

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A. No. 1494 of 1996 decided on 11.1.1999.

Name of Applicant : M. T. Johan

By Advocate : Shri V. P. Sharma

Versus

Name of respondent/s Union of India & others

By Advocate : Shri R. L. Dhawan

Corum:

Hon'ble Mr. N. Sahu, Member (Admnv)

1. To be referred to the reporter - Yes
2. Whether to be circulated to the -No
other Benches of the Tribunal.

N. Sahu
(N. Sahu)
Member (Admnv)

(29)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No. 1494 of 1996

New Delhi, this the 11th day of January, 1999

Hon'ble Mr. N. Sahu, Member(Admnv)

M. T. Johan, S/o Sh. P.O. Devasia, R/o
129-B, Old DDA Near ASAD Village,
Shapur Jat, N. Delhi-49

(30)
-APPLICANT

(By Advocate Shri V.P. Sharma)

Versus

1. Union of India through the General
Manager, Northern Railway, Baroda
House, New Delhi.

2. The Divisional Railway Manager,
Northern Railway, Bikaner (Raj).

3. The Divisional Personnel Officer,
Northern Railway, Bikaner (Raj).

(30)
-RESPONDENTS

(By Advocate Shri R.L. Dhawan)

O R D E R (Oral)

By Mr. N. Sahu, Member(Admnv)

The facts of this case are in a brief compass. The applicant retired on 30.4.1993. He joined service on 31.10.1958 in Kota Division, which is under Western Railway. He worked there upto 1.5.1977. On that date he was transferred to Bikaner which comes under Northern Railway. He worked under Northern Railway upto 30.4.1993 on which date he superannuated. When he retired, the respondents have paid him leave encashment for a period of 50 days only. When the applicant protested that he should be paid leave encashment for a period of 240 days, as per the rules, the impugned order, dated 7.12.1995 (Annexure-A-1) was communicated to him to the effect that he had only 50 days to his credit for which the encashment could be made.

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2. After notice the respondents have contested the jurisdiction of the Principal Bench to hear the O.A. on the ground that it was at Bikaner where the impugned order had been passed and it was at Rewari where the applicant was posted at the time of his retirement on 30.4.1993. As these places do not fall within the jurisdiction of the Principal Bench the O.A., it was contended is not maintainable on the ground of lack of jurisdiction. The applicant's counsel moved a petition before the Hon'ble Chairman under Section 25 of the Administrative Tribunals Act, 1985 and obtained orders to retain the case in the Principal Bench. Thus, the defect in the jurisdiction stands cured.

3. The next point made was that the Divisional Railway Manager, Kota Division is a necessary party and he has not been impleaded. It is submitted that the O.A. is not maintainable for non-joinder of the necessary parties. It is not necessary to implead all subordinates as respondents, once the Head of the organisation, namely, the General Manager is impleaded. Impleading the General Manager takes care of all other official respondents working under him. There is, therefore, no merit in this contention.

4. The important point made in the counter was that the leave account of the applicant pertaining to the period of his service in Kota Division except for the period 16.7.1971 to 11.7.1973 was not received from the Western Railway despite persistent efforts made in this regard by the competent authority. It

was also stated that the said records which could be treated as evidence for the leave to the credit of the applicant were not available.

5. Subsequently, in the course of hearing the learned counsel for the respondents placed on record a copy of the Railway Board's letter dated 13.1.1993 on the subject of recasting of leave accounts of the employees whose leave accounts were reported to be missing. The next is the copy of the letter of the General Manager dated 5/17.9.1991 addressed to the Secretary, Railway Board. Finally, a copy of the leave account dated 23.9.1997 as reconstructed, according to the instructions, has been filed.

6. Shri Dhawan, learned counsel for the respondents has very vehemently urged that these are statutory instructions and they are bound to be followed by all Courts in view of the decision of the Hon'ble Supreme Court in the cases of The Railway Board and others Vs. R.P. Subramaniyam and others, (1978)1 SCC 158 and Union of India Vs. Shanti Swarup AIR 1979 SC 1548. Shri Dhawan urged that instructions of the Railway Board being statutory they are as binding as the rules in the Code or Manual and have statutory force. Since the leave account has been reconstructed following these statutory instructions, the Courts cannot find fault with it. In the said reconstructed leave account, according to Shri Dhawan, there is a debit balance of 43 days and as leave encashment had already been paid for 50 days, in the place of 7 days, it is a case of

Swaminarayanan

over payment and since the amount had already been disbursed, the respondents did not want to disturb what was already settled.

