CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.190/2001

New Delhi this the 21st day of August, 2001.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Sumer Chand, S/o
Shri Rulha Singh,
R/o D-25, Dabri Extension,
New Delhi (Near Janak Puri). -Applicant

(By Advocate Shri M.L. Sharma)

-Versus-

Union of India through:

1. The General Manager,
   Northern Railway,
   Baroda House,
   New Delhi.

2. The Divl. Rail Manager,
   Northern Railway,
   Moradabad. -Respondents

(By Advocate Shri R.L. Dhawan)

O R D E R

By Mr. Shanker Raju, Member (J):

The applicant an ex-khalasi has assailed an order dated 30.11.98 whereby he has been denied pension as he failed to have qualifying service of 10 years as prescribed under the rules. The applicant has also challenged an order dated 23.2.2000m which contains the comments on his representation, which were not conveyed to him.

2. Briefly stated the applicant was appointed as a regular khalasi on 18.10.68 and lastly posted as ESM khalasi at Lakshar where he has superannuated he has superannuated on 31.7.97. The applicant has remained absent unauthorizedly from duty from 3.4.82 to 30.8.89 and the period has been treated as leave without pay. Earlier also the applicant remained under suspension w.e.f. 9.2.71 to 4.7.71 and remained absent from 9.12.69 to 16.11.71 and the period has been treated as not spent on duty. As such

during the service of about 28 years the applicant could not avail to attain qualifying service of 10 years which would have entitled him for pensionary benefits as prescribed under the Railway Service Pension Rules, 1993.

3. The learned counsel of the applicant stated that from 18.10.68 to 29.5.77 his qualifying service comes to around 8 years, 7 months and then from 30.5.77 to 9.5.78 it comes to around 11 months and from 1.4.78 to 2.4.82 he has completed two years service which entitles him for accord of pensionary benefits as he has qualifying service of more than 10 years. As regards the suspension period it is stated that as no penalty has been imposed on him the same should have been treated as spent on duty under para 14 of the IREM Volume II. In this background it is stated that the working period of the applicant at Dehradun, Moradabad and Shahjahanpur has not been taken into reckoning for computing his qualifying service. It is also stated that the suspension period was decided wrongly as not spent on duty, without putting him to notice and also the period of absence was also treated as leave without pay, without issuing any show cause notice. It is further stated that the absence period is covered by medical certificates and he has not been allowed to join duties on 31.8.89 and was kept away for a period of 7 years and ultimately allowed to presume duties on 16.4.96 and as such the illegal action of the respondents has denied him his valuable right of pension, which is not a bounty and to which the applicant is legally entitled.

4. On the other hand, strongly rebutting the contentions of the applicant the learned counsel of the respondents has raised two preliminary objections, including non-maintainability of the OA as the same is contrary to Section 21 (2) of the Administrative Tribunals Act, 1985, as according to him, the applicant is now praying for treating the period of suspension during the period from 1971 to 1979 which falls beyond three years from the date of coming into force of the Tribunal in 1985. As such the Tribunal has no jurisdiction to entertain the OA. It is also stated that the applicant has approached this Tribunal beyond the period of limitation as he has been aggrieved by an order dated 30.11.98 whereby his claim for pension was rejected but he has filed this OA on 16.1.2000, i.e., more than one year from the date of the impugned order and resort of the applicant to bring the OA within limitation placing reliance on an order passed on 15.3.2000 is not tenable as the same is an inter-departmental communication and has never been marked to the applicant or issued to him and also has not been received by him. The learned counsel of the respondents has placed reliance on the decision of the Apex Court in P.K. Ramachandran v. State of Kerala & Anr., JT 1998 (7) SC 21. As regards the medical record submitted by the applicant it is stated that the same is not legally admissible as the medical record as per para 521 of the rules is to be submitted within 48 hours whereas the applicant has submitted the medical as well as the fitness simultaneously and further more as per Note 3 below Rule 35 (5) of the IREM Vol. I on account of leave including extraordinary leave in case of permanent Railway servants should not exceed five years in one spell. As the

applicant remained absent from 3.4.82 to 31.8.89 the period exceeded the limit of five years and has been rightly treated as leave without pay. By placing reliance on Rule 36 of the Railway Service (Pension) Rules, 1993 it is stated that only during service for which leave salary is payable and on extraordinary leave granted on medical leave shall only count as qualifying service and the other leave would not be counted for reckoning the period as qualifying service. As in the present case the period has been treated as leave without pay the same would not count towards the qualifying service and as such this period has to be deleted from being reckoned as qualifying service. As the applicant has not completed 10 years of qualifying service as per Rule 69 of the rules he is not entitled to pension. As regards the leave account w.e.f. 18.10.60 to 8.12.69 the same is not available with the respondents. The applicant himself remained absent and his total qualifying service for pensionary benefits was only three years five months and two days.

