

CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION No.210/00365/2015

Dated this Monday, the 10th day of February, 2020

CORAM : R.VIJAYKUMAR, MEMBER (ADMINISTRATIVE)
RAVINDER KAUR, MEMBER (JUDICIAL)

Shri Abdul Hamid Shaikh, S/o Shaikh Saunit, Age 59 yrs.,
working as Bearer in Catering Unit of Chief Commercial
Manager (Headquarters), 2nd Floor,
Commercial Department of Central Railway,
CST Mumbai 400 001, R/o Room No.38,
Triveni Sadan Building, Bhavani Shankar Road, Dadar,
Mumbai 400 001 (MS).
- Applicant
(By Advocate Shri D.N.Karande)

Versus

1. Union of India, through the Chairman,
Ministry of Railways, Railway Board, Rail Bhavan,
New Delhi 110 001.
2. General Manager, Central Railway,
2nd Floor of GM Office Building, CST Mumbai 400 001.
3. Chief Personnel Officer, Central Railway,
1st Floor of General Manager's Office Building,
C.S.T. Mumbai 400 001.
4. Divisional Railway Manager, Central Railway,
Mumbai Division, CST Mumbai 400 001.
5. Sr. Divisional Personnel Officer, Central Railway,
Mumbai Division, CST Mumbai 400 001.- **Respondents**
(By Advocate Shri S.C. Dhawan/Shri B.B. Rai, Chief Law Assistant)

ORDER

Per : R.Vijaykumar, Member (A)

This OA was heard and reserved for orders after hearing Shri D.N. Karande, learned counsel for the applicant and Shri S.C. Dhawan, learned counsel for the respondents on 30.10.2018. Thereafter certain clarifications were invited by listing the matter as 'Being

Spoken To Minutes' on 09.01.2019 and responses were received from Shri D.N. Karande, learned counsel for the applicant and Shri B.B. Rai, Chief Law Assistant, who appeared on behalf of the respondents.

2. This OA has been filed on 29.06.2015 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

“8(a). That this Hon’ble Tribunal may kindly be please to call for the records pertaining to the grievance of the applicant.

8(b). The Hon’ble Tribunal may kindly declare that the applicant is entitled to count his past service rendered prior to absorption for qualifying service for pensionary benefits and other consequential retirement benefits.

8(c). This Hon’ble Tribunal may kindly be pleased to order the respondents to implement the judgments of Apex Court, High Courts and this Hon’ble Tribunal on issue of counting past service for pensionary as well as other retirement benefits.

8(d). The respondents may kindly be directed to extend the consequential benefits including complementary passes, with pensionary benefits to be accrued on account of the counting of previous service.

8(f). Cost of the OA be saddled on the respondents.

8(g). Any other reliefs that this Hon’ble Tribunal deems fit.”

3. The applicant claims to have been working as Commission Bearer in the Departmental Catering Unit of Central Railway of Mumbai Division from 07.05.1984. Following the judgment of the Hon’ble Apex Court in **M.M.R. Khan and others Vs. Union of India and others**, reported in 1990 AIR 937 : 1990 SCR (1) 687,

staff of statutory or non-statutory canteens of Indian Railway who have sought reliefs were favoured with directions to be treated as Railway employees and were extended all service conditions on par with Railway employees. The Railway Board also issued instructions on 18.05.1990 implementing these directions and made available all benefits including pension and SRPF as provided to other Railway servants of comparable status from 01.04.1990 in orders issued on 19.11.1990 (Annexure A-3). This applicant was accordingly screened and finally found suitable for appointment in Class IV post in the Commercial Catering Department and was appointed therein in orders of the respondents dated 21.06.1996 and his service record indicates that he reported for duties on the same date. The applicant served in this Group D post as Bearer until 30.09.2015, when he superannuated.

