put in the requisite qualifying service of 10 years and the calculation submitted by the petitioner is erroneous. It is the contended by the learned counsel for the 2nd respondent that the leave availed by the petitioner on loss of pay should not be taken into consideration for the purpose of calculating the qualifying service, as is prescribed in the Pension Rules. In this regard, the learned counsel for the 2nd respondent placed reliance on the counter, wherein, it is averred that the net qualifying service of the petitioner less the period of leave on loss of pay to the extent of 308 days in the State Transport Department and 65 days in the State Transport Corporation, if

deducted, the qualifying service rendered by the petitioner is only to the extent of 8 years 11 months and 22 days. Such being the case, the petitioner is not entitled for pensionary benefits. It is the ancillary contention of the learned counsel for the 2nd respondent that the petition has been filed after a long delay and the same is hit by laches.

7. Learned Special Government Pleader, appearing for the 1st respondent, while sailed along with the 2nd respondent submitted that the qualifying service put in by the petitioner being not equal to 10 years, which is the minimum prescribed qualifying service for the purpose of pension, the petitioner is not entitled for the grant of pension. In essence, the learned Special Government Pleader adopted the arguments and the averments in the counter filed by the 2nd respondent and the counter filed by the 1st respondent, is on the same footing as the counter filed by the 2nd respondent.

8. By way of rejoinder, it is submitted by the learned counsel for the petitioner that during the whole service of the petitioner, the petitioner was not put on notice about the leave availed by him on loss of pay and no proceedings to that effect was issued by the petitioner. Therefore, out of blue, it is not open to the respondents to contend that the leave on loss of pay availed by the petitioner looms large on the petitioner to disentitle him of pension. On the contention of delay, it is the submission of the learned counsel for the petitioner that the petitioner has been following all along with representations and the non-consideration of the representation and passing any order by the respondents cannot be attributed as delay on the part of the petitioner.

9. This Court gave its anxious consideration to the contentions advanced by the learned counsel on either side and also perused the materials available on record.

10. The facts relating to the service of the petitioner either with the Transport Department or with the Transport Corporation is not in dispute. The date of entry into service as also the date of retirement of the petitioner on voluntary basis is not in dispute. The quantification of net qualifying is the only disputed aspect in the whole gamut of facts, in which much stress has been laid on the leave on loss of pay availed by the petitioner. In view of the fact that the whole crux of the issue lies in the leave availed by the petitioner on loss of pay, the learned counsel for the 2nd respondent was directed to produce the relevant portion of the service book of the petitioner to ascertain the leave particulars, which have been entered in the said book to his credit.

11. Pursuant to the direction issued by this Court the 2nd respondent produced copies of the relevant portion of the service book of the petitioner. This Court perused the copies of the relevant portion of the service book vis-a-vis the counter filed by the respondents. The counter filed by the respondents aver the total loss of pay leave availed by the petitioner at a whopping 308 days and 65 days.

12. It is fairly conceded by the learned counsel for the respondents that for leave on loss of pay, no separate proceedings are issued keeping the employee informed of the leave availed by him. Further, a perusal of relevant portion of the service record reveals that between Nov., 1972 and June, 1973, the petitioner is shown to have availed leave on loss of pay during every month for about three and a half months. Between a period of eight months, the petitioner has availed leave on loss of pay for about three and half months. This Court is at a loss to understand as to the basis on which leave was sanctioned to the petitioner. To put it more precisely in the month of February, 1973, the record reveals that of the 28 days, the petitioner was on leave on loss of pay for 23 days. Leave on loss of pay is a leave, which is taken by an employee without any intimation to the office. If the employee had really taken 23 days leave without intimation, necessarily departmental proceedings ought to have been initiated against the employee. If the employee had given a leave letter to avail leave and there was no leave to his credit, it was incumbent on the part of the employer to inform the employee that there is no leave to the credit of the employee, which he can avail and any leave availed by him would be treated to be leave on loss of pay. However, as fairly conceded by the learned counsel for the respondents, no proceedings was taken departmentally against the employee nor the employee was put on notice about there being no leave to his credit. Such being the case, this Court is at a loss to understand the action of the respondents in permitting the petitioner to go on leave without any action being taken against him.