(32)

7. The learned counsel for the applicant has argued that the introduction of these two items are of the nature of additional evidence, independent of the pleadings already made on record. The learned counsel Shri Sharma has drawn my attention to the counter as well as to the rejoinder. The counter stated that the leave account was missing and there the matter ended. In the course of arguments without taking the Court's permission counsel for the respondents cannot introduce the reconstructed leave account which was not part of the earlier pleadings. Even the instructions also cannot be introduced at this stage. The learned counsel for the applicant relied on the very famous decision of the Hon'ble Supreme Court in the case of Mohinder Singh Gill and another Vs. Chief Election Commissioner and others, AIR 1978 SC 851. He draws my attention to para 8 of the order of their Lordships at page 858, which is as under -

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"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

8. I must say that there is considerable force in the submission of the learned counsel for the applicant. However, Shri Dhawan states that in the

adjudication of an O.A. substantive justice must be rendered and on mere technicalities the respondents' otherwise legitimate claim cannot be defeated.

(3A)

9. I have carefully considered the submissions of the counsel for both sides. I must state that this Court must respect the discipline in the accepted procedure with regard to pleadings in a particular case. If without the permission of the Court or giving an opportunity to the otherside certain new material is introduced, there can in the first place be no end to litigation and in the second place the focal point of adjudication gets blurred or extended. Both are not permissible in disposing of a petition. Even so, the Court has to render substantive justice. I am also aware of the fact that this Court is not a right forum for adjudicating on the correctness of the facts. This Court can only rely on the pleadings which are in the form of affidavits on record. Keeping these aspects in view, it will be appropriate for me to issue the following directions.

10. The applicant is entitled to leave encashment. Leave is earned on account of service rendered. The earning of leave is a matter of arithmetic; is a matter of fact; is a matter of record. If the respondents have lost the applicant's leave account, it is not on account of the applicant's fault. At the end of three decades of service the applicant cannot be denied what is his due. This due is a matter of legal right. The

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entire leave account is defined under the leave rules and the credit to be given at the end of each year is also defined in the leave rules. Any instructions of either Railway Board or its deputy i.e. the General Manager cannot run counter to the statute passed by the Parliament giving credit of leave to an employee for rendering a particular period of service. I cannot permit an imaginary state of things to be imported into reckoning of a leave account which is contrary to the statutory rules governing credit of leave to an employee. Since earning of leave every year and leave to the credit at the end of service are matters of fact, I find that the instructions of the Railway Board dated 13.1.1993 (No. E(G)91 LE1-3) are unexceptional in so far as Para 2 is concerned and has to be enforced and respected. The proposal of the General Manager Eastern Railway, Calcutta in letter No. E 637/o/pt.II dated 5/17.9.91 to the Secretary (E), Railway Board is at best a proposal and not an instruction. Even if it is camouflaged as an instruction, if it runs counter to the statutory rules, it has to be ignored as invalid. The Hon'ble Supreme Court has also stated that the instructions of the Railway Board or any other statutory authority cannot run counter to the statute. Thus, this is a case where the statute has fixed the leave to be credited to the service rendered by an employee year after year. It is the statute which has fixed how much of leave encashment is permissible at the time of retirement. It was 240 days after giving effect to the recommendation of the Fourth Pay Commission and 300 days after the Fifth Pay Commission's

(35)

recommendations are accepted. These are statutorily fixed. The General Manager's instructions that for the missing period, the average of the actual leave availed of should be calculated; and leave account reconstructed, totally runs counter to these statutory provisions and deserve to be ignored.

11. Even so, I extract hereunder the orders of the Railway Board dated 13.1.1993 for recasting of leave accounts of the employees whose leave accounts are reported to be missing -

"During the meeting of DC under the JCM scheme held on 5/6.9.91, when the question about recasting of leave accounts of the Railway employees whose leave accounts are reported to be missing was raised, it was explained that the matter is being examined in consultation with the Railway Administrations.

