CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.87/08

Monday this the 24th day of November 2008

C O R A M :

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER

A.Abdul Kader,
S/o.Mohammed Haji,
K.P.Nivas, P.O.Anayiduku,
Thana, Kannur District. ...Applicant

(By Advocate Mr.P.M.Pareed)

Versus

1. Southern Railway represented by its General Manager, Head Quarters Office, Park Town, Chennai – 3.

2. General Manager (P), Southern Railway, Park Town, Chennai – 3.

3. Chief Track Engineer, Southern Railway, Head Quarters Office, Personnel Branch, Park Town, Chennai – 3.

4. Senior Divisional Personnel Officer, Southern Railway, Park Town, Chennai – 3.

5. Union of India represented by Secretary, Ministry of Railways, Rail Bhavan, New Delhi. ...Respondents

(By Advocate Mr.K.M.Anthru)

This application having been heard on 24th November 2008 the Tribunal on the same day delivered the following :-

O R D E R

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The applicant who entered service in the Railways in 1966 as Apprentice Mechanic was promoted in 1968 as Chargeman and later on 15.2.1986 he was removed from service. His appeal was rejected by the Railway Board. The applicant thereafter as late as in January 2001

requested for conversion of his removal from service into one of compulsory retirement, but that did not evince any reply from the respondents. After another five years the applicant submitted his representation before the 2nd respondent, namely, General Manager, Southern Railway, for settlement of his dues in July, 2006 followed by a legal notice in September, 2006. In January, 2007 he filed O.A 69/07 which was disposed of with a direction to the 2nd respondent to consider the representation and dispose of the same. By the impugned Annexure A-5 order dated 30.3.2007, the 2nd respondent rejected his representation stating that amount due to the applicant his only to the extent of 16767/- as Provident Fund due and the same was not paid to the applicant as he did not intimate the details of bank account etc. As regards the claim of the applicant for payment of gratuity, as per the Gratuity Act, the 2nd respondent advised, that Railway servants are covered by the provisions of Manual of Railway Pension Rules up to December, 1993 and thereafter Railway Services Pension Rules, 1993. As such the Gratuity Act 1972 does not apply to him. And since the applicant had been removed from service he is not entitled to the benefits of any gratuity under the Railway Pension Rules.

2. The applicant has come up before this Tribunal again challenging Annexure A-5 order and prayed for a direction to the respondents to disburse the gratuity payable under Payment of Gratuity Act, 1972.

3. Respondents have contested the O.A referring to the decision by the Apex Court in the case of **Union of India and another Vs.Manik Lal Banerjee** (2006 SCC [L&S] 1959). They have contended that the payment

of Gratuity Act, vide Section 2(e) thereof, excludes persons who hold the post under Central Government or a State Government and is governed by any other Act or by any rules providing for payment of Gratuity.

4. The applicant has filed his rejoinder reiterating his contentions and also stating that the Hon'ble Supreme Court did not have the occasion to refer to the earlier judgment reported in **Municipal Corporation of Delhi Vs. Daram Prakash Sharma and another** (1998 [7] SCC 221) in which it has been stated that in view of the over-riding provisions contained in Section 14 of Payment of Gratuity Act, the provisions for gratuity under the pension rules will have no effect. He has also referred to a decision of the Division Bench of Hon'ble High Court of Kerala which considered the applicability of Payment of Gratuity Act to the employee of Kerala State Electricity Board which also ruled in the same fashion.

5. Counsel for the applicant argued that Section 14 of Payment of Gratuity Act enables the applicant to derive the benefit of Gratuity under the said Act and as per the Act the applicant is entitled to the benefits as he does not come under any excluded category.