4. The applicant relies on the judgment of the Hon'ble High Court of Calcutta in Writ Petition (CT) No.28/2011 decided on 30.08.2012/19.09.2012 which referred to the judgment of the Hon'ble Apex Court in Writ Petition (Civil) No.195/1995 wherein the petitioners, South Eastern Railway Congress,

have prayed for parity in pay scales and other service benefits for Commission Vendors and Commission Bearers with the regular employees of the Railways. After giving interim directions on relief on 28.08.1995 and 02.04.1996, the final order of the Hon'ble Apex Court recorded on 03.12.1997 was as under:

"Despite directions given as far back as on 22nd April, 1997, as to when and by what time the Commission Vendors and Commission Bearers working in the South Eastern Railway are likely to be absorbed pursuant to the direction given earlier by this Court, no such intimation could be given to this Court. An interim direction was given by this Court that such workers would be paid Rs.1,500/- (Rs. Fifteen hundred) per month by way of interim relief because it was reasonably expected that at that time that the concerned workers would be absorbed without much delay. Our attention has been drawn by Mr. Shymala Pappu, the learned Senior Counsel for the petitioner that in the case of similar workers in Southern Railway, the Railway Board by its memo no.88/T.G.III/648/19/PNH Meeting, dated 10th September, 1979 directed that such Commission Vendors until they would not be absorbed permanently would be paid at the minimum revised scale then in force and such interim relief would also include allowance like House rent allowance, Compensatory City Allowances and also the Dearness Allowances. The learned counsel has submitted that similar direction may be passed in favour of the Commission Vendors and Commission Agents represented by the petitioners.

In our view, in the facts of this case, there is justification in the said submission. We, therefore, direct that till such Commission Vendors and Commission Bearers of South Eastern Railway who are now getting Rs.1,500/- per month, are not absorbed against the available vacancies, they will be paid the minimum of the revised scale of pay on the basis of Fifth Pay Commission's recommendations together with Dearness Allowances and other allowances and also the House rent allowance which would have been payable on permanent absorption but no increment should be given to them until they are regularly absorbed against available vacancies.

The Writ Petition stands disposed of."

5. Following this judgment, the respondent Railway Board absorbed the petitioner and others similarly placed in permanent service but did not grant them the benefits accorded to employees of statutory and non-statutory recognised railway canteens on par with Railway Servants of comparable status that had been granted to those employees following the decision of the Hon'ble Apex Court in M.M.R. Khan & Ors. Vs. Union of India & Ors. AIR 1990 SC 937 by successive circulars of 18.05.1990, 19.11.1990 and 17.01.2006, the last of which entitled those employees to count service in the Railway Canteen prior to the declaration and absorption as Railway employees. The Hon'ble High Court of Calcutta held that since the Commission Vendors and Commission Bearers who had been regularized were earlier employed in non-statutory recognized canteens, they would also be entitled for the benefit of the above three circulars of the respondents that were issued for ex-canteen employees and that any different interpretation would be contrary to the findings of the Hon'ble Apex Court in Writ Petition (Civil) No.195/1995. Accordingly, the Hon'ble High Court concluded that the petitioners before the Court would be

entitled to compute the qualifying service for being paid pension and other post-retiral consequent benefits by taking into account the entire period of service prior to their individual dates of absorption in Railway Service on par with pension and other consequent benefits available to other Railways employees. The essential claim of the applicant is to compare their position with that of employees of statutory and non-statutory canteens and to seek the same benefits as were accorded to them.

6. The respondents have replied that the applicant in the present case superannuated on 30.09.2015 and has been paid pension and all settlement dues as per the rules. They state that the Railway Service (Pension) Rules, 1993 clearly provides that "services rendered in part-time capacity or at casual market or daily rates or in a non pensionable post or on payment of a fee or honorarium shall not be treated as qualifying service". They emphasise that the applicant was working as a Commission Vendor prior to his absorption and was being paid commission for the work done by him and therefore, in terms of Rule 14 of these Railway Service (Pension) Rules, 1993 (Annexure R-1),

he was not entitled to include the period for which he received commission as qualifying service for the purposes of pension and consequential pensionary benefits. The relevant Rule reads as under:

“14. Periods which shall not be treated as service for pensionary benefits - Periods of employment in any of the following capacities shall not constitute service for pensionary benefits, namely-

(i) in a part-time capacity;

(ii) at casual market or daily rates;

(iii) in a non-pensionable post;

(iv) in a post paid from contingencies except as provided in rule 31;

(v) under a covenant or a contract which does not specifically provided for grant of pensionary benefits;

(vi) work done on payment of a fee or honorarium.

(vii) Apprentice period of Special Class Apprentices – (Authority: Railway Boards letter No.F(E)III/99/PNI/ (Modification) dated 23.5.2000)

(viii) removal or dismissal from service in accordance with rule 40;

(ix) resignation from service save as indicated under rule 41;

(x) period of unauthorized absence in continuation of authorised leave of absence treated as overstay.

