BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.11.2021

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THE HON'BLE DR.JUSTICE ANITA SUMANTH

W.P.(MD)No. 7343 of 2018
and
W.M.P.(MD).No.7029 of 2018

A. Ayya Samy .. Petitioner

Vs.

1. The Secretary to Government,
Transport Department,
Government of Tamilnadu,
Fort. St. George,
Chennai -9.

2. State Express Transport Corporation Tamilnadu Ltd.,
Through its Managing Director,
Pallavan Salai,
Chennai. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of certiorarified mandamus after calling for records pertaining to the orders dated 07.11.2005 in letter No.50597/C4/SETC/05 and dated 22.11.2016 in letter No.61246/C4/SETC/2016 passed by the second respondent and quash the same and consequently direct the respondents to pay monthly pension to the petitioner w.e.f. 01.01.1988 with arrears and other consequential benefits for the service rendered by him from 25.09.1960 to 31.03.1982 in the erstwhile Tamilnadu State Transport Department, together with interest at the rate of 12 % per annum award costs.

For Petitioner : Mr. S. Arunachalam
for R. Murugan

For Respondent : Mr. K.S. Selvaganesan
Counsel for State for R1

Mr. K. Sathiya Singh
Standing Counsel for R2

ORDER

The petitioner was working as a Conductor in the Tamil Nadu State Transport Department, appointed on 25.09.1960. His services were made permanent and he was brought into time scale of pay with effect from 01.01.1962.

2. With the formation of the Transport Corporations in 1975, a Government Order was issued in G.O.Ms.No.378, dated 18.04.1975 to the effect that employees of Tamil Nadu State Transport Department, who were absorbed in the Transport Corporations and who had completed the qualifying service of 10 years or above, would be entitled to pension from the State Department from the date of absorption, in addition to their salary.

3. An option was called for from the employees as to whether they wished to continue under the prevalent rules that is the Operational Subordinate Service Rules, 1960 (OSSR) or in other words the Non-Pensionary Contributory Provident Fund Scheme or the New Madras Liberalised Pension Rules, 1960 (1960 Rules).

4. The last date for exercising the option was fixed as 30.06.1974. The petitioner has specifically averred at paragraph 5 of the affidavit filed in support of the writ petition that he did not exercise option to continue under the OSSR, 1960.

5. Thus, and in the case of those persons who had not exercised the option, G.O.Ms.No.212, Transport Department dated 28.03.1974, provided that the provisions of the 1960 Rules, would automatically apply. Thus, according to the petitioner, he is entitled to the pension as per the 1960 Rules, and G.O.Ms.No. 378, dated 18.04.1975.

6. The matter of grant of pension thereafter took some twists and turns in the form of litigation that concluded by a judgment of the Hon'ble Supreme Court in the case of *Government of T.N. And Others vs. M. Anachu Asari and Others* [(2005) 2 SCC 332].

7. Thereafter, G.O.Ms.No.42, dated 27.05.2005, came to be issued calling for applications from erstwhile employees of the State Transport Department for the grant of pension and the petitioner made such application.

8. The offer to pay gratuity under the OSSR was made to him, which offer was also rejected. Reference in this regard is made to in Letter No. 29343/T3/TTC/86 dated 16.04.1998, wherein the Senior Deputy Manager of the Thiruvalluvar Transport Corporation Limited states as follows:

> "*To*
> *The Under Secretary to Government,*
> *Transport Department,*

Fort St. George,
Madras - 600 009.

Sir,

Sub: Terminal Benefit - Thiru A. Iyyasamy, C.I.
St. No. 375 - settlement - Regarding.

Ref: 1. Govt. Lr. No. 54517/RW.II-8/86 dated 22.09.87.
2. Representation received from the employee dated 12.11.87.

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We invite your kind attention to the Govt. letter 1st cited. Thiru A. Iyyasamy, Conductor 2005 Checking Inspector st.No. 375 was santioned a sum of Rs. 1,645/- as terminal benefit under OSSR vide reference 1st cited. Accordingly the amount was sent to the employee through Branch Manager Madurai during 10/87 by the individual refused to accept the cheque stating that he does not want to settle his dues under OSSR and he wants to settle his dues under pension for the service rendered by him the erstwhile TSTD.

