

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.02.2021

CORAM :

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.2869 of 2021

P.Rajendran

... Petitioner

-vs-

The General Manager,
Tamil Nadu State Transport Corporation,
(Coimbatore Division - II) Ltd,
Chennimalai Road, Erode-1. ... Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India, praying to issue a writ of Mandamus, directing the respondent to fix the salary as per present scale of pay to the petitioner on par with other employees in same cadre and to pay entire arrears of amount (including Salary and other monetary benefits) within time fixed by this Court, considering my representation dated 08.12.2020.

For Petitioner : Mr.MA.P.Thangavel

O R D E R

This writ petition has been filed, seeking a direction to the respondent to fix the present salary on par with other employees in the same cadre and to release the arrears of amount based on my representation dated 08.12.2020.

2. Heard the learned counsel for the petitioner. Notice to the Respondent is dispensed with, as no adverse order is going to be passed against the Respondent.

3. The petitioner was working as Driver in the respondent Transport Department and was dismissed from service on 24.02.2004. In an Industrial Dispute raised by the employee, the Labour in I.D.No.546 of 2004 passed an Award dated 22.01.2008, setting aside the dismissal and ordered reinstatement without back wages. Aggrieved by the Award of reinstatement, a Writ Petition in W.P.No.27487 of 2008 was filed and the same was dismissed by this Court on 23.07.2019, confirming the order of the Labour Court.

3.1. During pendency of the Writ Petition, the last drawn pay of Rs.6,593/- was paid and after the judgment, the petitioner was reinstated as Driver on 24.06.2020 on a payment of Rs.5,021/- from July, 2020 without taking into account the actual salary and emoluments that are applicable to other employees / Drivers in the respondent Management and that those employees are receiving Rs.50,000/- per month.

3.2. According to the petitioner, the gross salary was mentioned as Rs.4,072/- in December, 2020 and the net salary of Rs.2,372/- alone was paid. It is stated that he was initially getting a better payment pursuant to the interim direction and the amount was reduced on reinstatement. Hence, he made a representation dated 08.12.2020 to the respondent for fixation of a scale of pay on par with other employees in the same cadre and extend the benefits. It is further stated that the entire family is dependent on the income of the petitioner and with the meagre amount being received, he has been struggling to eke out their livelihood. It is prayed that this Court may issue a specific direction to the respondent to fix the salary on the basis of his representation dated 08.12.2020.

4. A scrutiny of the facts of the case unfolds that the petitioner was dismissed from service on 24.02.2004 and that he had the benefit of the Award of reinstatement without backwages in I.D.No.546 of 2004 dated 22.01.2008, which was also confirmed by an order of this Court dated 23.07.2019 passed in W.P.No.27487 of 2008. It is seen that the petitioner has artistically worded the prayer and is indirectly seeking to extend the benefit of revised wages on par with his counter part in the garb of disposal of the representation, which he is not eligible. Though the petitioner has stated that on reinstatement, his wages have been brought down, he has not produced any material documents in support of his claim of revision of wages and extension of benefits.

5. It is no doubt true that on reinstatement the petitioner would be entitled to wages on par with other employees, when he is given the benefit of continuity of service. If the petitioner is allowed to takes steps to prosecute the Management, unless or until the corporation is made as party to the proceedings, the prosecution cannot be sanctioned in the light of the judgment of this Court in the case of S.Balasubramanian and others vs. State, reported in (2013) 2 LW (Cri) 289. Since there are disputed questions of fact involved in this case and that the petitioner has also relied upon the aforesaid judgment, this Court wants to point out that when the petitioner seeks for implementation of the Award, it is open to him to seek the claim under Section 33C(1) of the Industrial Disputes Act, 1947 and the admitted amount can be determined in the light of the

decision of the Apex Court in the case of *Fabril Gasosa vs. Labour Commissioner*, reported in (1997) 3 SCC 150 and in case of disputed amount, the disputed portion can be adjudicated and computed by the appropriate Labour Court, when an application under Section 33C(2) of the Industrial Disputes Act, 1947 is filed. For better understanding, Sections 33C(1) & (2) of the Industrial Disputes Act, 1947 are extracted hereunder:

Section 33C(1) - Where any money is due to a workman from an employer under a settlement or an award or under the provisions of 4 Chapter VA or Chapter VB], the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue: Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer: Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Section 33C(2) - Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months.