The matter has accordingly been examined and it is considered that in cases of a part of leave account being lost, the balance brought forward, as indicated in the part leave account still available, should not be ignored but should be accepted as authentic and the cumulative balance worked out on the basis of the same. In other cases of missing leave accounts these can be reconstructed on the basis of leave account charts, pay bill ledgers, service register entries, office orders on leave, the employee's own statement, muster rolls, absence statements etc. Provisions contained in Rule 1019-1021 of MRPR are also relevant.

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The practice being followed by Eastern Railway appears to be satisfactory. A copy of letter No. E637/o/Pt.II dated 5/17.9.91 is therefore enclosed for guidance. There is also a practice that leave at credit as on 1st Jan. and also as on 1st July is advised to all the employees which may also be followed.

Attention is also invited to the General instructions issued vide letter No (G)3 LE1/3 dated 30-6-89. The Railway Ministry desire that these instructions be followed rigidly so that the difficulties

being faced by the Railway employees particularly at the time of retirement are avoided.

37

12. What is referred to in Para 3 of the above extract is the proposal of the General Manager, Eastern Railway dated 5/17.9.1991 to the Railway Board. This is extracted hereunder -

"Sub:- Recasting of leave account of the employees whose leave accounts are reported to be missing.

Ref:- 1) Board's letter No. E(G)91 LE1/3 dt. 9.8.91

2) Board's letter No. E(G)91 LE1/3 dt. 26.8.91.

The issue has been examined and this railway has the following recommendation to offer.

1. From the incremental stages since appointment it is to be ascertained whether there was only LWP or period (S) which do not qualify for earning leave viz. suspension, dies-non etc. If there is any period of LWP for more than 2(two) days at a stretch, it should be assumed that the leave account bears no credit on that date.

2. The length of service after that date of if there is no such LWP from the date of appointment, leave that would have been earned upto the date of missing of the leave record should be calculated. While calculating the leave earned, it should be seen that the balance of leave (Leave on Average Pay) on that date is not more than 180/240 days as the case may be.

3. To ascertain the quantum of leave taken, the following procedure should be adopted. Leave (LAP) taken during the 5 (five) years from the date the leave record is available should be totalled up and divided by 5 (five) to find out the yearly average of LAP taken. Applying this factor in the number of years of service upto the date for which the leave records are lost, the quantum of leave that might have been enjoyed can be worked out.

4. The difference of 2 and 3 above will give the balance of LAP upto the date the leave record is not available. Balance so arrived at should be recorded as balance brought forward from the date leave record is available in the leave account, which should be attested by one Accounts Officer and one

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Personnel Officer/Leave Record maintaining officer. Thereafter, the leave upto the date of retirement or the date of such attestation, as the case may, should be updated.

(38)

13. Para 3 of the Railway Board's letter dated 13.1.1993 is not an instruction and even if it is OM, it runs counter to the statutory rules and, therefore, is not valid.

14. I accordingly direct the respondents to follow para 2 of the Railway Board's instructions dated 13.1.1993, namely, the leave account can be reconstructed on the basis of leave account charts, pay bill ledgers, service register entries, office orders on leave, the employee's own statement, muster rolls, absentee statements etc. The reason is that leave availed of is a question of fact. It cannot be substituted by imagination or on probabilities. I accordingly direct the respondents to follow the Railway Board's instructions dated 13.1.1993 as at Para 2 and ignore as invalid the proposal of the General Manager dated 5/17.9.1991 and reconstruct the leave account of the applicant on the basis of the Board's guidelines within a period of four months from the date of receipt of a copy of this order. The applicant shall be invited to assist in the reckoning of the leave account. His objections be taken note of and a reasoned order passed and conveyed to him about the actual leave availed of by him. At this stage Shri Dhawan has pointed out items 15, 16, 20 and 21 of the reconstructed leave account by which the actual leave availed has been noted. This is a matter which we must accept if it is

:: 10 ::

otherwise factually correct and the applicant does not object to it. If it is based on facts it has to be accepted as proper and correct. I direct the respondents to reconstruct the leave account on the basis of the Railway Board's instructions extracted above particularly, the last sentence of para 2, after the applicant is invited to place his objections and after the objections are met, the actual leave to his credit should be computed and conveyed to him and leave encashment be paid accordingly. The O.A. is disposed of. No costs.

Narayan Sahu
(N. Sahu)
Member(Admnv)

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