13. One more aspect which requires to be mentioned here is that the service record, which reveals the leave availed by the employee for the period Nov., 1972 to Feb., 1981, reveals that the calculation of leave on loss of pay is also not correct. There are arithmetical errors in computation and also the same does not reflect the days on which the employee went on leave. Instead the record merely shows the number of days the employee is alleged to have been on leave on loss of pay. The maintenance of record in such a fashion not detailing the leave availed by the employee on the particular days in a month more so when the employee has not been put on notice about the leave availed by him on loss of pay, not only leaves a bitter taste in

the mouth of this Court, but also hits at the very root of the respondents case. In such circumstances, this Court is not inclined to accept the record of leave on loss of pay entered in the service record of the petitioner and its computation for the purpose of denying pension to the petitioner.

14. When there are errors in the computation of leave on loss of pay and further no proceedings have been issued to the petitioner relating to the leave availed by him on loss of pay and no departmental action having been initiated against him by the respondents for the leave availed by him without any permission, the composite inference that could be drawn from the same would be that the case of the respondents bristles with infirmities and inconsistencies and in such a backdrop, accepting the version of the respondents relating to computation to deny the petitioner of the pensionary benefits for the services rendered by him would not only be unjust and improper, but would indeed be a denial of justice to the petitioner. The scales of justice should be weighed in such a manner that justice should enure to the deserving of the parties to the lis. In the case on hand, this Court is of the considered view that the scales of justice definitely tilts in favour of the petitioner for grant of pension and the subsequent family pension to the impleaded petitioner.

15. On the question of delay, though it is the stand of the respondents that there is huge delay on the part of the petitioner in approaching this Court, mere delay by itself cannot be put against the petitioner to deny him the benefits to which he is legally entitled to. Further, it is borne out by record that the order fixing the cut off date was passed by the Hon'ble Supreme Court pursuant to which in the year 2005, G.O. Ms. No.42 was passed. Thereafter, only on the basis of the order in W.P. (MD) No.3157 of 2011 dated 31.3.2010, which was affirmed in W.A. (MD) No.381/2011 vide order dated 9.4.11 and the SLP filed by the respondents herein against the order in appeal having been dismissed by the Hon'ble Apex Court on 3.2.12, the eligibility to count the service as daily wages was settled and in such view of the matter, the petitioner having submitted his representation on 17.8.12, the delay in claiming pension, canvassed by the respondents cannot be sustained. The petitioner has approached this Court immediately once the law stood settled relating to computation of the period of daily wages for the purpose of pension. Therefore, the delay, as raised by the respondents does not in any way affect the case of the petitioner.

16. For the reasons aforesaid, this writ petition is allowed and the respondents are directed to take the qualifying service of the petitioner at 10 years and calculate the pension

based on the said qualifying service and pay the pension to the petitioner from the date of his retirement from service on voluntary basis, i.e., 31.8.1990 and on and from the date of death of the petitioner, i.e., 26.11.2013, the impleaded petitioners would be entitled for family pension. The respondents are directed to calculate the pension and family pension and pay the same within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Secretary to Government
Government of Tamil Nadu
Transport Department
Secretariat, Chennai 600 009.
2. The Managing Director
Tamil Nadu State Transport
Corporation (Vellore) Ltd.
(Old Name Pattukottai Azhagiri Transport
Corporation Ltd.)
Vellore.

+1cc to Mr.V.S.Jagadeesan, Advocate, S.R.No.28962

+1cc to the Government Pleader, S.R.No. 28977

W.P. NO. 10846 OF 2013

RSV(CO)

GN(15/10/2020)

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