

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.09.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO.24728 OF 2013

S.Bhoobalan

.. Petitioner

- Vs -

1. The Managing Director
Metropolitan Transport Corporation
(Chennai) Ltd.
Pallavan Illam, Anna Salai
Chennai 600 002.
2. Tamil State Transport Corporation
Employees Pension Trust
Pallavan Illam, Pallavan Salai
Chennai. .. Respondents
(R-2 impleaded suo motu vide order
of Court dated 19.8.2020 inWP.NO.24728/2013)

Writ petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of mandamus directing the respondent to give the petitioner the benefit of continuity of service, pay protection, fix the protected pay in the scale of pay applicable to Senior Office Assistant on the date of reappointment, regulate the pay and settle retiral benefits based on the revised pay with arrears.

For Petitioner : Mr. K.Malaikannu

For Respondents: Mr. K.Murthy for R-1
Mr. C.S.K. Sathish for R-2

ORDER

It is the case of the petitioner that he was appointed as conductor on 14.9.1976 in Pallavan Transport Corporation. In the course of his avocation, the petitioner suffered occupational injury and the 1st respondent referred the petitioner to the Medical Board to ascertain the physical fitness for further continuance in the post of driver. The Medical Board, on evaluation of the petitioner, declared him unfit vide its communication dated 10.1.94 pursuant to which the petitioner was relieved from the post of conductor on 1.3.94. It is the further case of the petitioner that he was provided with alternate job as Senior Office Assistant vide order dated 26.5.94 and also granted pay protection. However, curiously, vide memo dated 19.8.1994, the petitioner was demoted to the

post of Junior Office Assistant in a lesser time scale of pay, against which the petitioner preferred appeal, which was rejected vide order dated 30.11.94. It is the further case of the petitioner that he superannuated from service on 30.4.2013. It is the further averment of the petitioner that his past services from the year 1976 to 26.5.94 was not reckoned for the purpose of calculating pension but only his service from 26.5.94 to the date of superannuation was taken for calculating pension. In this regard, the petitioner submitted representations to revise the pay and to include his past service to arrive at the net pensionable service, which was not considered by the respondent prompting the petitioner to file the present petition.

2. Learned counsel appearing for the petitioner submits that though the petitioner was relieved from service due to occupational injury on being declared unfit, however, he was provided with alternate job as Senior Office Assistant, but he was demoted to the post of Junior Office Assistant, without assigning any reason. It is the further submission of the learned counsel that his past service from the year 1976 to 26.5.94 has not been taken into account for calculating the total pensionable service and that the petitioner should be granted continuity in service, as not all the terminal benefits of the petitioner was paid, while he was relieved from the earlier post of conductor, which clearly implies that the employer-employee relationship continued and, therefore, continuity of service ought to be given and he should be granted all consequential benefits along with calculating the previous service for the purpose of quantifying the pensionable service.

3. Per contra, learned counsel appearing for the 1st respondent, while did not dispute the facts as projected by the learned counsel for the petitioner, however, pointed out that against the reversion as Junior Office Assistant, the petitioner preferred appeal, which was rejected, and in the absence of the same being challenged, the said order has attained finality and, therefore, the petitioner is stopped from claiming the post of Senior Office Assistant and the monetary benefits associated with the said post. However, in the same stretch, learned counsel for the 1st respondent fairly conceded that the Provident Fund contribution of the petitioner for the past service rendered as conductor was not paid to the petitioner on his being relieved, but the same was carried over to the new post of Junior Office Assistant and he was paid the benefits on his superannuation only. However, he submitted that the said carry over of the amount is not only on account of administrative convenience, but equally for the benefit of the petitioner and this act would not in any way confer right on the petitioner to have his previous service calculated for the purpose of pension.

4. Learned counsel appearing for the 2nd respondent submitted that the petitioner has accepted his discharge from the post of conductor and received his terminal benefits and he

was given re-employment as Junior Office Assistant on the basis of G.O. Ms. No.746. Therefore, the petitioner would not be entitled to have his past services counted for the purposes of pension. It is the further submission of the learned counsel for the 2nd respondent that the Pension Trust, viz., the 2nd respondent, came into existence only in the year 1998 and, therefore, the petitioner is not entitled to have his past services counted with the 2nd respondent, which was formed only in the year 1998, though the petitioner was relieved from his previous service way back in the year 1994.