(xi) joining time allowed to a railway servant transferred at his own request and not in public interest for which he is not entitled to be paid;

(xii) period of service treated as dies-non;

(xiii) foreign service in respect of which the foreign employer or railway servant has not paid service contributed unless the payment has been specifically waived by the President;

(xiv) on contract basis except when followed by

confirmation.”

7. They also submitted that the applicant has relied on the Railway Board letter dated 19.11.1990 referred by the Hon'ble High Court of Calcutta but this letter specifically provides that "service rendered by the applicant will count as qualifying service, if the same is admissible under the rule". The circular further emphasizes the aspect that such counting would be subject to the service being in conformity with the said rules pertaining to such claims. They also invite attention to the fact that the relevant Pension Rules of 1993 that are the basis for such a claim, came into force after the said three letters of the Railway Board and therefore, these letters and the claims of applicants in that regard would have to be read strictly in conformity with the extant Pension rules. In this regard, the respondents refers to the submission of the applicant at paragraph Nos.4.1-4.3 where he admits that he was working in a Canteen situated on the platform. They argue that such a canteen is not a statutory canteen and refer to the decision of this Tribunal in paragraph No.45 of the OA No.525/2011 decided on 08.06.2015 title **Fateh**

Chand Saini Vs. Union of India, which relied on the judgment of the Hon'ble Apex Court in **Union of India Vs. A.S.Pillai and others reported in (2010) 13 SCC 448** in which it is recorded that "the Hon'ble Supreme Court refused the relief of absorption/regularization of the part time employees on the ground that the part timers are free to get themselves engaged elsewhere and they are not working for the authority/employer". They also submit that the applicant has not explained how the Railway Board letter of 19.11.1990 and others which provide for counting service from 01.04.1990 and 22.10.1980 would have any relevance to the case of the applicant.

8. In regard to his claim for Post- Retirement Complimentary Passes on par with the Railway Servants, they refer to Rule 2(h) of Railway Servants (Pass) Rules, 1986 which excludes casual labourers. Further, Rule 8 read with Schedule IV of Railway Servants (Pass) Rules, 1986 that Railway servants with minimum 20 years of service are entitled for post retirement complimentary passes. The present applicant came to his regular post only on 17.06.1996 and retired on 30.09.2015 without completing 20 years of regular service and

therefore, he is not such entitled for such pass. They rely on the judgment of the Hon'ble Apex Court in **Union of India & Another Vs. Dr. Baliar Singh decided on 25.11.1997** (Annexure R-2) which upheld the requirement of 20 years of such regular service. They also refer to the IREM Vol-II, para 2002 which reads as under:

“Entitlement and privileges admissible in casual labour-

“Casual labour are not eligible for any entitlement and privileges other than those statutory admissible under the various Acts, such as, Minimum Wage Act, Workmen's Compensation Act etc. or those specifically sanctioned by the Railway Board from time to time.”

9. In this regard, they urged that there are no such codal provisions for Commission Vendors and further, that the provisions of Railway Board letter dated 25.06.2006 referred by the applicant is not applicable to the applicant who had never worked as a casual labour but only as Commission Vendor and was getting remuneration out of his earnings by sale of products on pro-rata basis and hence, cannot claim even such benefit.

10. In rejoinder, the applicant agrees that he was paid commission but argues that Rule 14 does not exclude those who were receiving commission within the reading of its provisions and, therefore, he would become entitled. They submit that the decision of the Hon'ble Apex

Court in **M.M.R Khan** supra falls into three categories of statutory/non-statutory recognized and non-statutory recognized canteens and the Catering unit of the Railways falls under the third category. They submit that the applicant was absorbed after examination of his past records which were documented and are available with the respondents. They deny the relevance of **Dr. Baliar Singh** supra, where the applicant was working in a Railway Catering Unit. They refer to **Urmil Johar Vs. State of Punjab**, reported in 2015 (6) SLR 703 where it was held that absorption is not an incident of fresh recruitment and the State cannot be allowed to resile from its earlier stand and embark on a course of action to the prejudice of the absorbed employees. They also refer to the judgment of the Hon'ble Apex Court in **A.N.Sachdeva Vs. Maharashi Dayanand University** reported in SCC (L&S) 2016 (1) 54 and held that a distinction cannot be drawn between employees who have been absorbed/allocated and those who have been appointed directly and this would amount to discrimination in terms of evaluating the service rendered but have not explained how this discriminated on the basis of entry by

absorption and entry by direct appointment.

