

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

A Jayadevan
17-9-93

O.A.No.588/92

DATE OF DECISION : 17-9-93

M.S.Jayadevan,
Assistant Draftsman,
O/o the Ex. Engr. (Construction),
SR, Alleppey. .. Applicant

Mr. P.Sivan Pillai .. Adv. for applicant

V/s

1. Union of India through
the General Manager,
SR, Madras-3.
2. The Chief Engineer
(Construction),
SR, Madras-8.
3. The Chief Personnel Officer,
SR, Madras-3.
4. The Executive Engineer,
Construction, Southern Railway,
Alleppey. .. Respondents

Mr. M.C.Cherian .. Adv. for respondents

CORAM : The Hon'ble Mr.N.Dharmadan, Judicial Member

JUDGEMENT

MR. N.DHARMADAN, JUDICIAL MEMBER

A question of protection of pay, ^{earned} by the applicant while working as temporary Technical Mate even after absorption as Assistant Draftsman with the regular scale of Rs.1200-2040 raises for consideration on the admitted following facts.

2. Facts:- Applicant was initially appointed as casual Technical Mate on 29.10.1983. He was granted temporary status with effect from 16.9.1985 in accordance with the decision in Inder Pal Yadav's case (AIR 1990 SC 2263). While he was getting a pay of Rs.1320/- in the scale

of Rs.1200-2040 the Railway Recruitment Board (for short RRB) selected him as Assistant Draftsman in the scale of Rs.1200-2040. He was relieved by the Executive Engineer/Project as per Annexure-A8 dated 13.12.1989 to enable him to join as Assistant Draftsman. He joined duty on 14.12.89 for the apprenticeship/training for one year. Initially he was paid Rs.1200/- as stipend. But by Annexure-A1 order dated 25-5-90 the Chief Engineer (Construction) revised his stipend to Rs.1320/- finding him eligible for the same as ~~it~~ was the last pay drawn by him as temporary Technical Mate. However, by a subsequent letter dated 16.5.1991 the Chief Engineer (Construction) cancelled the revised stipend under Rule 2405 of the Indian Railway Establishment Manual (IREM for short). A consequent memorandum, Annexure-A4, was issued threatening recovery of Rs.2515/- in ten instalments on the ground that there is overpayment. These two orders are challenged in this application filed under Section 19 of the Administrative Tribunals Act.

3. Shri P.Sivan Pillai appearing on behalf of the applicant raised two points viz. (i) a service benefit once given to a Government employee cannot be taken away or cancelled if it has become final, and (ii) since the applicant was treated as a temporary status Technical Mate and paid Rs.1320/- while appointing him as Assistant Draftsman in the same scale, he is entitled to protection of his pay under the peculiar circumstance of this case.

4. Regarding the first point, it is admitted that the applicant was selected by the RRB and sent for one year's apprenticeship from 14.12.1989 on a stipend of Rs.1200/-. But later it was revised and increased to Rs.1320/- counting his previous service as a temporary Technical Mate

from 16.9.85 to 13.12.1989 as could be seen from Annexure-A7 letter dated 3.12.1990. The Chief Engineer (Construction) already passed Annexure-A1 on 25.5.90 protecting his last pay of Rs.1320/- as temporary status Technical Mate. Applicant has ~~also~~ drawn the amount. But within a year, the Chief engineer again passed Annexure-A2 order reducing the stipend under Rule 2405 of IREM. According to the respondents, this order was passed when it was found that the stipend was erroneously revised as Rs.1320/- as per Annexure-A1 order, considering his earlier pay. The pay protection is available only to a permanent Railway servant and not to a regular temporary status Technical Mate. As indicated above, this order was passed under para 2405 of IREM ~~(Para)~~ 1904 of Chapter XIX of IREM, Volume-II, 1990 Edition). The said paragraph is extracted below:-

"1904. Training. - Apprentices are required to undergo a prescribed course of training and to pass such examinations as may be laid down in their respective syllabi. They do not become eligible for appointment to working posts until they have successfully completed their training."

As per para 1905, during the period of training apprentices are entitled to such stipend and allowances as may be prescribed from time to time. In spite of this stipulation and the statement contained in Annexure-R1 offer of appointment dated 12.12.1989, the Chief Engineer issued Annexure-A1 on 25.5.90 finding the applicant eligible to draw a sum pf Rs.1320/-. On the facts of the case, it cannot be considered that Annexure-A1 has been issued on a mistaken basis as contended by the respondents. According to the Railway, the RRB has selected the applicant for the post of Assistant Draftsman and that his prior service as a casual Technical Mate cannot be taken into consideration in

