

Set-aside order

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH
~~XXXXXXXXXXXX~~

O.A. No. 382/89

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~~T.A. No.~~

DATE OF DECISION 8.4.1991

Shri C.K.Makwana Petitioner

Mr.B.R.Kyada Advocate for the Petitioner(s)

Versus

Paschim Railway Karmachari Parishad Respondent
through

Mr.B.K.Sharma Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. M.M.Singh

: Administrative Member

The Hon'ble Mr. R.C.Bhatt

: Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *yes*
2. To be referred to the Reporter or not? *yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *no*
4. Whether it needs to be circulated to other Benches of the Tribunal? *yes*

Shri C.K.Makwana,
Additional Divisional Railway Manager,
Western Railway, Kothi Compound,
Rajkot.

: Applicant

(Advocate: Mr.B.R.Kyada)

Versus

1. Shri B.K.Sharma
Station Master,
Jadar, Dist. Sabarkantha
(Branch Secretary, Paschim
Railway Karmachari Parishad,
Himatnagar).
2. Mr.Matadin,
through: Shri B.K.Sharma,
Station Master, Jadar,
Dist. Sabarkantha.
3. Mr.Dadankhan,
through: Shri B.K.Sharma,
Station Master,Jadar
District Sabarkantha.

: Respondents

(Paschim Railway Karmachari
Parishad through: Mr.B.K.Sharma)

J U D G M E N T

O.A.No.382/89

Date: 8.4.1991

Per: Hon'ble Mr. R.C.Bhatt

: Judicial Member

1. This original application under Section 19 of the Administrative Tribunals Act, 1985 is filed by the Additional Divisional Railway Manager, Western Railway Rajkot for quashing and setting aside the award passed by the Presiding Officer of the Central Govt. Industrial Tribunal, Ahmedabad in Reference (I.T.C.) No.40/84 dated 5th November, 1988.
2. The facts leading to this application are as under
The Govt. of India, Ministry of Labour and Rehabilitation made a reference of the Industrial Disputes to the Industrial Tribunal in exercise of the powers conferred under Section 10(1) (d) of the Industrial Disputes Act, 1947. The dispute referred to the Industrial Tribunal was as under:

"Whether the action of the management of Divisional Railway Manager, Western Railway, Rajkot in not promoting Shri Matadin as LWI on adhoc basis and promoting Shri H.R.Bosia his junior is justified? If not, to what relief, Shri Matadin is justified?

Whether the action of the management of Divisional Manager, Western Railway, Rajkot in not paying wages to Shri Dadan Khan for the period from 21.7.1982 to 30.11.82 and also punishing him by way of DAR action simultaneously are justified? If not to what relief is the workman concerned entitled?".

3. The respondent No.1 Paschim Railway Karmachari Parishad, a Union, in support of the demand of the workman, had filed its claim statement in support of the demand of the workman before the Industrial Tribunal and the Western Railway, through its Divisional Railway Manager, Rajkot had also filed its written statement before the said Tribunal. The parties to the said reference had produced documents in support of their respective claim but had not lead any oral evidence before the said Tribunal. The Industrial Tribunal, after hearing the parties and going through the documentary evidence on record, allowed both the demands made in the reference and directed the Railway to pay costs of Rs.150 to the Union and made award accordingly on 5th November, 1988.

4. Feeling aggrieved and being dissatisfied by the said award of the Industrial Tribunal in reference (ITC) 40/84, the Western Railway has filed this application. The Paschim Railway Karmachari Parishad i.e. Union of Employees is joined as Respondent No.1 while the two concerned workmen M/s. Matadin and Dadankhan are respondent No.2 and 3 respectively. The respondent No.1 Union has filed written statement before this Tribunal resisting the application.

