

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

O.A. No. 948 of 1996

Present : Hon'ble Mr. Justice S.N. Mallick, Vice-Chairman

Smt. Sibarani Chatterjee, w/o Late
Bibhuti Bhusan Chatterjee, House Wife,
residing C/o. Sri Rampada Mahapatra,
East Inda, Saratpalli, Jafala Road,
P.S. & P.O. Kharagpur, Dist. Midnapore.

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Applicant

-Vs-

1. The Union of India, represented by
the General Manager, South Eastern
Railway, Garden Reach, Calcutta-700043 ;

2. The Chief Personnel Officer,
South Eastern Railway, Garden Reach,
Calcutta - 700 043 ;

3. The Divisional Railway Manager,
South Eastern Railway, Kharagpur,
Dist. Midnapore.

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Respondents

For applicant : Mr. S. Mitra, Counsel

For respondents : Ms. B. Ray, Counsel

Mr. C. Samaddar, Amicus Curie

Heard on : 6.1.98 & 14.1.98

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Order on : 09.02.1998

O R D E R

In this application, the petitioner has prayed for a
direction on the respondents to sanction her family pension with
effect from 11.6.86, which is the date of the death of her hus-
band in harness.

2. The admitted case of the petitioner is as follows :

The husband of the petitioner Late Bibhuti Bhusan Chatterjee
was a casual labour working in the South Eastern Railway under
Kharagpur Division on and from 24.5.70. After rendering 120 days

continuous service as casual labour, he was given temporary status under the relevant railway rules. He was, however, screened and empanelled by the Screening Committee for being absorbed on regular basis as per order dated 19.3.86 passed by the Assistant Engineer/KGP, Assistant Engineer(V)/KGP and Assistant Personnel Officer(E)/KGP under No.E/12/V after obtaining sanction from the Divisional Railway Manager in the matter of age relaxation of the said Bibhuti Bhusan Chatterjee along with other empanelled employees(Vide Annexure 'A/1'). But before his service could be regularised and he could be appointed in a permanent post on the basis of the aforesaid panel, the said Late Bibhuti Bhusan Chatterjee died on 11.6.86. The present petitioner made a representation to the respondent authorities on 3.6.88(Vide Annexure 'A/2') for giving her dues including family pension. But the railway authorities by their order dated 9.3.89(Annexure 'A/3') released only the gratuity. Thereafter, the petitioner served a Lawyer's notice upon the respondent No.1 as per Annexure 'A/4' dated 1.6.93 demanding sanction of family pension to her. It has been urged in the application that by an order dated 23.4.80(Vide Annexure A) passed by the Chief Personnel Officer, S.E. Railway, the respondent No.2, it was notified on the basis of a decision taken by the General Manager, South Eastern Railway that in partial modification of the extant orders, the casual labours, who were on the verge of retirement(i.e. within one year to retire) and more than 15 years service or so, should be screened and absorbed in regular department followed by confirmation in regular establishment with a view to extending the pensionary benefits including family pension to them/their dependents' relatives as the case might be. It is the case of the petitioner that her husband was empanelled on the basis of the

said order/notification and it is her case that the panel as per Annexure 'A/1' including the name of her husband would go to show that her husband's service was regularised on the basis of the notification dated 23.4.80 but he could not be appointed and posted in a regular establishment as he had expired on 11.6.86. According to the applicant, she is entitled to family pension.

3. The respondent railway authorities have challenged the applicant's prayer for family pension by filing a reply. It is the case of the respondents that the petitioner's husband expired on 11.6.86 after rendering 16 years 11 days service without being regularised due to non-availability of post/vacancy in the unit in which he was working before his death. Till his death, no employee junior to the petitioner's husband was regularised. His juniors were regularised on 6.12.93 after the death of the applicant's husband. It is also the case of the respondents that the notification relied upon by the petitioner as per Annexure 'A' had had no application to the petitioner's husband. It was, on the other hand, applicable to a specific group of employees, who were going to retire within one year from the date of notification having more than 15 years of continuous service. On the date of the notification, the petitioner's husband was not going to retire within one year, nor he had 15 years of continuous service so as to be eligible for screening for being absorbed on regular basis. Admittedly, the petitioner's husband was appointed as a casual labour on 24.5.70. It is, however, admitted that a panel was made on 19.3.86 as per Annexure 'A/1', but the absorption of the candidates from the said panel in regular vacancies would not be automatic but would be dependent on the availability of vacancy. Due to non-availability of vacancy, the question of

regularisation of the petitioner's husband could not and did not arise. It is specific case of the respondents that the petitioner's husband was not regularised at any point of time but his name was, however, empanelled for the purpose of regularisation against permanent vacancy when available. It is also the case of the respondents that as the petitioner's husband died before his service could be regularised by absorption in a regular permanent post, the question of giving family pension to the present applicant does not arise and is barred by relevant rules in this regard.