6. Counsel for the respondents submitted that Railway servants are not covered under Payment of Gratuity Act, 1972.

7. Before going into the merits of the case the dexterous way of the applicant's attempt to circumvent limitation has to be highlighted here. Admittedly the applicant was removed from service in 1986 and his appeal was dismissed in 1991. It is after a decade from then that he wrote for

settlement of his dues which was not responded to. It is after another five years the matter was resurrected by him and in quick succession he sends legal notice. This formed the basis for O.A.69/07 which was, without going into the merits, disposed of with an innocuous order directing the respondents to decide the representation. Comprehensive reply has been given by the General Manager, Southern Railway, rejecting the claim of the applicant. Now, keeping the latest reference from the Railways the applicant has filed this O.A. His claim is for settlement of his dues which pertains to the period 1986. The O.A is pathetically time barred. In this regard reference is made to the latest decision of the Apex Court in the case of **C.Jacob Vs. Director of Geology & Mining & Anr.** (Cc 11425/2008) decided on 3.10.2008 wherein the Apex Court has held as under :-

> "The modus of 'representation'
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> 6. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters.
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> Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation. The Courts/Tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-

employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation.

The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored.

7. Every representation to the government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the department, the reply may be only to inform that the matter did not concern the department or to inform the appropriate department. Representations with incomplete particulars may be replied by seeking relevant particulars.

The replies to such representation, cannot furnish a fresh cause of action or revive a stale or dead claim."

8. Now even on merit the applicant has no case as he is not covered under the said Act. In Manik Lal Banerjee (2006) 9 SCC 643, the Apex Court has held as under :-

"**8.** Mr Manik Lal Banerjee, respondent appearing in person, on the other hand, contended that Section 2(*e*) of the 1972 Act should be interpreted conjointly with Section 2(*f*) defining "employment" and Section 2(*a*)(*i*) defining "establishment" and so construed, it must be held that the same is applicable to the cases of railway employees also. Strong reliance in this behalf has been placed on *Executive Engineer (Construction), S. Rly.* v. *M.P. Sankara Pillai*[1].

9. It was urged that in view of Rule 15(4)(*ii*) of the 1993 Rules, as pension and commuted value thereof are only governed by the Pensions Act, 1871, the matter relating to payment of gratuity could not have been brought within the purview of the 1993 Rules. As pension and gratuity are not bounties, the same should be given a liberal construction. Mr Banerjee furthermore contended that the decision of the Joint Consultative Machinery (JCM) to pay 20% dearness allowance in emoluments for the purpose of gratuity being not a decision

under a legislative Act, the same is subservient to the provisions of the 1972 Act. In any event, the Fifth Pay Revision Commission having made an interim report that 90% of dearness allowance should be paid to the employees who have retired from 1-4-1995 to 31-12-1995, there is no reason as to why the respondent should be deprived from the benefit thereof.

10. The 1972 Act was enacted to provide for a scheme inter alia for payment of gratuity to employees in relation to railway companies.

11. Section 2(*e*) of the 1972 Act defines "employee" to mean any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity".

The definition, thus, excludes an employee holding civil post under the Central Government and governed by another Act or Rules providing for gratuity.

12. Section 2(*f*) of the 1972 Act defines "employer" inter alia to mean, in relation to any railway company belonging to or under the control of the Central Government or the State Government, a person or authority appointed by the appropriate Government for the supervision and control of the employees. Section 4 provides for payment of gratuity to an employee on the termination of his employment after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub-section (2) of Section 4 provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned, which amount in view of sub-section (3) of Section 4 shall not exceed three lakhs and fifty thousand rupees.

13. The 1972 Act is applicable inter alia to the "establishment" belonging to a railway company. The amount of gratuity, however, is payable to an employee. The interpretation clause contained in Section 2(*e*) takes out from the purview of the said Act a person who holds inter alia post under the Central Government and whose terms and conditions of service are governed by an Act or the Rules providing for payment of gratuity. The 1993 Rules provide for payment of gratuity in Rule 70 in the following terms:

"70. *Retirement gratuity or death gratuity*.—(1)(*a*) In the case of a railway servant, who has completed five years' qualifying service and has become eligible for service gratuity or pension under Rule 69, shall, on his retirement, be granted retirement gratuity equal to one-fourth of his emoluments for each completed six monthly period of qualifying service subject to a

maximum of sixteen and one-half times the emoluments and there shall be no ceiling on reckonable emoluments for calculating the gratuity...."