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

6. In the present case on hand, as stated supra, the petitioner has not produced any materials and therefore, the Labour Court alone is empowered to decide whether the petitioner is entitled to any monetary benefits on par with other employees. If the Award is not implemented in letter and spirit,

the Government is empowered to sanction prosecution, when an application under Section 29 of the Industrial Disputes Act, 1947 is filed and it is the duty of the Government to sanction prosecution and for the appropriate Criminal Court to decide. Section 29 of the I.D.Act, 1947 reads as under:

"29. Penalty for breach of settlement or award - Any person who commits a breach of any term of any settlement or award, which is binding on him under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both and where the breach is a continuing one, with a further fine which may extend to two hundred rupees for every day during which the breach continues after the conviction for the first] and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realised from him shall be paid, by way of compensation, to any person who, in its opinion, has been injured by such breach."

7. The contention of the petitioner is that when a complaint is preferred, the Company needs to be made as a party for the Government to sanction prosecution in terms of Section 32 of the Industrial Disputes Act, 1947. Though it is not at all required for impleading the Company as one of the parties for sanction of prosecution, in the light of the judgment of this Court reported in (2013) 2 LW (Cri) 289, the Government may not sanction prosecution, as the Transport Corporation is a wing of the Government. When there is an Award, which has not been complied with, it is the duty of the Government to sanction prosecution, irrespective of the fact whether it is a Corporation or not. Learned Single Judge of this Court, while quashing a criminal case against the Officials of the Company interpreted Sections 32 of the Industrial Disputes Act, 1947 and Section 141 of the Negotiable Instruments Act and held as follows:

"22. Admittedly, in this case, the award of the Industrial Tribunal was not against any individual. It was only against the Company, viz., "Addisons Paints & Chemicals Limited". The award should have been satisfied only by the Company. If the Company has not satisfied the award, then the person committing the offence is the Company. In Criminal Law, in general, there is no vicarious liability, unless, there is a specific provision made creating such vicarious liability on any other person other than the person, who actually committed the crime. So far as Industrial Disputes Act is concerned, Section 32 is the provision, which creates vicarious liability on the persons enumerated therein for the offence committed by the company.

23. A Company is an artificial person and since such artificial person is a juristic person, the Hon'ble Supreme Court, on several occasions has held that the Company can be prosecuted and punished for the offence committed by the Company. At this juncture, it is pertinent to refer to a judgment of this Court in Abraham Memorial Educational Trust vs. C.Suresh Babu, reported in 2012 (5) CTC 203, following the judgment of a Constitution Bench of the Hon'ble Supreme Court in Standard Chartered Bank v. Directorate of Enforcement, reported in (2005) 4 SCC 530. In the said case the Supreme Court had an occasion to consider whether a body Corporate can be prosecuted and punished for criminal offences. In paragraph Nos.6 and 31, the Constitution Bench has held as follows:-

"6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

.....

31. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious

offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment....

(emphasis supplied)

24. From a reading of the above judgment, it is crystal clear that, in law, if the Company commits an offence, the Company has to be prosecuted. The Company should be given an opportunity to defend and then the Company could be punished. Since, a Company is an artificial person, who acts through human agents, the law makers have created vicarious liability by making appropriate provision for the same, thereby, making the persons, who are responsible for the day-to-day affairs of the Company, such as Managing Director, Director etc., also liable for punishment under Section 32 of the Industrial Disputes Act. If a person committing the said offence is a Company, then, the other persons enumerated therein are also liable for punishment along with the Company. Therefore, it is a condition precedent that the Company should have been found to have committed the crime. If there is a finding that the Company has committed the crime, then only, apart from the Company, the persons, who are human agents and who are responsible for the commission of the Crime by the Company should also be held liable for punishment. In the absence of any such finding against the Company, there cannot be any vicarious liability on the persons enumerated in Section 32 of the Industrial Disputes Act. Therefore, as has been held by the Hon'ble Supreme Court in the decision cited supra, it is absolutely necessary that there has to be a finding that the Company had committed the offence and accordingly, the Company should be punished. While doing so, the persons enumerated in Section 32 of the Industrial Disputes Act can also be punished by invoking the enabling provision contained in Section 32 of the Industrial Disputes Act.

25. As I have already pointed out, no one can be condemned, without affording sufficient opportunity to defend, which means, a Company can be punished for any offence committed under the Industrial Disputes Act only by arraying the Company as an accused and after affording opportunity to the said Company. Without making the Company as an accused and without affording any opportunity to the Company, if any finding is recorded by any Court holding the Company guilty of any offence, it will be arbitrary, which will be violative of Article 14 of the Constitution of India.

Therefore, the Criminal Court is precluded from recording any finding of guilt against the Company in the absence of the Company being arrayed as an accused and without affording opportunity to the Company. Thus, if we approach the issue by keeping in mind Article 14 of the Constitution of India, then, the argument of Mr.K.M.Ramesh, the learned counsel for the respondents 2 and 3 that in Section 32 of the Industrial Disputes Act, the phrase, "as well as the Company" is found missing does not merit any consideration.

