

**(2013) 12 MAD CK 0063**

**Madras High Court**

**Case No:** Writ Petition No. 19051 of 2011 M.P. No. 1 of 2011

Union of India

APPELLANT

Vs

The Registrar, Central  
Administrative Tribunal,  
Nayeema Begum and Abdul  
Saleem

RESPONDENT

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**Date of Decision:** Dec. 20, 2013

**Citation:** (2013) 5 LLN 650 : (2014) 3 MLJ 24

**Hon'ble Judges:** P. Devadass, J; N. Paul Vasanthakumar, J

**Bench:** Division Bench

**Advocate:** V.G. Sureshkumar, for the Appellant; P. Suresh Babu for 2nd Respondent and Mrs. Sudha Ramalingam for 3rd Respondent, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

N. Paul Vasanthakumar, J.

This writ petition is filed by the Southern Railway, challenging the order of the Central Administrative Tribunal (CAT) made in O.A. No. 141 of 2011 dated 16.3.2011, allowing the application filed by the second respondent herein, seeking to quash the order of the first petitioner dated 24.1.2011 and the consequential order of the third petitioner dated 29.1.2011. The case of the second respondent before the Tribunal was that she was appointed on compassionate grounds by the first petitioner by considering the fact that her husband, third respondent herein was missing for more than seven years and as per Section 107 and 108 of the Indian Evidence Act, he was presumed to have died. The first petitioner appointed the second respondent as Grade-III Safaiwala by order dated 20.10.2009 subject to compliance of all the rules and regulations, including recruitment rules. The second respondent as widow of the third respondent, was paid the terminal benefits such as gratuity, leave salary on the presumption of death of the third respondent.

2. While the second respondent was serving as Safaiwala Grade-III, on 8.1.2011 the third respondent who served in the Railways, who was presumed to be died, sent a representation to the Southern Railway and requested for restoring him in service of the Railways. In view of the said representation from the third respondent, a show cause notice was issued to the second respondent on 5.1.2011, pursuant to which the second respondent submitted reply stating that the third respondent was not found from 6.10.2002 and she suffered a lot with her two children, of which one daughter aged 12 years is suffering from epilepsy; that she gave a complaint to the police after thorough search on 25.3.2003 and the police gave a certificate as not traceable and the said report was filed before the Judicial Magistrate Court No. I, Tiruppathur, and the case was closed; that as the third respondent who is the husband of the second respondent was missing, she applied for compassionate appointment and the same was granted on 20.12.2009; that as per the investigation final report and as the third respondent could not be traced, she applied for compassionate appointment and hence there was no suppression of fact; that the third respondent did not meet the second respondent and he has not taken care of the second respondent and her two children; and that the application having been submitted with bona fide reason and not cheated the Railways, compassion must be shown to the second respondent to save the livelihood of herself and her two children, of which one is suffering with epilepsy. The third respondent deserted the second respondent till date and he is also not willing to take care of his family even in future.

3. On 24.1.2011 termination order was passed in exercise of the power vested with the Railways, which deals with appointment of persons on compassionate ground in case of missing railway employees in RBE No. 164/98 dated 26.7.1998, wherein it is stated that the services of the wards/widow will be terminated in case the missing railway employee becomes available subsequently. The said termination order was challenged before the Tribunal and the Tribunal considering the facts and circumstances of the case, particularly with regard to her contention that she has not cheated the Railways and she applied for compassionate appointment based on the police report and as per Section 107 and 108 of the Indian Evidence Act, set aside the order of termination dated 24.2.2011 with consequential direction to the Railways to reinstate her as Safaiwala Grade-III with all attendant benefits.

4. The Southern Railways aggrieved over the said order of the Tribunal dated 16.3.2011, challenged the same in this writ petition contending that the third respondent, who was a Railway employee, having resurfaced and made a claim for restoration in service, in exercise of the powers conferred under the Railways, terminated the compassionate appointment, as the third respondent/Railway Employee becomes available, and the Tribunal without reference to the said empowerment, allowed the application.

5. The learned counsel appearing for the petitioners submitted that the second respondent having got appointment on compassionate ground on the presumptive death of the third respondent, once the third respondent resurfaced, or is available, the benefit of compassionate appointment obtained by the second respondent is bound to be recalled/cancelled. Therefore, the order of the Tribunal is liable to be set aside. The learned counsel further submitted that the third respondent having not attended duty from 2002, the Railway Department is entitled to initiate departmental action against the third respondent for unauthorised absence for over 11 years.

6. The learned counsel appearing for the second respondent argued that the second respondent being a deserted woman, was able to survive with two children only because of the compassionate appointment given to her, and if at this stage the order of termination is upheld, the second respondent and her two children will be put to serious financial difficulties and mental torture, and their survival will be in doubt. Therefore, a sympathetic view as taken by the Tribunal may be taken in this case and appropriate orders may be passed in this case in exercise of equity jurisdiction.

7. The learned counsel appearing for the third respondent submitted that the third respondent is suffering due to want of employment and for the past several years he worked as coolie in Hubli and due to mental strain he did not attend duty in Railways, and due to difference of opinion between the third respondent and the second respondent, they are not living jointly and appropriate orders may be passed to meet the ends of justice, safeguarding the interest of the third respondent as well as the second respondent.