11. The learned counsel for the applicant was heard at length on the issue and the respondents, and so were represented by Shri B.B.Rai, Chief Law Assistant to explain the matter in the absence of the learned counsel for the respondents. He argued that the applicant had never objected to reduce pension or gratuity but was now only seeking consequential pensionary benefits.

12. We have gone through the OA and rejoinder along with Annexures filed on behalf of the applicant. We have also gone through the reply along with Annexures filed on behalf of the respondents and have examined the files and cognized all relevant facts of the case.

13. We have heard the learned counsel for the applicant and the learned counsel for the respondents and carefully considered the facts and circumstances, pleadings, law points, case law and rival contentions in the case.

14. The applicant has sought a comparison between his position and the case of employees of quasi-administrative organizations of the Railways which includes non-statutory canteens and then has emphasized the consideration of a similar case of Commission Vendors dismissed by

the Calcutta Bench of this Tribunal in OA No.758/2007 and which was then struck down and writs allowed by the Hon'ble High Court of Calcutta in WP (CT) No.28/2011 dated 19.09.2012. As detailed previously, this judgment relies on the result of litigation by a section of Commission Vendor and Commission Bearers who had been granted interim direction by the Hon'ble Apex Court to be paid Rs.1,500/- per month until they were absorbed permanently and the Railway Board has also passed orders on 10.09.1979 (vide orders extracts above) extending certain allowances. The Hon'ble Apex Court had recorded that the same benefit should be given to the petitioners including similar pay and allowances but no increment should be given until they would likely be absorbed against the available vacancy. The wording of these orders would suggest that their services, until they were absorbed, was not to be considered as qualifying for a permanent post or for the purpose of even receiving increments. In such a case, a question arises whether it was even the intention of the Hon'ble Apex Court to treat their services as eligible for being counted towards pensionary benefits. The details of the provisions of the

Railway Service (Pension) Rules, 1993 which were promulgated prior to the Hon'ble Apex Court judgments of 31.12.1997 that were preceded by interim orders of 28.08.1995 and 02.04.1986, all after the coming into effect of Pension Rules, 1993 was also not brought to the notice of the Hon'ble High Court of Calcutta in 2012 when it considered the circulars issued by the Railway Board for the purpose of comparing the cases of Commission Vendors and Commission Bearers who operated canteens on Railway platforms as opposed to the employees of non-statutory, non-recognized or other canteens of the Railways. The respondents have now brought to notice the Railway Services (Pension) Rules, 1993 in the present OA that govern the claims of such employees including the applicant. Rule 14(i) denies benefits of counting service for those who have been worked in a part-time capacity under Rule 14 (i) or as casuals or those who have worked under a covenant or contract under Rules 14(i), (ii), (iii) and (v). It is not the case of the applicant that he was working according to a time schedule set by the respondents or by the canteen to which he was attached. He was receiving his income in the

form of a Commission from the sales that he executed and his income would vary accordingly. Commission itself is a product of a contract which may be oral or written. Therefore, it is quite apparent that the applicant came under Rule 14 that denied him for pensionary benefits given that kind of service that he rendered. These Rules have clearly not been placed before the Court and considered by the Hon'ble High Court of Calcutta while passing the orders that enables a claim of the applicant and while making direct comparisons with the employees of the Canteens of the Railways who stand in a completely different footings. It is also relevant to note that the view expressed by the Hon'ble Apex Court in **A.S.Pillai** supra that part-time employees have the freedom to work elsewhere in addition, we infer that they cannot seek benefits from all directions for their service that they have rendered in that period of time. In that sense, therefore, the Commission Vendor cannot compare with the employees of the Canteens. Further, entitlement of Post Retirement Complimentary Passes is entirely dependent on the applicant specially his case that his past service prior to absorption needs to be counted. However, in

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the present case, the rules and in particular the Pension Rules of 1993 do not support his contention. Therefore, we hold that the impugned reply furnished by the respondents in letter No.HPB/581/R/Comml/Misc dated 03.11.2014 (Annexure A-1) is in order and in strict conformity with Rules. Accordingly, the OA is dismissed without any order as to costs.

(Ravinder Kaur)
Member (Judicial)

(R.Vijaykumar)
Member (Administrative)

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JD
10/02/2020