5. Mr.B.K.Sharma, Secretary of the respondent No.1 Union took the preliminary objection about the maintainability of this application first on the ground that same is barred by Section 21 of the Administrative Tribunals Act and secondly that this Tribunal has no jurisdiction to entertain

this application. So far objection of limitation is concerned, there is no substance as this application is filed within one year from the date of the award of the Tribunal. Hence it is not barred under Section 21 of the Administrative Tribunals Act. Mr. Sharma further submitted that the appropriate Govt. has published the award under Section 17 of the Industrial Disputes Act and hence it has become enforceable under Section 17A of the Industrial Disputes Act and the said award is binding to the parties under Section 18 of the Industrial Disputes Act. Therefore, according to him, the Western Railway cannot file this application and, that, after the award is published, it cannot be called in question by any Court, in any manner whatsoever, and therefore this Tribunal has no jurisdiction to entertain this application. Now so far the claim of finality of award under Section 17 and 17 A of the Industrial Disputes Act are concerned, it may be noted that it is subject to the result of the determination of the same by higher authority provided under law. So the question which arises at this stage is whether this Tribunal has jurisdiction, power and authority to entertain this application under Section 19 of the Administrative Tribunals Act against the award made by the Industrial Tribunal. This question of jurisdiction was raised by the Respondent Union at the time of admission of this application and the Bench of this Tribunal by an order dated 21.3.1990 had rejected the contention of the respondent about jurisdiction and admitted the application and therefore this contention again cannot be raised. Mr. Kyada for the applicant relying on the decision in Komal Chand Daduram etc. vs. Union of India and others reported in AIR 1988(2) CAT 412 (Jabalpur Bench) submitted that as held in that decision, the Administrative Tribunal having been constituted under Article 323^A of the Constitution gets the same jurisdiction in service matters as the High Courts have and the Administrative Tribunals

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could reverse or modify the decision of the Industrial Tribunal Mr.Sharma, on the other hand, for Respondent No.1 submitted that though this is an application under Section 19 of the Administrative Tribunals Act, in substance, the applicant has filed an appeal against the award of the Industrial Tribunal and he submitted that this Tribunal cannot sit in appeal over the award of the Industrial Tribunal.

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a larger Bench of five members of the Central Administrative Tribunal in a case of A.Padmavally and another vs. CPWD III (1990) C.S.J.(CAT) 384 (7) has held that the powers under article 226 and 227 of the Constitution of India vest in the Administrative Tribunal against the award of the Industrial Tribunal under I.D.Act provided cases of employee is covered by Section 14 of the Administrative Tribunals Act. However, the exercise of power is discretionary and would depend on the facts and circumstances of each case. In this view of the matter, it cannot be said that this Tribunal has no jurisdiction to hear the present application being against the award of the Industrial Tribunal and therefore the contention of the respondents about want of jurisdiction is rejected. We now proceed to examine the case of the applicant in exercise of our power under Article 227 of the Constitution of India, in view of the decision in A.Padmavally's case (supra).

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6. The learned advocate for the applicant - railways submitted that the Industrial Tribunal has committed error of law and error of evidence, that the Tribunal has erred in considering the question of dispute beyond the terms of reference, and, therefore, order passed by the Tribunal was without jurisdiction. He also submitted that the Industrial Tribunal has misdirected itself and did not

confine itself to the terms of reference. Mr.Sharma for the respondents - Union submitted that the award passed by the Industrial Tribunal is in accordance with law and evidence on record and that there is no error of law or error of evidence.

7. The first dispute referred to the Industrial Tribunal for the adjudication was

"whether the action of the management of Divisional Railway Manager, Western Railway, Rajkot in not promoting Shri Matadin as LWI on adhoc basis and promoting Shri M.R.Bosia his junior is justified? If not, to what relief, Shri Matadin is justified?"