26. As a matter of fact, in the judgment of the Full Bench of the Hon'ble Supreme Court in *Aneeta Hada vs. Godfather Travels & Tours (P) Limited*, reported in (2012) 5 Supreme Court Cases 661, the Hon'ble Supreme Court had an occasion to consider the said situation also. In paragraph Nos. 56 to 59 the Hon'ble Supreme Court has summarized the law on the subject, which reads as follows:-

"56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term as well as in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words as well as have to be understood in the context.

57. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*, (1987) 1 SCC 424 it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in *Deewan*

Singh and others v. Rajendra Prasad Ardevi and others and Sarabjit Rick Singh v. Union of India, (2008) 2 SCC 417.

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words as well as the company appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries has to be treated to be restricted to its own facts as has been explained by us hereinabove."

27. A cursory reading of the said judgment would make it very clear that if a finding is recorded against the Company, without the Company being arrayed as an accused, it would create a concavity in its reputation and there may be situations that the corporate reputation is affected when a director is indicted. The Supreme Court further went on to say that for maintaining the prosecution under Section 141 of the Negotiable Instruments Act, arraying of the Company as an accused is imperative. In the same

judgment, the Hon'ble Supreme Court has further held that the usage of the phrase, "as well as the Company" is only to obviate doubt, if any. Thus, it is only clarificatory. Therefore, it is of no significance that the phrase, "as well as the Company" is found missing in Section 32 of the Industrial Disputes Act.

28. In view of the above position, there can be no doubt that for punishing an accused under the Industrial Disputes Act by invoking Section 32 of the said Act, it is absolutely necessary that the Company should be arrayed as an accused and only when the Court records a finding that the Company is guilty of the offence, then only the other persons enumerated in Section 32 of the Industrial Disputes Act, such as, Director, Manager, Secretary, Agent etc., can also be punished.

29. As pointed out by Mr.K.M.Ramesh, the learned counsel for the respondents 2 and 3, of course, it is true that before the commencement of trial, when the petitioners approached this Court challenging their prosecution, it was held that the prosecution of the petitioners alone is maintainable. But, in view of the authoritative pronouncement of law made by the Hon'ble Supreme Court in the judgment in Aneeta Hada's case (cited supra), the view taken by this Court in the said order cannot be taken as a correct proposition of law.

30. Now turning to the facts of the present case, the Company, viz., "Addison Paints & Chemicals Limited", against which, the award was passed and which had allegedly committed the offence has not been arrayed as an accused. In the absence of the said Company being arrayed as an accused, the prosecution of the petitioners herein, who are only the Director and then Vice-President and the conviction cannot be sustained.

31. Though, the other accused have not preferred any appeal, since, I find that the conviction of the accused in the case is not at all sustainable in view of the legal hurdle, though, the other accused are not before me, I am bound to acquit those accused also. As a result, it is necessary for me to interfere with the conviction and sentence of all the accused in the case."

8. For purpose of effective comparison, Section 32 of the Industrial Disputes Act and Section 141 of the Negotiable Instruments Act, are incorporated below in a tabular column:

Section 32 of the Industrial Disputes Act	Section 141 of the Negotiable Instruments Act
Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not), every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence.	If the person committing an offence under Section 138 is a company, every person, who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly; Provided that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

9. A cursory look at the aforesaid two provisions unravels the fact that the words "as well as the company" as found mentioned in the provisions of Section 141 of the Negotiable Instruments Act are absent in the Industrial Disputes Act, 1947. Though learned Single Judge relied on several judgments of the Hon'ble Supreme Court for arriving at a conclusion, none of the judgments of the Apex Court relied upon by the learned Single Judge dealt with the issue concerning Section 32 of the Industrial Disputes Act, 1947. However, learned Single Judge proceeded on the misconception that the Company should be made as a party and granted the relief to the petitioners/accused therein and the said decision is not correct proposition of law, when Section 32 of the I.D.Act is interpreted. Some of the words contemplated under Section 141 of the N.I.Act, are allowed to fit in the provisions of Section 32 of the I.D.Act to suit our

convenience, it will certainly pave way to the Management and its Officials to escape from the clutches of law. When the words "as well as the company", referred to Section 141 of the N.I.Act, are found absent in Section 32 of the I.D.Act, 1947, allowing the Officials to go scot-free on the ground of non-joinder of necessary party, namely, Company is a bad precedent. Of course, such impleadment is mandatory as per the provisions of Section 141 of the N.I.Act, whereas Section 32 of the I.D.Act, 1947, being a social welfare legislation, does not mandate a Company to be made as a party. The foremost duty of the Court is to give interpretation to the provisions of the Rules, Act, etc., and it has no power to legislate laws and the learned Single Judge, by giving a wrong interpretation as to the inclusion of the Company as party and out of puzzlement, dug the dirt, thereby attempted to legislate / insert a new law by bringing the words "as well as the company" into Section 32 of the Industrial Disputes Act. It is to be noted that while relying on a judgment, if it is found that the factual situation totally differs, then there is no compulsion for the subordinate courts to blindly rely on the same to arrive at a conclusion, as held by the Hon'ble Supreme Court in the case of Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others, reported in (2002) 3 SCC 533, as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