5. It is the further submission of the learned counsel for the 2nd respondent that the petitioner having been appointed as a fresh entrant on the basis of G.O. Ms. No.746, it is not open to the petitioner to claim the benefit of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, as the said Act came into force only in the year 1996, much later in point of time after the appointment of the petitioner and the said Act cannot be applied retrospectively. In this regard, learned counsel for the 2nd respondent drew the attention of this Court to the decision of the Division Bench of this Court in Managing Director, TNSTC - Vs - P.Ellappan (2005 (2) LLN 912), wherein, the Division Bench has held that once the person has been conferred the benefit under G.O. Ms. No.746, he is estopped from claiming the benefit under the Disabilities Act. It is the vehement submission of the learned counsel appearing for the 2nd respondent that the calculation of past service for the purpose of pension has not even been claimed by the petitioner and in the absence of any relief being sought for, the petitioner is precluded to canvass the said relief at this point of time.

6. This Court paid its undivided attention to the contentions advanced by the learned counsel on either side and also perused the materials available in the typed set of documents.

7. The facts in issue are not in dispute. The discharge of the petitioner from service of conductor on 1.3.94, the subsequent employment of the petitioner on 26.5.94, his initial re-employment as Senior Office Assistant and his subsequent reduction as Junior Office Assistant and his superannuation on 30.4.13 are accepted. Even it is the admitted case of the petitioner that pension has been given to him on his superannuation for the services rendered by him as Junior Office Assistant from 26.5.94 to 30.4.13. The claim of the petitioner is only against his reversion to a junior post and consequent re-fixation of pay in the higher post and also to grant all the retiral benefits on the basis of such re-fixation, including calculating his past service for the purpose of computation of pension.

8. It is to be pointed that though it is the submission of

the learned counsel for the 2nd respondent that pension for the previous service period from 14.9.76 to 1.3.94 has not been claimed as relief by the petitioner himself in the writ petition and, therefore, it cannot be canvassed before this Court at this point of time, however, the said contention is liable to be rejected on two grounds. Firstly, the inherent jurisdiction of this Court under Article 226 of the Constitution vests power on this Court to give necessary directions in the interest of justice to provide substantial justice to all the parties to the lis. Therefore, this Court is not barred from giving the relief to the petitioner to have his past services in the post of conductor counted for the purpose of calculation of pension. Secondly, it is to be pointed out that the contention of the learned counsel for the 2nd respondent that no relief has been sought for by the petitioner for counting his past service for the purpose of calculation of pension may not be actually correct. A careful perusal of the relief sought for by the petitioner reveals that the petitioner has prayed this Court to grant continuity of service, pay protection, revision of pay and to settle the retiral benefits based on the revised pay. True it may be that the prayer is not healthily worded, in that the petitioner has not directly sought relief of pension by counting his past service, but it is to be pointed out that the petitioner has sought for continuity of service and once the said continuity is granted, the normal course that follows is that the petitioner would be entitled to pensionary benefits by counting his previous service for calculating pension. Further, the petitioner has also sought the relief of revision of pay and for settlement of retiral benefits. Pension is also part of the retiral benefits and it is not necessary that a specific prayer has to be made towards payment of pension by counting his past service. Therefore, the said submission of the learned counsel for the 2nd respondent that there being no relief sought for towards payment of pension by counting his past service does not merit consideration and, accordingly, the same is rejected.

9. Coming to the merits of the issue, it is true that the Division Bench of this Court in Ellappan's case (supra) has held that once the petitioner has received the benefit under G.O. Ms. No.746, he is estopped from claiming the relief under the Disabilities Act. This Court is in respectful agreement with the said proposition of law propounded by this Court. However, the facts in issue lies on a different tangent and not on the issue of applicability of G.O. Ms. No.746 vis-a-vis the Disabilities Act. Further, the facts in the present case are also different from the facts in Ellappan's case. Therefore, this Court is of the opinion that the ratio laid down in Ellappan's case would not be of any assistance to the petitioner for the reasons that would be discussed in the later part of this order.

10. The petitioner entered the service in the year 1976 and on account of occupational injury, was relieved from service on