The Tribunal, after considering and examining the evidence on record, came to the conclusion that the promotion given to Shri Bosia was illegal and Mr.Matadin, as he was senior to Mr.Bosia, should have been promoted to the post of WLI and Mr.Matadin should be deemed to have been promoted as WLI from the date Mr.Bosia had been given the promotion with all consequential benefits. So far the case of Mr.Matadin is concerned, as per the facts mentioned in the award of the Tribunal, the Rajkot division of the Railway, vide its letter dated 5th March, 1979 had called for application for six posts of Welfare Inspector (WLI) out of which one post was reserved for S.C. and another for S.T. and the eligibility criteria and other conditions for filling in the said post of WLI was as per the railway's letter dated 6.3.1979 in which it was mentioned in para 5 "staff who satisfy the above conditions would be subjected to a selection which will consist a written as well as oral test". The concerned workman Shri Matadin (S.C.) and Shri Bosia (S.C.) and some others had applied for the above post and names in order of combined seniority list of the employees who were declared passed in written test and who were considered eligible to appear in viva voce test was circulated to all concerned by the railways and in the said list Shri Matadin ranked at Sr.No.23 while Shri Bosia

ranked at Sr.No.33 for which there is no dispute. It is also mentioned in the award that as per the said list in the category of S.C. Shri Matadin ranked at Sr.No.2 and Shri Bosia ranked at Sr.No.7. It also appears from the award of the Industrial Tribunal that Railway vide its General Circular dated 7th November, 1979 had issued instructions because of the "Supreme Court's stay order on 40 point roster and reservation in non-selection post" and so far as "selection post" are concerned, it is stated as under:

"Selection posts : (II) Operation of panels upto 16.10.79 (i.e. promotion affected from the panel upto 16.10.1979) the date of the stay order will be treated as regular. Thereafter unreserved vacancies in selection grades should be filled up provisionally from selected candidates. The reserved vacancies should be kept unfilled for the time being in view of the Supreme Court's stay order. However, if any individual Railway administration considers it necessary till fill up such posts also in the public interest, they may do so by promoting the senior most employee treating such appointment as purely adhoc."

8. The railway vide its memorandum dated 17.12.1979 issued provisional panel wherein four employees had been selected in which neither the name of Shri Matadin nor of Shri Bosia were found in the panel list. However, the railway vide its memorandum dated 8.2.1980 issued a fresh provisional panel wherein names of Shri Bosia and one Shri Chaudhary has been included and they were ranked below the four employees already mentioned in the earlier provisional panel list. The case of the Union before the Industrial Tribunal was that once the list was finalised, it could only be changed by the higher authority and in addition thereto as per the Railway General Circular dated 7th November, 1979, the senior most employee was to be given the promotion and therefore, the second list which was prepared was not legal and valid and the reliance was placed on 'Amendment of the Panel' rule which has been referred to in the award itself as under:-

"After the competent authority has accepted the recommendations of the Selection Board, the names of the candidates will be notified to the candidates. A panel once approved should normally not be cancelled or amended. After the formation and announcement of panel with the approval of the competent authority if it is found subsequently that there were procedural irregularities or other defects and it is considered necessary to cancel or as amend such a panel, this should be done after obtaining the approval of authority next higher than the one that approved the panel".

Therefore, the second list which was prepared was illegal, and it was also not done after obtaining the approval of the authority next higher than the one that approved the panel. Moreover, as per the general circular of the railway dated 7.11.89, the post was to be filled in by promoting the senior most employee and as Shri Matadin was senior to Shri Bosia, Shri Matadin should have been promoted and not Shri Bosia. The learned advocate for the applicant Mr. Kyada submitted that the Tribunal has not considered that the post WLI was a selection post and only the employee who had been placed on the panel can have a right for promotion to a selection post which was not considered by the Tribunal and thus has committed an error. There is no substance in this contention because when the railway issued provisional panel list dated 17.12.1979 of four employees, there was no name of either Shri Matadin or Shri Bosia in the said panel list. It is also contended by Mr. Kyada that after the oral test, provisional panel of four employees was notified on 17.12.1979 and at that time of notifying this panel of four employees the candidates of S.C./S.T. was not included and even though, the Tribunal has erred therein considering that they were eligible and others were not eligible. The question before the Tribunal was whether the railway had power to issue a fresh provisional panel dated 8.2.1980 inserting the name of Shri Bosia and one Shri Chaudhary and could be put in rank below the four employees already mentioned in the earlier provisional panel list in which there was no name of Shri Bosia or Mr. Chaudhary. It is not in dispute that Mr. Matadin was