4. I have heard the Ld. Counsel appearing for the petitioner and the Ld. Counsel appearing for the respondents and I have gone through the Annexures on record. Mr. C. Samaddar, Ld. Counsel has been requested by this Court to act as Amicus Curie in this matter and I have also heard him. The Ld. Counsel appearing for the purpose and Mr. Samaddar, Ld. Counsel appearing as amicus curie have submitted written notes of arguments in addition to their verbal submissions.

5. The only question in this case is whether the petitioner is entitled to get family pension according to law and under the provisions of the relevant rules applicable to her deceased husband who died in harness as a casual labour with temporary status before he could be regularised and appointed in a permanent post on the basis of the panel as per Annexure 'A/1'.

6. In order to decide this question, it would be necessary to look into the relevant rules of the Indian Railways. Under Rule 3, Sub-Rule(23) of the Railway Services(Pension) Rules - 1993, a railway servant does not include casual labour or person lent from

a service or a post which is not under the administrative control of the Railway Board to a service or a post which is not under such administrative control. Under Rule No.20 of the said Pension Rules, it is laid down that subject to the provisions of the rules contained therein, qualifying service of a railway servant (to entitle him to pension) (supplied) shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. Rule No. 101 of the Indian Railway Establishment Code - Vol.1 (Fifth Edition - 1985) states that the rules contained therein shall govern the general conditions of service applicable to Railway servants, some of which correspond to the Fundamental Rules and Supplementary Rules applicable to all civil servants (other than railway servants) under the Indian Union, who are subject to the rule making powers by the President. Rule 103(43) defines a Railway servant. It runs as follows :-

"(43) Railway servant means a person who is a member of a service or holds a post under the administrative control of the Railway Board. It also includes a person who is holding the post of Chairman, Financial Commissioner or a Member of the Railway Board. Persons lent from a service or post which is not under the administrative control of the Railway Board to a service or post which is under such administrative control do not come within the scope of this definition. The term excludes casual labour. "

7. As per Rule 1501 of the Indian Railway Establishment Manual - Vol.1 (Revised Edition - 1989), the definition of temporary railway servant is as follows :-

" A "temporary railway servant" means a railway servant without a lien on a permanent post on a Railway or any other administration or office under the Railway Board. The term

does not include "casual labour", including 'casual labour with temporary status', a "contract" or "part-time" employee or an "apprentice".


8. Rule 2001 of the Indian Railway Establishment Manual - Vol. II (Revised Edition - 1990) also clarifies the position so far as a casual labour is concerned. It provides as follows :-

" Casual Labour refers to labour whose employment is intermittent, sporadic or extends over short periods or continued from one work to another. Labour of this kind is normally recruited from the nearest available source. They are not ordinarily liable to transfer. The conditions applicable to permanent and temporary staff do not apply to casual labour.

9. Rule 2006 of the said Indian Railway Establishment Manual - Vol. II states as follows :-

" Absorption of casual labour in regular Group D employment may be considered in accordance with instructions issued by the Railway Board from time to time. Such absorption is, however, not automatic but is subject, inter-alia, to availability of vacancies and suitability and eligibility of individual casual labour and rules regarding seniority unit method of absorption etc. decided by the Railway Administration. "

Reference may also be made to the provision of Rule 2005 of the said Indian Railway Establishment Manual - Vol. II, which deals with the entitlements and privileges admissible to casual labour who are treated as temporary (i.e. given temporary status) after the completion of 120 days or 360 days of continuous employment (as the case may be). It is specifically noted there that such casual labour who acquire temporary status will not, however, be



brought on to the permanent or regular establishment or treated as in regular establishment on Railways until and unless they are selected through regular Selection Board for Group-D post in the manner laid down from time to time. It is also made clear there that no temporary post shall be created to accommodate such casual labour, who acquire temporary status, for the conferment of attendant benefits like regular scale of pay, increment etc. and that after absorption in regular employment, half of the service rendered after attaining temporary status by such person before regular absorption against a regular/temporary/permanent post, will qualify for pensionary benefits, subject to the conditions prescribed in the Railway Board's letter No.E(NG) II/78/CL/12 dated 14.10.80 and in letter No.E(NG)II/85/CL/6 dated 28.11.86 in the case of Project casual labour.