In this connection it is to point out that his option as per G.O.Ms.No. 212/Tpt dated 28.03.74 to the governed by OSSR only has been made in the service register at page No.12. As he was opted within the stipulated time he is entitled only to get OSSR gratuity and the bill claimed accordingly, the cheque has since been cancelled on 1.4.88.

The representation now received from the employee is sent in original for further action at Government level if any."

9. The case of the respondent is specific to the effect that he had not exercised the option for OSSR and thus is entitled to the gratuity payable under the 1960 Rules. It thus boils down to whether an option for OSSR has been exercised by the petitioner or not and the counter filed by the second respondent assumes some importance here.

10. At paragraph 5, R2 states that, upon scrutiny of the service book of the petitioner, an entry has been made for the sanction of a sum of Rs.1645/- towards OSSR Gratuity for the services rendered by him in the TNSTD. The records were thus called for though, in any event, the petitioner has also obtained a copy of the service records under RTI and has placed the same along with the writ petition.

11. The original records were summoned to ensure integrity of the copies supplied by the petitioner. Page No.12 of the records referred to in the counter contain the following entry:

> *"Thiru. Iyyaswamy, Conductor St.No.2005 has exercised his optiion to continue in OSS Rules within the stipulated time with reference to G.O.Ms.No.212 Transport dt. 28.03.74, vide Lr.no. 8047/cm/75 of the Depot superintendent erstwhile TSTD addressed to SAO(R) and GR no 3564/R3/TTC/Po. Dt. 5.11.80 of the B.M. Coimbatore addressed to G.M.T.T.C"*

12. While the recording by the Section Officer is to the effect that the petitioner has exercised his option, there is no option form that accompanies the entry and the respondents were specifically called upon to support the statement in counter, which only refers to the noting at page 12 of the service book. No option form is produced before the Court.

13. It is also pointed out to them that what is mentioned in the counter is only page No. 12 of the service records and not the existence of an option form itself, to support their statement that the petitioner has in fact exercised such option. However, and in light of the position that there is no option form that is placed before the Court nor referred to in counter, the only conclusion that the court can arrive at is that there has been no option exercised by the petitioner at all.

14. This very issue has engaged a learned single judge in W.P. (MD) No.19921 of 2017 and batch who by order dated 24.01.2018, has come to the conclusion that the petitioners in those cases could not be asked to prove the contrary and produce the option forms that they are stated to have submitted to the respondents.

15. That order, dated 24.01.2018, has been stayed by a Division Bench of this Court in a writ appeal filed by the State, by order dated 22.11.2019, for the reason that in the course of the hearing before the Division Bench, the State counsel circulated option forms signed by all 14 of those writ petitioners.

16. In the present case, despite the pendency of the matter since 2018 no form has been produced. The counter does not refer to an option form and only refers to page 12 of the service book. I am thus inclined to accept the case of the petitioner as stated in affidavit that the option under G.O.Ms.No.212, Transport Department, dated 28.03.1974, has not been exercised by him at all.

17. In any event and needless to say, should the option form be located by the respondents at a later date, proving the averments of the petitioner to be false, it is always open to them to produce the

same before the Court and establish their case.

18. Yet another argument advanced is in regard to the delay in the petitioner approaching this court. As order dated 07.11.2005 rejects the claim of the petitioner, respondents would contend that there is substantial laches on the part of the petitioner and this writ petitioner is not maintainable.

19. The sequence of events that have transpired in this matter, would, in some measure, explain the intervening delay. No doubt the petitioner has not challenged order dated 07.11.2005 till the filing of the present writ petition and has filed a representation only on 31.10.2016 seeking the benefit of pension.

20. In the meantime, the issue of grant of pension was itself the subject matter of litigation that concluded with the judgement of the Supreme Court in the case of *M. Anachu Asari and Other (supra)*. That apart, W.P.(MD)No.1181 of 2008, came to be filed by a similarly placed employee, seeking a mandamus directing the respondents to provide pensionary benefits in terms of the Madras Liberalised Pension Rules and that writ petition came to be allowed on 08.10.2009.