14. Rule 49 of the 1993 Rules provides for the manner in which emoluments of such an employee should be calculated. "Pay" in those Rules means the pay in the revised scales under the Fourth Pay Commission Report.

15. Following representations made on behalf of the employees; the Central Government in a JCM conceded grant of a part of dearness allowance to be reckoned as dearness pay (DP) for the purpose of computing the amount of gratuity and the same was treated as an additional advantage over and above those allowed in the recommendations of the Fourth Pay Commission. The quantum of such dearness pay was taken on the consumer index as on 1-7-1988 and 20% of dearness allowance was declared to be payable as dearness pay. Such benefit was extended also to the railway employees whose retirement had taken place on or after 16-9-1993.

16. The Tribunal indisputably granted relief to the respondent solely relying on or on the basis of the decision in *Pritam Singh*. In *Pritam Singh case* indisputably the question as regards non-applicability of the 1972 Act and consequent applicability of the 1993 Rules had not arisen for consideration. The controlling authority in *Pritam Singh case* proceeded on the basis that the provisions of the 1972 Act were applicable. The Tribunal in *Pritam Singh* opined :

"...The controlling authority has considered the definition of the term 'wages' and came to the conclusion that the applicant is eligible for getting the gratuity. We do not see any infirmity or illegality in the order as averred by the petitioner in this original application. According to us, there is no merit in the application which is only to be dismissed. Accordingly, we dismiss the original application with no order as to costs."

17. Our attention has also been drawn to the fact that the Central Administrative Tribunal, Principal Bench in *Federation of Central Govt. Pensioners' Assn. Organisations* v. *Union of India* by a judgment and order dated 1-10-2004 held that the decision of the Tribunal in *Pritam Singh* was rendered per incuriam and, thus, did not create any binding precedent. The Railway Administration in terms of its speaking order dated 4-6-2004 also held so. The Tribunal, unfortunately, did not apply its mind to that aspect of the matter and proceeded to grant relief to the respondent herein solely relying on or on the basis of the said decision. *Pritam Singh*, in our opinion, did not create any binding precedent. Only because this Court dismissed the special leave petition, the same would not mean that any law within the meaning of Article 141 of the Constitution was laid down thereby. *Pritam Singh* was evidently rendered per incuriam as the statutory provisions relevant for determining the issue had not been taken into consideration.

18. It is well settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. The decision in *Pritam Singh* having indisputably not taken into consideration, the exclusionary clause contained in Section 2 (*e*) of the 1972 Act cannot be held to be an authority for the proposition that despite the provisions of the 1993 Rules, the 1972 Act would apply in the case of the railway servants.

> **19.** It is now well settled that if a decision has been rendered without taking into account the statutory provision, the same cannot be considered to be a binding precedent. This Court in *Pritam Singh* while exercising its discretionary jurisdiction, might have refused to interfere with the decision. The same, therefore, did not constitute any binding precedent. The Tribunal and consequently the High Court, therefore, committed a manifest error in holding otherwise.
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> **20.** Submission of Mr Banerjee that if the 1972 Act applies to an establishment belonging to a railway company and the persons specified in Section 2(*f*) are the employers, despite exclusion of railway servants governed by the provisions of the 1993 Rules from the purview of the definition of "employee" in terms of Section 2(*e*) of the Act, the case shall be governed by the 1972 Act, cannot be accepted."

9. The contention of the applicant was that the above decision has not taken into account the provisions of Section 14. This contention has to be rejected as the said provisions would apply only if a person is covered under the Act whereas in this case the applicant is not covered under the Payment of Gratuity Act.

10. In view of the above, **the O.A is dismissed**. Under these circumstances, there shall be no order as to costs.

(Dated this the 24th day of November 2008)

K.NOORJEHAN
ADMINISTRATIVE MEMBER

K.B.S.RAJAN
JUDICIAL MEMBER

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