senior to Shri Bosia. Therefore, apart from the fact that the list finalised could only be changed by the higher authority, the Railway's General circular dated 7.11.79 is very clear that the reserved vacancies had to be kept unfilled for the time being in view of the Supreme Court's stay order. However, if any individual railway administration considered it necessary to fill up such posts also in the public interest, they may do so by promoting the senior most employee treating such appointment as a purely adhoc. Mr. Kyada submitted that in the selection, it was not necessary that the senior man had to be placed on the panel, but the employee who qualified in both test i.e. written test as well as oral test, was only placed in the panel. He submitted that as Shri Matadin did not qualify the oral test his name was not placed on the panel. Mr. Sharma, submitted that this contention made by the learned advocate is absolutely incorrect and there was no material on record to show that Shri Matadin had not qualified in the oral test. In the written statement in ground 4.5 while meeting with the allegation made on the point in the application at para 3.5 it is contended that as regards failure of Shri Matadin for selection it was quite wrong and no material was placed to prove the same. Moreover, the Tribunal had to decide the case on the lines of the reference only and it is not in dispute that Shri Matadin was senior S.C. candidate and was due for promotion, that the Tribunal had never interfered with the result of selection but the Railway could not amend the panel as per its will. The Railway had to act according to the general circular dated 7th November, 1979 by which the post was to be filled in by promoting the seniormost employee and therefore the Tribunal has rightly held that Shri Matadin was senior to Shri Bosia and the allegation that Shri Matadin did not pass in the oral test has been replied in written statement at para 4.9 by the respondents that no such authority was produced by the railway which could prove that Shri Matadin had failed and no such

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documentary evidence is shown to us also by the applicant. In para-8 of the award the Industrial Tribunal has considered this point of the Railway which had contended that Shri Matadin's name was not there on the panel whereas his junior Shri Bosia was placed on panel which was approved by the union on the two counts which appeared just and proper to the Tribunal looking to the different circulars and therefore, the Industrial Tribunal did not agree with the contention taken on behalf of the Railway. The Tribunal has considered the Railway Circulars which have been embodied in the award. Therefore, the contention raised by Mr. Kyada that the Industrial Tribunal had committed an error of law and of evidence in reaching the conclusion in deciding that as Shri Matadin was seniormost employee, he should have been promoted and not Shri Bosia is without merit and the same deserves to be rejected.

9. It was urged on behalf of the applicant that the Industrial Tribunal has erred in considering the Board's letter dated 5.2.1969 and it is submitted that the inclusion of names of two persons from S.C. and S.T. were not taken from out side but they were considered fit on merit and therefore after receiving the explanation from the Head quarter office, their names were included. It is important to note that the Tribunal has considered the letter dated 5.2.1969 in which it is mentioned that a panel once approved should normally not be cancelled or amended that after the formation an announcement of panel, with the approval of the competent authority, if it is found subsequently that there were procedural irregularities or other defects and it is considered necessary to cancel or amend such a panel, the same should be done after obtaining the approval of the authority next higher than the one that approved the panel. As observed earlier in the provisional panel there was no mention of the name of either Mr. Matadin or Mr. Bosia but the railway by

