

(7) (X)

Court No.1

CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD

Registration O.A. No.104 of 1986

Habibullah Khan Applicant

Versus

Union of India & Others Opposite Parties.

Hon. Justice Kamleshwar Nath, V.C.

This application under Section 19 of the Administrative Tribunals Act, 1985 is for recovery of leave encashment amount of applicant's retirement.

2. The applicant was appointed as a Commercial Clerk, North Eastern Railway, Gonda on 17.11.47 and retired as an Inspector on 31.7.83. He was entitled to encashment of the leave on average pay which may have been to his credit on the date of his retirement. The appropriate authorities had a leave account for the period only from 1.1.79 to 31.7.83 during which it was recorded that the applicant had earned from time to time and an aggregate of 137 days leave on average pay, of which he had availed from time to time 48 days leaving 89 days leave at his credit. The benefit of this outstanding leave has already been received by the applicant. ~~opposite parties.~~

3. The applicant's case is that the leave account containing the balance of 89 days does not cover the period of his employment from November, 1947 to December, 1978. In para 6, sub paras vi, vi and vii he had pleaded that he had "sufficient leave on average pay" to his credit which on retirement was more than 180 days

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and that on the basis of the recorded leave account for the period from 1.1.79 to 31.7.83 even the prorata leave which he could get would have been more than 180 days.

4. The case of the opposite parties in paras 10, 11 and 12 of the counter affidavit is that the leave account of the applicant for the period prior to 1.1.78 alongwith several other records, not only of the applicant but of several other employees of the railway, were burnt in a fire accident in Izatnagar Division of the North Eastern Railway. It was said that under Rules 1018 to 1020 of the Manual of Railway Pension Rules, a meeting of three Deputy Heads of Departments was constituted to ascertain and determine the amount of leave taken by the applicant and that meeting decided that the applicant should be deemed to have leave of 89 days on the date of his retirement. It was added that the three Deputy Heads of the Departments had given their report after an opportunity to the applicant to produce relevant records/ documents but the applicant had failed to produce any which could help in determining the leave which he had taken. It may be mentioned that the applicant had furnished a chart of leave availed by him from 1969 to 1978 on the basis of diary and notes alongwith representation dated 16.10.84 and again he submitted a statement of leave accrued and availed by his representation dated 22.10.84. The opposite parties contest the accuracy of those charts on the ground that the applicant, having been given an opportunity to produce

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the relevant records, had failed to do so alongwith an application dated 15.10.80, Annexure-4 to the Counter Affidavit.

5. No one is present on behalf of the applicant. I have gone through the records ~~with~~ with the aid of Shri Amit Asthalekar who is appearing on behalf of the opposite parties. He has relied upon the last paragraph of the Committee's report, Annexure-2, in which the Committee took a decision that the applicant may be deemed to have availed 5 days (per year ?) leave without pay and on that basis his qualifying service during the period from 17.11.47 to 6.3.79 may be calculated. This decision proceeds on the basis that in view of the entries contained in the leave account for the period from 1.1.79 to 31.7.83 it could not be said that the applicant may not have availed any leave without pay between 17.11.47 and 6.3.79 as the leave account indicates that he had not taken any such leave during the period from 1.1.79 to 31.7.83. This view of the Committee takes us nowhere. In the first place, it does not determine whether or not the applicant may have availed any leave on average pay. In the second place, if the Committee thought that there may have been uniformity in the pattern of the applicant's service and leave as apparent from the leave account for the period from 1.1.79 to 31.7.83, it could not arrive at a conclusion that the applicant must have availed some Extra Ordinary Leave without pay because the leave account does not indicate that the applicant had taken any leave without pay.

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6. The refusal of the opposite parties to place reliance upon the charts submitted by the applicant alongwith his representations dated 16.10.84 and 22.10.84 cannot be said to be improper because the applicant did not produce them at the earliest opportunity alongwith the papers annexed to his application dated 15.10.80, Annexure-4 to the Counter. Nor any of the diaries or notes on the basis of which the statements annexed to the representation dated 16.10.84 is mentioned to have been prepared have been filed with this application.

7. Even so it will be appreciated that an employee is not required by any principle of law or Rule to maintain documents of his service which may indicate the leave which he might have availed from time to time. It goes without saying that the responsibility of maintaining the appropriate records is of the employer and the burden of proving facts which can be proved primarily by the record must rest upon the employer. If it was a mere case of suppression of records by the opposite parties, there would have been no difficulty so far as this Tribunal is concerned because as urged by the applicant the Tribunal might have adopted the leave account for the period from 1.1.79 to 31.3.83 as evidence of uniform conduct of the applicant and on that basis make a pro-rata calculation for fairness and justice but this case has an extra-ordinary situation inasmuch as it is admitted that the records of service not only

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of the applicant but also of several other railway employees were destroyed in an accidental fire and therefore the opposite parties cannot be said to have suppressed any relevant material. This extraordinary situation could have been resolved by the appropriate authorities of the railways to take a policy decision in such situation. Rules 1018 to 1020 of the Manual of Railway Pension Rules relied upon by the learned counsel for the opposite parties do not directly deal with the question of determination of earned leave at the disposal of its employee. They deal with determination of the period of qualifying service and perhaps only indirectly for that purpose the Committee appointed for the purpose may be in a position to determine the leave account. This Tribunal is not in a position to say anything more in this regard for want of any further material in the form of rules or decisions of the competent authority of the railways. All that can be said is that the authority competent to take policy decisions in railway matters concerning employees whose records have been lost should consider the matter either by itself or by a properly constituted High Power Committee to determine a fair and just policy. It would be very hard to presume that an employee must have availed some leave and therefore must have availed all the leave. In the present case, the view contained in Annexure-2 of the Counter Affidavit is on the face of it strange because having noticed that between the period from 1.1.79 to 31.7.83, the applicant had not availed of any

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leave without pay and having observed that there must have been an uniform pattern during the tenure of applicant's service, the Committee, nevertheless, went on to say that the applicant must have availed five days (per year ?) of leave without pay between 17.11.47 and 6.3.79. I should not like to say that determination of pension etc. of the applicant on that basis may be erroneous and that is not a question before this Tribunal; but the error apparent in the reasoning cannot escape notice. What I should like to say is that in matters like these, ^{an} a humanitarian and compassionate attitude should be adopted by the competent authorities and even if it may not be presumed that the applicant had all the leave at his credit at all times, it may also not be presumed that he may have availed all the leave at his credit at any time. The situation must be resolved by a policy decision of the competent authority which decision, in the absence of any rules, would naturally have a binding effect upon the employee.

8. The petition, for the reasons stated above, is partly allowed and the opposite parties are directed to re-examine the question of the period of leave on average pay which may be fairly deemed to be at the credit of the applicant on the date of his retirement taking into consideration the observations contained in the body of the judgement. The opposite parties will pass suitable orders within four months from the date of receipt of the copy of this order. Parties will bear their costs.

[Signature]
Vice Chairman

Dated the 23rd Nov., 1989.
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