10. Mr.C.Samaddar, Ld.Amicus Curie has placed before me the Family Pension Scheme for Railway employees - 1964 contained in Establishment Srl.No.5/64 Circular No.SPO(R)/30/193/G/664 dated 9.1.64.

11. The above Family Pension Scheme is applicable to all regular employees on pensionable establishment-temporary or permanent but are not on contributory Provident Fund basis - who are in service on the 1st January, 1964 or are recruited thereafter. It is clearly stated in Clause 13 of the said Scheme that the same is not applicable, inter-alia, to casual labour.

12. The entire case of the present applicant is to be judged on the basis of the aforesaid rules contained in Indian Railway Establishment Code as well as in Railway Services(Pension),1993.

The rules contained in Indian Railway Establishment Code have been framed by the Railway Board in exercise of the powers delegated by the President under proviso to Rule 309 of the Constitution, while the Pension Rules - 1993 are issued by the President himself under proviso to Art.309 of the Constitution. The rules are specific and clear in their contents and these must be taken into consideration by this Tribunal while exercising its judicial powers according to law.

13. It has been contended by the Ld.Counsel appearing for the petitioner that on the basis of the Annexure 'A' dated 23.4.80, which is a circular issued by the Chief Personnel Officer, South Eastern Railway regarding pensionary benefits of casual labour read with Annexure - 'A/1', the panel prepared for absorption of casual labours including the name of the applicant's husband at Srl.No.9 as per Establishment letter dated 19.3.86, the applicant's husband should have been absorbed and his service should have been regularised so as to entitle him to all service benefits including family pension. It has been urged by Mr.Mitra, Ld.Counsel appearing for the petitioner that the delay in screening the applicant's husband on the part of the Railway-respondents for his absorption in a regular post is only a technical flaw for which the applicant cannot suffer. Mr.Mitra while relying upon a Tribunal judgment, reported in 1992(1) A.T.J. 543(Cal)(Smt.Malati Kar & Ors. -vs- Union of India & Ors.) and upon a Full Bench judgment of the Tribunal, reported in A.T.J. Sept.1997(2) Vol.23(Cal)(Gita Rani Santra -vs- Union of India & Ors.), has argued that a casual labour with temporary status(in this case the applicant's deceased husband), who has been working continuously for a long period

but not regularised before his death, shall be deemed to have been regularised on the date of his death for the purpose of sanction of family pension to his family or in the alternative her husband should be deemed to have been regularised on the date of attainment of normal age of superannuation for the purpose of sanction of normal pension in his favour. The above Calcutta Full Bench judgment of the Tribunal is mainly based on the earlier judgment of this Tribunal which may be referred to as Malati Kar case. The relevant part of the Full Bench judgment may be quoted below :-

"12. It is clear from the above analysis of the position of the Rule and legal provision is harsh in so far as non-absorption of casual labours with temporary status despite their rendering service for decades is concerned. Such action on the part of the Railways may be dubbed as exploitation of labour which is not permissible in an egalitarian society like ours. The rule position is therefore, to be tempered with equitable consideration.

13. A deemed provision in law is a fiction which should be applied only in exceptional circumstances. In an egalitarian society like ours having a Government wedded to the ideals of achieving welfare for its people, we considered that the contention of a casual labour with temporary status for decades is an exceptional circumstance. We are, therefore, of the view that justice, equity and fair play demand that the fiction of deemed provision should be applied in such a situation when the rules under law do not take care of it."

In the above judgment, the Tribunal further held as follows :-

"Considering the fact that a regular railway servant can claim pension after rendering 10 years of qualifying service and that the service rendered by the casual labour with temporary status is counted only to the extent of 50% for computation of qualifying service, we consider that 20 years period is a reasonable one".