memorandum dated 8.2.1980 issued fresh provisional panel where in names of Mr.Bosia and one Mr.Chaudhary were included inspite of the fact that Mr.Matadin was the seniormost employee and therefore the Tribunal rightly held that it was in violation not only of the circular dated 5.2.1969 but circular dated 7.11.1979 by which the seniormost employee was to be taken for appointment on purely adhoc basis. It is submitted on behalf of the respondent No.1 that no merit list, marksheet of written test as well as oral test, were placed before the Industrial Tribunal and there was no documetary evidence before the Industrial Tribunal that Mr.Matadin had failed in oral test and therefore there was no justification to ~~ex~~clude his name by putting or including the name of a junior employee namely Mr.Bosia. In our opinion, also the contention taken by the applicant has no substance and we agree with the finding of the Industrial Tribunal that on reading the circulars the illegality was committed by including the name of Mr.Bosia in preference to the seniormost employee Mr.Matadin.

10. Therefore, so far the reference regarding the first dispute is concerned, we do not agree with the learned advocate for the applicant that the Tribunal has committed any error of law or error of evidence or has considered the question in dispute beyond the terms of reference or that the order passed by the Tribunal was without jurisdiction or that it has misdirected itself. The Tribunal, after having held that the promotion given to Mr.Bosia was illegal, rightly held that Mr.Matadin is deemed to have been promoted as WLI from the date Mr.Bosia has been given his promotion with all consequential benefits.

11. So far the second dispute referred to the Industrial Tribunal with regard to the action of the management of the Divisional Railway Manager, Western Railway, Rajkot in not paying wages to Shri Dadankhan i.e. respondent No.3 for the

period from 21.7.1982 to 20.11.1982 and also punishing him the way of DRA action simultaneously were justified and if not what relief was the concerned workman entitled, the Industrial Tribunal has held that the punishment inflicted on Shri Dadankhan was illegal and he should have been granted sick leave and wages for the period of sickness and the disciplinary action taken against him was also held illegal.

12. Mr.Kyada, learned advocate for the applicant submitted that Mr.Dadankhan remained on unauthorised leave from 21st July, 1982 to 30th November, 1982 without informing the unit incharge under whom he was working nor to the railway doctor at Mehsana and he had not produced any sick certificate from medical officer about his inability to attend the work and the Tribunal had erred in not considering that the certificate which was issued by railway doctor was not fitness certificate but was only certificate authorising the railway employee to report for duty and the certificate produced by the concerned workman from private doctor was not accepted by the railway doctor under Rule S.R.2/8. The Industrial Tribunal has discussed this aspect at length in para 8,10,11 and 12 of the award. The respondent No.3 was residing in the village when he fell sick all of a sudden and he had produced the medical certificate of a private doctor from whom he had taken the treatment, that on the authority of the private doctor's certificate he obtained the duty certificate from the railway doctor and resumed duties. Mr.Kyada submitted that the railway doctor's certificate was not fitness certificate and Rule S.R. 2/8 was violated by the concerned workman. The Industrial Tribunal has referred to the contention of the Railway in ~~in~~ the written statement filed before the Industrial Tribunal as can be seen from para 11 of the award:

"In para 14 of the written statement the Railway admits that Shri Dadan Khad has taken duty certificate from railway doctor and in para 16 the railway says that railway doctor has not issued a fitness certificate."

The main contention of the railway was that the prescribed procedure has not been followed by the respondent No.3 and therefore sick leave was not granted and the wages for sick leave were not paid and also disciplinary action had been taken for remaining absent without leave. On this point, the Industrial Tribunal has observed that relevant documents or information were not put before the Tribunal about the nature of the sickness and the record was available with the railway, so at least railway should have guided the Tribunal as to whatever the real facts. The Tribunal has observed that merely on the ground that the procedure prescribed had not been followed, the workman cannot be punished. The railway should have satisfied the Tribunal that the action which had been taken was justified on facts and principles of natural justice. Moreover, it cannot be disputed that a certificate from the private doctor was submitted by respondent No.3 to the Railway doctor who in turn issued fitness certificate and therefore the Tribunal rightly held that the necessary implication would be that the railway doctor had believed the case of the concerned workman to be genuine and the railway had committed an error by rejecting the claim of the respondent No.3 for sick leave and consequential wages for sick leave. That it cannot be in dispute that the respondent No.3 was really sick and on mere technicality not supported by reliable evidence the railway committed an error in rejecting the claim of respondent No.3 for sick leave and also wages for sick leave. Moreover, the railway had also inflicted the punishment of not granting the sick leave and not granting wages for sick leave coupled with the disciplinary action without following departmental procedure by issuing show cause