1.3.94. If it is a relief proper, it is incumbent upon the respondents to settle all the benefits due to an employee on his being relieved from service. It has been fairly accepted by the learned counsel for the 1st respondent that though some of the benefits have been paid to the petitioner, however, provident fund to the credit of the petitioner was not paid to him and the same was carried over in the same account of the petitioner in his re-employed post. Subsequently, on creation of the Pension Trust, viz., the 2nd respondent, the provident fund amount lying to the credit of the petitioner's provident fund account stood transferred to the Pension Trust. In this regard it is to be pointed out that the 2nd respondent had held the provident fund amount of the petitioner not from the date of his re-employment on 26.5.94, but from the initial date of his appointment, viz., 14.9.1976. The contribution of the petitioner to the provident fund from the date of his initial appointment as conductor stood transferred to the Pension Trust, which was held by the 2nd respondent till the date of superannuation of the petitioner. After holding the provident fund of the petitioner even relating to his past service, it is not open to the 2nd respondent to come before this Court and contend that the petitioner is not entitled to pension from the date of his initial appointment. Had the provident fund been settled when the petitioner was relieved from service, there would be no quarrel in the act of the respondents in calculating the service of the petitioner from the date of his re-employment for the purpose of payment of pension. However, on the failure of the 1st respondent to settle the provident fund on the discharge of the petitioner on 1.3.94 and, holding the amount to the credit of the petitioner on his re-employment and, thereafter, transferring the amount to the Pension Trust on its formation leads this Court to the irrefutable conclusion that the petitioner is entitled to have his past service counted for the purpose of calculating the pensionable service. Once this Court comes to the conclusion that the petitioner is entitled to have his past service counted for the purpose of calculating the pensionable service, the necessary corollary that follows is that the service of the petitioner would be deemed to be a continuous one as there is no severance of employer-employee relationship on account of the relieving of the petitioner from service on 1.3.94, as the provident fund account of the petitioner was maintained by the 1st respondent even during the break-in period only to be carried over to the new post. The provident fund of the petitioner continued to be in the custody of the 1st respondent and stood transferred to the account of the petitioner on his re-employment. Therefore, for all purposes, the services of the petitioner would be deemed to be a continuous one and if at all, the period between 1.3.94 and 26.5.94 could only be treated to be a period on loss of pay, which could be deducted while calculating the total pensionable service. For the reasons aforesaid, this Court holds that the petitioner not only is entitled to have his past services from 14.9.76 to 1.3.94 counted for the purpose of calculating the service for pension,

but equally, the employment of the petitioner in the previous post and the subsequent re-employed post would stand to be a continuous one, barring the break from 1.3.94 to 26.5.94, which service alone would stand excluded for the purpose of calculating the pensionable service of the petitioner.

11. Though the learned counsel for the 2nd respondent relied on Ellappan's case (supra) to drive home the point that the petitioner has kept silent and has come before this Court belatedly, only after his superannuation and, therefore, the delay is detrimental to the petitioner, however, the said contention deserves to be rejected for the simple reason that this Court has already held that the act of the 1st respondent has preserved the employer-employee relationship between the respondents and the petitioner and, therefore, there was no necessity for the petitioner to come before this Court claiming continuity of service at the relevant point of time. The lacunae of the respondents cannot be bridged by putting the blame on the petitioner attributing his act as a delayed one. The facts in issue relating to delay, as discussed by the Division Bench in Ellappan's case (supra) is not applicable to the case on hand for the reason aforesaid as no delay has envisioned in this case and the non-calculation of the past service prompted the petitioner to come before this Court immediately and, therefore, the said contention of the learned counsel that delay is detrimental to the case of the petitioner deserves to be rejected.

12. Insofar as the relief claimed by the petitioner for being posted in the higher post of Senior Office Assistant from which he was posted to the lower post of Junior Office Assistant is concerned, it transpires from the record that on the petitioner being downgraded to the post of Junior Office Assistant from the post of Senior Office Assistant, the petitioner filed an appeal against the said down gradation, which was rejected by the 1st respondent. The said rejection was not challenged by the petitioner in a manner known to law and the said order has attained finality. In such circumstances, the order of rejection having not been challenged in a manner known to law, it is deemed that the petitioner has accepted the rejection of the 1st respondent and continued in service and superannuated from the post of Junior Office Assistant. In such a backdrop, the relief sought for by the petitioner for revision of pay in the higher post and for pay protection cannot be acceded to and, accordingly, the said relief is liable to be rejected.

13. For the reasons aforesaid, this writ petition is allowed in the following terms :-

- i) The petitioner would stand entitled for pension from the date of his initial appointment as conductor, i.e., from 14.9.1976;

- ii) The petitioner would be deemed to have

continued in service on and from 14.9.1976 till the date of his superannuation on 30.4.2013;

iii) The period from 1.3.94 to 26.5.94 would be deemed to be loss of pay, which period would not be taken into account for calculating the pensionable service;

iv) The petitioner is entitled to have his pensionable service calculated from 14.9.1976 to 30.4.2013, less the period from 1.3.94 to 26.5.94; and

v) The petitioner would not be entitled for pay protection and revision of pay in the higher post on his re-employment.

The respondents are directed to calculate the pension payable to the petitioner on the basis of the directions issued above and release the arrears of pension to the petitioner within a period of three months from the date of receipt of a copy of this order. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Managing Director
Metropolitan Transport Corporation
(Chennai) Ltd.
Pallavan Illam, Anna Salai
Chennai 600 002.

2. Tamil State Transport Corporation
Employees Pension Trust
Pallavan Illam, Pallavan Salai
Chennai.

W.P. NO. 24728 OF 2013

RLD(CO)

GN(21/10/2020)