14. Besides the above two judgments of this Tribunal, the Ld. Counsel for the petitioner also relied upon a decision of the Supreme Court, reported in A.I.R. 1982 SC 854 (L. Robert D' Souza -vs- The Executive Engineer, Southern Railway & Anr.).

He has also referred to a decision of the Supreme Court, reported in 1996(1) SCSLJ 89 (Prabhavati Devi -vs- Union of India & Ors.), wherein the Supreme Court has held that the family pension is admissible to the widow of a deceased Substitute acquiring temporary status. It has been rightly pointed out by the Ld. Counsel appearing for the respondents and Mr. C. Samaddar, Ld. Amicus Curie that the above Prabhadevi's case has no application to the present one as it relates to a case of a Substitute having temporary status and it does not relate to a casual worker simpliciter or to a casual worker with temporary status. Under the relevant rules, a Substitute worker with temporary status is a separate entity distinguishable from a casual labour and a casual labour with temporary status in reference to their service entitlements. Regarding D' Souza's case (supra), it must be noted that the decision of the Supreme Court in the aforesaid case related to a different matter, which is not in issue in the present one. One of the major issues in the aforesaid case before the Supreme Court was when a casual or seasonal labour employed in the construction work other than work charge Project acquires the status of the temporary railway servant. In view of what has been laid down by the Supreme Court in D' Souza's case, it would be far-fetched to say and to accept the contention of Mr. Mitra that the applicant's husband should be deemed to be treated as regularised or absorbed in a permanent post. In Malati Kar case (supra) and in Gita Rani Santra's case (supra), the Tribunal has held that due to non-absorption of casual labours with temporary status for a long period of time despite their rendering service for decades, a theory of deeming provision in the relevant rules should be incorporated in favour

of the deprived or the exploited employees as it were permitting the court to hold that in such circumstances, the employees concerned should be deemed to have been regularised or absorbed in a permanent post. Mr. Samaddar has rightly submitted that the import of such a deeming provision in the rules contained in the Indian Railway Establishment Manual - Vol. I & II and in the Indian Railway Establishment Code - Vol. I & II would be against the law and against the judicial powers of the Tribunal. According to Mr. Samaddar, the rules contained in Indian Railway Establishment Manual and in the Indian Railway Establishment Code as well as Railway Services (Pension) Rules, 1993, there is no provision for such inference.

15. I have already quoted the relevant rules in this regard, which justify the submission of Mr. Samaddar. It is not the function of a Court or a Tribunal to make law for the Executives. The powers exercised by the Judiciary must conform to the Constitution of India and to the general laws of the land. Of course the Court must exercise its powers in interpreting a particular law or statutory rule and while doing so, it has to decide whether such law or statutory rules or executive action are against any provision of the Constitution. The Court has also to see whether any administrative action has been taken in accordance with the legal provisions contained in the relevant Statute. Unless a case is covered by such condition, the Court cannot run a parallel administration so as to get its decision complied with against the provision of law. It appears from Gita Rani's case that this Tribunal has taken a view that as the Supreme Court rejected the S.L.P. filed by the Union of India preferred in respect of the decision taken by the Tribunal in Malati Kar's case, it must be held that

the order passed by the Tribunal in Malati Kar's case merged with the order passed by the Hon'ble Apex Court and the decision taken in Malati Kar's case has become final, binding and the law of the land. The Tribunal while coming to such decision referred to a decision of the Supreme Court in a case between State of Maharashtra & Anr. v. Shri Prabhakar Bhikaji Ingle. From the judgment of this Tribunal, it is clear that in the aforesaid case, after the dismissal of the SLP by the Supreme Court, an application for review under Order 47 Rule C.P.C. was filed before the Maharashtra Administrative Tribunal. It has been laid down there by the Apex Court that once the Supreme Court has confirmed the order passed by the Tribunal, that becomes final and therefore, the Tribunal cannot have power to review the previous order which stands merged with the order passed by the Supreme Court. But the question before this Tribunal is quite different. In Gita Rani's case, the Tribunal was not considering any review application. In a number of cases, it has been held by the Supreme Court that the dismissal of a SLP in limine by a non-speaking order does not justify any inference that by necessary implication, the contentions raised in the S.L.P. on the merits of the case have been rejected by the Supreme Court. Reference may be made to A.I.R. 1986 SC 1780 (Indian Oil Corporation Ltd. v. State of Bihar & Ors.). In Supreme Court Services Law Judgments - 1989 Vol. 13 pg. 100 (Supreme Court Employees Welfare Association v. Union of India & Anr. & S.P. Jain & Anr. v. Union of India & Anr.) and in a decision, reported in SCSLJ 1996(2) Vol.23 pg. 122 (State of Manipur v. Thingujam Brejen Meetei), it has been categorically held in these cases that dismissal of SLP in limine with a non-speaking order does not amount to acceptance of the correctness of the decision sought to be appealed against. In that view of