21. It is relevant to note that the facts are almost identical and at paragraphs 12 and 13, he points out the absence of the option form in that case as well stating as follows:

> " *12. A perusal of the service register of the petitioner reveals that right from the date of his temporary appointment in 1968, there has been periodically endorsement with regard to the various service benefits option within the stipulated period, the same should have been incorporated in the service register mentioning the date on which such option has exercised. The argument was put forth on behalf of the respondents to state that the present service register is which has maintained by the Transport Corporation and there are earlier records when the petitioner was a Government employee. This contention has to be rejected since the Service register produced is a singe service record and contains all the entries from the date on which the petitioner became the employee of the corporation. There is no record produced to show under what circumstances, the Branch Manager had singed the said option form on 13.06.1980. Admittedly as on 13.06.1980, no employee exercised the option since the cut off date has been fixed as 30.06.1974. Considering the facts of the case which arose in the particular case, I*

am of the view that the benefit should go in favour of the employee. The respondents are not able to explain as to why such option was not recorded in the service register as on 30.06.1974 and done only on 11.04.1979. Further, the date namely 11.04.1979, does not find place in the option form whereas the Branch manager of Kattabomman Transport Corporation Limited, General Depot, Tirunelveli has signed on 13.06.1980. This has also not been explained before this court by producing any record.

13. Learned counsel for the respondents corporation would submit that there are several of such persons who would stake such a claim like that of the petitioner by stating that they have all completed more than 10 years as on 01.04.1982. I am of the view, the present case is peculiar in its facts and circumstances that this court is convinced that option was not exercised by the petitioner within the cut off date and there is no record to establish that the said form was signed by the petitioner before the cut off date. Therefore, any decision in the present case cannot have a bearing in respect of any other claims."

22. The State carried the matter in writ appeal and by order dated 28.01.2011, W.A.(MD) N0.40406 of 2010 (in SR Stage), came to be rejected both on the ground of delay as well as on merits. At paragraph 6, the Division Bench states as follows:

" *6. As per G.O.Ms.212, dated 28.03.1974, an option to stay under OSSR rules has to be exercised on or before 03.06.1974. According to the appellants, such an option was exercised by the respondent. Hence, the respondent is not eligible for the benefit under the Madras Liberalised Pension Scheme. An endorsement with regard to the alleged option was recorded in the service register of the respondent only on 11.04.1979 that is much later from the cut of date I.e., 30.06.1974. Though in the copy of the proforma for the option, the date of signing was shown as 24.06.1974, the Branch Manager of the Kattabomman Transport Corporation Limited, General Depot, Tirunelveli had singed the same only on 13.06.1980 that is after six years. The learned single judge by carefully going through all these* *aspect has come to a conclusion that the so-called option exercised by the employee should have been subsequently dated from the cut off date ie., 30.06.1974. Further, learned Single Judge has found that as per G.O.Ms.No.378 and 1028 and 284 (Finance) Department the employee who has completed 10 years of service with the Government is entitled to the benefits as provided under G.O.Ms. 212 and the cut off date has been fixed as on 01.04.1982. We do not find any infirmity in the order passed by the learned Single Judge. In fact, the learned Single Judge by carefully gone through the records and correctly allowed the prayer of the respondent. Under such circumstances, we are of the view by condoning the delay of 323 days, no useful purpose is going to be served in the main Writ Appeal. Therefore, we are not inclined to allow this petition. Hence, this application is dismissed. The petitioners are directed to pay pensionary benefits to the respondent within a period of eight weeks from the date of receipt of a copy of this order."*

23. Not content with the order passed in writ appeal, the State carried the matter to the Supreme Court, which by judgment dated 07.05.2014 confirmed the order passed in writ appeal, only stating that if a double benefit had been received by the employee, both by way of pension as well as by way of gratuity under OSSR, then the amount paid under the OSSR, shall be refunded to the State along with interest at the rate of 8 percent per annum calculated from the date of receipt of gratuity till date of payment.

24.The question of refund in this case would not arise, since as earlier stated, the cheque sent in settlement to the gratuity under OSSR was returned by the petitioner as confirmed by the respondent vide communication dated 16.04.1988.

25. In light of the discussions as aforesaid, this writ petition is allowed and orders of R2 dated 07.11.2005 and 22.11.2016 are quashed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

1. The Secretary to Government,
   Transport Department,
   Government of Tamilnadu,
   Fort. St. George,
   Chennai -9.

2. The Managing Director,
   State Express Transport Corporation Tamilnadu Ltd.,
   Pallavan Salai,
   Chennai.

+1 CC to M/s.R. MURUGAN, Advocate (SR-34864[F] dated 17/11/2021)

+1 CC to M/s.K. SATHIYA SINGH, Advocate (SR-34987[F] dated 18/11/2021)

W.P.(MD)No. 7343 of 2018
17.11.2021

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