10. At this juncture, it was brought to the attention of this Court that the judgment of the learned Single Judge (supra) was questioned before the Apex Court by way of filing Petitions for Special Leave to Appeal Crl.Nos.9654 to 9656 of 2013 and the same were dismissed by the Supreme Court on 09.12.2013 in limine. Mere dismissal of the appeal by the Supreme Court in limine without any speaking orders cannot be said that the Superior Court set out a well defined and correct proposition of law and that the order of the learned Single Judge attained finality and such dismissal can only be construed that a quietus has been given to the particular case. The Apex Court, while deciding the issue as to whether the Review Petition before High Courts after dismissal of SLP is maintainable or not in the case of *Khoday Distilleries Ltd. (Now Known As Khoday India Limited) And Others vs- Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.,*

Kollegal (Under Liquidation), represented By The Liquidator [Civil Appeal No. 2432 of 2019 (arising out of SLP(C) No.490 of 2012), decided on [01.03.2019] observed as follows:

"Here also, special leave petition was dismissed in limine and without any speaking order. After the dismissal of the special leave petition, the respondent in this appeal had approached the High Court with review petition. Said review petition is allowed by passing order dated December 12, 2012 on the ground of suppression of material facts by the appellant herein and commission of fraud on the Court. Such a review petition was maintainable. Therefore, the High Court was empowered to entertain the same on merits. Insofar as appeal of the appellant challenging the order dated December 12, 2012 on merits is concerned, the matter shall be placed before the regular Board to decide the same."

11. From the above, it can be inferred that Review Petition is maintainable before Sub-ordinate Courts, when a SLP filed by a party is a non-speaking order and is dismissed in limine. However, no Review is permissible before High Courts, insofar as criminal jurisprudence is concerned and the learned Single Judge, while sitting singly in the Criminal side had given the finding. The legal issues decided by the Criminal Court will not bind a Civil Court in the light of the authoritative pronouncement of the Apex Court that, the issue as to whether the findings recorded by Civil Court are binding in criminal proceedings between the same parties in respect of the same subject matter, is no more Res Integra. In M/s.Karamchand Ganga Pershad and another vs. Union of India and Others, reported in AIR 1971 SC 1244, the Apex Court held as under:-

"It is well established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true."

This Court is in complete disagreement with the proposition of Law laid down by the learned Single Judge rendered in the criminal case in S.Balasubramanian and others vs. State, reported in (2013) 2 LW (Cri) 289, as learned Single Judge erroneously interpreted the particular provision of the Social Welfare Legislative Act, viz., Section 32 of the Industrial Disputes Act, 1947, by referring to Section 141 of the Negotiable Instruments Act and the decisions of Apex Court in connection with Section 141 of the N.I.Act and held that "Company should be arrayed as a Party".

12. I am of the view that as stated earlier, for making a complaint against Officials falling under Section 32 of the Industrial Disputes Act, 1947, there is no need to make a Company as a party to the proceedings. Since there is no clear dictum / ratio laid down by the Apex Court in this regard, as

rightly pointed out by the learned counsel for the petitioner, the issue needs to be resolved by the Larger Bench to be constituted by the Hon'ble Chief Justice.

13. Accordingly, the matter is referred to a Larger Bench for deciding the following issues:

i) Whether a Company should be made as a party, when the Government is going to sanction prosecution under Section 29 of the Industrial Disputes Act, 1947 for not implementing the provisions of the Act against persons falling under Section 32 of the Act, 1947;

ii) Whether a Company should be made as a party, when the words "as well as the Company" are absent under Section 32 of the Industrial Disputes Act, 1947, as the same is not in pari materia with the provisions of Section 141 of the N.I.Act.

14. Coming to the case on hand, the relief sought for by the petitioner cannot be granted in view of the fact that he has to work out his remedy before the appropriate Labour Court, as narrated supra. Accordingly, the Writ Petition is dismissed. However, there is no order as to costs.

15. Registry is directed to obtain suitable orders from the Hon'ble Chief Justice and list the matter before the Larger Bench for deciding the above issues.

vum/ar

-s/d-

Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

To:

The General Manager,
Tamil Nadu State Transport Corporation,
(Coimbatore Division - II) Ltd,
Chennimalai Road, Erode-1.

+ 1 cc to Mr. Ma.P. Thangavel, Advocate Sr.8085

W.P.No.2869 of 2021

JPL(CO)

EU 7.6.2021