the matter, although in Gita Rani's case this Tribunal followed the decision of Malati Kar's case, it cannot be said that Malati Kar's case has become law of the land on the reasoning given by the Tribunal in Gita Rani's case. I must make it clear that this Tribunal is not sitting on appeal against the aforesaid two judgments passed by the Tribunal as relied upon by the Ld. Counsel appearing for the petitioner. But at the same time, this Tribunal is under a legal obligation to be guided by the principles laid down by the Apex Court in this regard.

16. In a case reported in A.I.R. 1988 SC 390 (Ram Kumar & Ors. v. Union of India & Ors.), the Supreme Court while accepting the provisions of the relevant rules has come to a conclusion that pensionary benefits are not admissible to casual labour acquiring temporary status.

17. In a recent decision of the Supreme Court, reported in SCSLJ 1997(2) 263 (Union of India & Ors. v. Rabia Bikaner etc.), the Supreme Court while following its earlier decision in Ram Kumar's case and the case of Union of India -vs- Sukanti & Anr. (SLP(C) No. 3341/93 etc. decided on July 30, 1996), has held that no retiral benefit is available to the widow of the casual labour acquiring temporary status, who had not been regularised till his death. In the aforesaid case, the Supreme Court took note of its judgment in Prabhavati Devi's case (supra) and distinguished the same on factual parameters, where the husband of the appellant was working as a Substitute. The Supreme Court took note of the Rule No. 2315 of the Railway Establishment Manual, which provides for regular scale of pay and allowances for the Substitutes working in regular establishment. In Rabia Bikaner's case (supra), the facts are more or less similar to the present one. The question

before the Supreme Court was whether the widow of a casual labour in Railway Establishment, who died after putting in six months service and obtaining the status of a temporary workman but before his appointment to a temporary post after screening, is entitled to family pension under the 1964 Family Pension Scheme. The answer of the Supreme Court has been in the negative while holding the view taken by the Tribunal in granting pensionary benefits to the widows of such employees as clearly illegal.

18. It must be noted here that in both Malati Kar's case and Gita Rani's case, the Tribunal made a passing reference to the decision of the Supreme Court taken in Ram Kumar's case. Be that as it may, in view of the above relevant rules in this regard and the position of law as settled by the Supreme Court in the aforesaid cases, I am of the view that the petitioner is not entitled to family pension. It would be against the provision of the relevant rules and the decisions of the Supreme Court, which have finally settled the position of law in this regard to hold that the petitioner's husband shall be deemed to have been regularised or absorbed in a permanent post after his empanelment as per Annexure A/2 and before his death in harness. Annexure 'A' is of no avail to the petitioner. It does not concern her husband at the relevant time and it had no continual effect. It is unfortunate that the petitioner's husband died after the empanelment as per Annexure 'A/2' but before his regularisation. There was nothing to show that there were existing vacancies at the time of his death or that any of his junior was absorbed in a regular vacancy. It must also be noted that the vires of the relevant rules have not been challenged before this Tribunal. There is nothing to show that any discriminatory action was taken against

the petitioner's husband by the respondents in the matter of absorption and regularisation. Hence, the claim of the petitioner, though arouses sympathy, is not justified by law.

19. In the circumstances, the application must be rejected and accordingly it is dismissed but no order as to costs.

20. In this connection, I must appreciate the services and the assistance rendered by Mr. C. Samaddar, Ld. Counsel appointed as Amicus Curie.

(S. N. Mallick)
Vice-Chairman

S. N. Mallick
9.2.98