5. The learned counsel of the applicant in his rejoinder re-iterated his pleas taken in the OA and further contended that before treating the suspension period as not spent on duty and also treating the period as leave without pay w.e.f. 1982 to 1996 when the applicant has not been put on duty no reasonable opportunity has been accorded as such the action of the respondents was patently illegal and it is stated that in their letter dated 15.3.2000 the applicant was suspended on 10.5.78 and the same was revoked on 31.3.80 and as he was not accorded any punishment this period should be treated as spent on duty for the purposes of pensionary benefits. It is lastly contended that the

claim for pension and pay and allowances thereof is a recurring cause of action and does not attract the law of limitation and for this he has placed reliance on the decision of the Apex Court in Union of India v. Bhagwan Shukla, 1992 (1) SLJ 190. It is also stated that in the absence of production of the leave record adverse inference should be taken against the respondents. It is also stated that the waring period from 31.8.89 to 15.4.96 should be decided and benefit of pension should be accorded to the applicant.

6. I have carefully considered the rival contentions of the parties and perused the material on record. As regards the grievance of the applicant for treating the suspension period as spent on duty pertaining from 1978 to 1980 and from 9.2.71 to 4.7.71 is concerned, the same is hopelessly barred by limitation. The applicant should have approached the appropriate forum at that time and having abundanted his right he cannot claim any relief and the same is also barred as per the provisions of Section 21 (2) of the Administrative Tribunals Act, wherein any cause of action arisen beyond three years before the coming into force of the Tribunal should not be gone into and on which this Tribunal has no jurisdiction.

7. As regards the contention of the applicant that he remained absent from 1982 to 1989 and thereafter he was not put on duty and ultimately the action of the respondents to put back him on duty on 16.4.96 and thereafter treating the period from 1982 to 1996 as leave without pay despite having the requisite medical record is concerned, I find that by an order dated 14.2.95 the

respondents have decided that as the absence has exceeded maximum limit of five years the applicant was observed to have ceased to be in Railway service but subsequently this order was re-considered and the applicant was put back on duty. The respondents have also treated the period of absence as leave without pay, admittedly, after 1996. The applicant has made a representation after his re-instatement and has also prayed for condonation of period of absence which have been replied to by a letter dated 30.11.98. The applicant then again made a representation and I find that on his representation some parawise comments have been offered by the General Manager but this letter was not served upon the applicant. Apart from it, the law of limitation would not be attracted as the applicant is seeking his pensionary benefits and this is a recurring cause of action as per the decision of the Apex Court in M.R. Gupta v. Union of India, 1995 (5) SC 114. In my view though there is no illegality in the action of the respondents to treat the period of suspension as not spent on duty but yet the period from 1982 to 1996 has been treated as leave without pay, which amounted to break in service and had not been counted as a qualifying service for the purpose of pension as envisaged under Rule 36 of the Pension Rules ibid. Admittedly the respondents have not produced the leave record of the applicant and have not explained as to why before treating this period the applicant was not accorded a reasonable opportunity to show cause. As the applicant has suffered civil consequences on account of the action of the respondents by treating the period as leave without pay, it was incumbent upon the respondents to have afforded him a reasonable opportunity which would be in consonance with the

principles of natural justice and in this view of mine I am fortified by the ratio of the Apex Court in D.K. Yadav v. J.M.A. Industries, 1993 SCC (L&S) 723 and this action of the respondents cannot be countenanced and is in violation of the principles of natural justice, depriving the applicant a reasonable opportunity to defend. Furthermore, we find that the applicant remained absent for five years and observed to have ceased in service of the Railway. The respondents revoked their action and put back the applicant on duty. The applicant has taken more than 7 years to resort to this action and this interregnum period is not counted for towards qualifying service. It was incumbent upon the respondents to have afforded a reasonable opportunity to the applicant. Due to the treatment of this intervening period from 1982 to 1996 the applicant has been deprived of his pensionary benefits as the same has not been counted as qualifying service. I am of the confirmed view that this action is not legally tenable.

8. In the result and having regard to the discussion made and the reasons recorded, I partly allow this OA and set aside the impugned orders at Annexure A-2 and direct the respondents to issue a show cause notice to the applicant before taking any decision on his absence from 3.4.82 to 17.4.96. After taking into consideration the contentions of the applicant a decision shall be taken and in the event the period is to be treated as qualifying service the applicant shall be accorded his pensionary benefits. The aforesaid exercise shall be completed within a period of two months from the date of receipt of a copy of this order. No costs.

S. Raju.

(Shanker Raju)
Member (J)