8. We have considered the rival submissions and perused the appointment order given to the second respondent dated 20.10.2009, the circular of the Railway Board in RBE No. 164/98 dated 26.7.1998, final report filed by the Police on 25.3.2003 before the learned Judicial Magistrate No. I, Tiruppathur and all relevant papers.

9. It is not in dispute that the police could not trace the third respondent, who was missing from 6.10.2002 for over seven years in spite of giving complaint by the second respondent on 25.3.2003. As the second respondent was not able to trace the third respondent for over seven years and having regard to the report filed by the Police before the Judicial Magistrate Court No. I, Tiruppathur stating that the third respondent was not traceable, it was presumed u/s 108 of the Indian Evidence Act that the third respondent died, and she applied for compassionate appointment which was considered by the Railways and an order of appointment was issued on 20.10.2009. It is also a fact that the third respondent sent a representation seeking to permit him to report for duty on 8.1.2011 and he is alive.

10. The respondents 2 and 3 were directed to be present before the Court during the course of the hearing and they appeared before this Court on 18.12.2013. The

second respondent identified the third respondent as her husband and the third respondent identified the second respondent as his wife. Third respondent also admitted that he is having two children, who are living with the second respondent for all these years. The second respondent expressed her willingness to live with the third respondent, but the third respondent is not willing to live with the second respondent.

11. The learned counsels appearing for the second respondent as well as third respondent submitted that having regard to the facts and circumstances of this case, this Court may exercise equity jurisdiction and mould the relief to both respondents.

12. In this case, we are of the firm view that the second respondent has not suppressed anything, or cheated the Railways. Section 108 of the Indian Evidence Act, 1872 gives a statutory presumption of death of a person, if he is not heard for seven years by those who would naturally have heard him, if he had been alive. The said inference is to be drawn based on a presumption that the man was dead after the period of seven years. In the case on hand, the third respondent was missing from 6.10.2002 and compassionate appointment was given to the second respondent only on 20.10.2009, i.e., after the expiry of seven years from the date of missing. The third respondent sent a representation claiming duty only on 8.1.2011, i.e., after a period of eight years from the date of missing. Thus, the Railways also cannot be blamed for having given compassionate appointment to the second respondent on the basis of Section 108 of the Indian Evidence Act, 1872.

13. In the above facts and circumstances of this case, this Court is desirous of exercising the equity jurisdiction in this case. The power of exercise of jurisdiction by the High Court under Article 226 of the Constitution of India, to do complete justice to the parties is no longer res integra. In the decision reported in [B.C. Chaturvedi Vs. Union of India and others](#), the Honourable Supreme Court approved the Full Bench judgment of the Orissa High Court reported in [Krishna Chandra Pallai Vs. Union of India \(UOI\) and Another](#), and held that the High Court being a Court of plenary jurisdiction, has inherent power to do complete justice to the parties, similar to Supreme Court's power under Article 142 of the Constitution of India.

14. We are aware that equity jurisdiction can be exercised only if the Court is satisfied about no misrepresentation/suppression of facts by the parties, who plead for equity, and only in deserving cases. The Courts are not entitled to violate the law on the basis of sympathy. While administering Justice, the Courts are bound to apply the cardinal principle of justice, equity and good conscience and at times with little compassion, without violating law.

15. Bearing the said principle in mind and considering the peculiar facts and circumstances of this case, a suggestion was made by this Court as to whether the third respondent, on being restored to duty can be ordered to retire compulsorily,

so that he will get pension alone since he has not been terminated from his service as on date, and the second respondent may be appointed afresh as Safaiwala Grade-III, the post in which she was appointed on 20.10.2009, without any other claim of service benefits for the earlier period. The respondents 2 and 3 and their respective counsels submitted that the writ petition may be ordered as suggested by this Court, so that respondents 2 and 3 and their children can survive and the Railway's interest will also be protected as the third respondent will get a punishment of compulsory retirement and the second respondent's appointment on compassionate appointment from 2009 to 2013 will have no effect for her future service benefits.

16. The learned counsel appearing for the Railways submitted that this Court may pass appropriate orders considering the factual matrix in this case. In fine, the order of the Tribunal made in O.A. No. 141 of 2011 dated 16.3.2011 is modified and the writ petition is disposed of with the following directions:

- (i) Petitioners are directed to permit the third respondent to report for duty as he was not terminated as on today.
- (ii) On his reporting for duty, petitioners are permitted to serve compulsory retirement order to the third respondent from the said date as agreed by the third respondent, so as to enable him to get pension alone from the date of compulsory retirement.
- (iii) Petitioners are directed to issue fresh appointment order to the second respondent, appointing her as Safaiwala Grade-III, the post in which she was appointed on 20.10.2009, with condition that the services rendered by her till date of fresh appointment shall not be counted for any purpose.
- (iv) The above said directions are directed to be complied with by the petitioners within a period of two weeks from the date of receipt of copy of this order.
- (v) This order is passed on the peculiar facts and circumstances of this case and shall not be treated as a precedent in any other case.
- (vi) There is no order as to costs.
- (vii) Connected miscellaneous petition is closed.