notice, etc. The Tribunal has observed in its award that on the records and pleadings of the parties it appears that no such formalities were performed and the principle of natural justice has been grossly violated and therefore the punishment inflicted on the concerned workman was held illegal.

13. Mr.Sharma for respondent No.1 submitted that every employee has a right of taking treatment from the doctor of his choice and not from the railway doctor and there was no illegality committed by respondent No.3 in obtaining the certificate from the private doctor whose treatment he had taken and on the basis of which also the railway doctor had given the duty certificate. He submitted that the railway not satisfied with this action inflicted two punishments, one marking the absence of respondent No.3 so that he lost his pay and another by punishing him under DAR and thus inflicted two penalties for the same alleged crime against principle of natural justice. Mr.Sharma submitted that the respondent No.3 was regular employee and permanent employee and it is not compulsory that one has to be examined by railway doctor in case of sickness. He submitted that there is no difference between duty certificate and fitness certificate.

14. In the instant case, the Industrial Tribunal has on the strength of the evidence before it rightly held that the railway had committed illegality by not paying wages to respondent No.3 for the period of his sickness specially when the railway doctor had given the duty certificate on the basis of the private doctor's certificate obtained by the respondent No.3 and the Industrial Tribunal has also rightly held that the disciplinary action taken against respondent No.3 was against the principle of natural justice and therefore he rightly held that the punishment inflicted upon the respondent No.3 was illegal and consequently he should be granted sick leave and should be paid wages for a period of his sickness and the disciplinary action taken against him

should be withdrawn.

15. Therefore so far the second dispute is concerned, we hold that there was no illegality committed by the Industrial Tribunal in reaching the conclusion, that the Industrial Tribunal had not acted beyond the terms of reference, nor the finding was arbitrary or perverse and the contentions advanced on behalf of the applicant that the findings of the Industrial Tribunal on both the disputes were illegal erroneous arbitrary beyond the terms of reference cannot be accepted.

16. It would be necessary to mention that the power under article 227 of the Constitution of India is to be exercised sparingly and in cases in which miscarriage of justice was found in the order under challenge. It is not entitled to interfere in every order like the appellate forum. The powers of this Tribunal in such cases are very narrow and this Tribunal may interfere against the order of the Industrial Tribunal in cases of (a) erroneous assumption or excess of jurisdiction, (b) refusal to exercise jurisdiction, (c) error apparent on the face of the record, (d) violation of principles of natural justice, (e) arbitrary or capricious exercise of authority (f) error of law which has resulted in miscarriage of justice. In this case, we do not find any such error committed by the Industrial Tribunal. Hence, we do not see any justification to interfere with the award passed by the Industrial Tribunal.

17. Lastly Mr. Sharma for the respondents submitted that the applicant has concealed one glaring fact that the contempt application has been filed by the respondents against the applicant before the Hon'ble High Court, Gujarat for not complying with the award passed by the Industrial Tribunal. He submitted that to circumvent the provision of Contempt of Courts Act, 1971, this application is filed

which is absolutely improper on the part of the Railway administration. We do not consider it necessary to deal with this allegation made by Mr. Sharma because on merits we hold that the applicant has failed to establish its case before us.

18. The result is that the application having no merits deserves to be dismissed and the same is dismissed with no orders as to costs.

R.C. Bhatt

(R.C. Bhatt)
Judicial Member

M.M. Singh

(M.M. Singh)
Administrative Member