fixing his stipend to be paid during the training and the pay in the new post. Annexure-R1 offer of appointment was issued on 12.12.89 fixing his stipend as Rs.1200/- and the scale of the post as Rs.1200-2040. This was accepted by the applicant and he was deputed for training on that basis. But the Chief Engineer issued Annexure-A1 order on 25.5.90 stating that the applicant is eligible to draw the last pay of Rs.1320/- as his stipend in the new post even after his selection as Assistant Draftsman. Since Annexure-A1 was issued after the acceptance of the offer and ~~(4)~~ adverting to the facts that the applicant has been selected to a new post without having any continuity of service, the decision of the Chief Engineer in Annexure-A1 cannot be lightly brushed aside as if it has been passed erroneously on a casual basis, as contended by the respondents. Admittedly, before passing the subsequent order, Annexure-A2, no notice was issued nor was he given an opportunity of being heard. Even if it is accepted for arguments sake that Annexure-A2 has been issued by the Chief Engineer as a corrective measure, in the light of the decision of this Tribunal in Anil Kumar P.A. vs. Superintendent of Post Offices & ^{on the ground that} Others, ATR 1991 (1) CAT 483, ^{if any,} ~~(5)~~ an administrative authority has an inherent power of correcting its own mistake without notice; ^{on the facts of this case,} as indicated above, it cannot be treated as a mistake capable of being corrected. Without taking proper steps for satisfying the requirements of principles of natural justice for after the passing of Annexure-A1 applicant is entitled to claim protection of pay. Irregularities, ⁱⁿ the order, Annexure-A1, can be removed only after giving notice or furnishing reason for cancelling the same. ⁽⁶⁾ The orders involving ⁽⁷⁾ civil consequence can only be passed after observance of the "audi alteram partem" principles. Recently, the Calcutta

High Court in Shyama Charan Das & another vs. Director of School, Education (Primary Section), Calcutta & another, 1992 Lab.I.C. 626, held as follows:-

"..... Applying the ratio of the decisions in the cases of State of Orissa v. Dr. Miss Binapani Dei (AIR 1967 SC 1269 (supra), A.K.Kripak v. Union of India (AIR 1970 SC 150) (supra), Mohinder Singh Gill v. Chief Election Commissioner (AIR 1978 SC 851) (supra), Ashok Chand Singh v. University of Jodhpur (AIR 1989 SC 823) (supra), Sanatan Gauda v. Berhampur University (AIR 1990 SC 1075) (supra), State of Punjab v. K.R.Erry (1975 Lab IC 440) (SC) (supra), I cannot but hold that the order involving civil consequence can only be passed after observance of the audi alteram partem principles. Failure to observe the said principles render the order involving civil consequence a nullity....."

In the light of the settled legal position as explained above, I see no force in the submission made by the learned counsel, Shri Sivan Pillai, that a right when conferred on a employee by passing an order cannot be ~~taken away~~ after it has become final even if the order is vitiated by mistake. The fact whether the order has been passed validly and whether it has conferred any legal right on a ~~it is final~~ Government employee or whether it is irregular ~~or~~ matters to be examined by the competent authority when it is brought to the notice of such authority/ circumstance warranting reconsideration. The decisions relied on by him in I.O.Corporation vs. Its Workmen, AIR 1975 SC 1856, G.V.B.Naidu vs. State of Mysore, 1971 Lab. IC 73, Sudhir Kumar Roy vs. Union of India, 1971 Lab. IC 380, and K.R.Raghavan vs. Union of India, 1979 Lab. IC 1294 were also examined by me. The facts in those cases can be distinguished and the proposition of law as explained above applies to the facts of this case. Hence, I see no relevance of the decisions referred to above. F.R. 27 of the Fundamental Rules and O.M. dated 8.8.1962 mentioned in item 12 under FR 27 ~~are~~ also distinguishable.

5. The learned counsel for the applicant further contended that the applicant has a right to protect his pay of Rs.1320/- in the scale of Rs.1200-2040 even after appointment as Assistant Draftsman. According to him, a casual labourer when granted temporary status is eligible to be treated as a temporary employee in the light of the two decisions of the Supreme Court, Annexure-A5 (Inder Pal Yadav's case) and Annexure-A6 (T.Mahalingam's case). He also submitted that in this view para 1313 (FR 22) of Indian Railway Establishment Code, Volume-II applies.

6. This contention was denied by the respondents. According to them a casual labourer even on attaining temporary status will continue as casual labourer with the limited benefits provided under para 2511 of IREM. Applicant was appointed to a new post of Assistant Draftsman and deputed for training. After ~~the~~ appointment of a candidate to a post and deputation for apprenticeship in that category, he is entitled only to the pay and the stipend provided for that post under category referred to therein. Pay protection principle applies on his absorption to a higher post or similar post. It does not apply to a temporary status casual employee who is not a temporary Railway employee.

7. The applicant filed rejoinder and reiterated his stand in the O.A. Annexures-A5 & A6 judgments are produced along with the same. It is seen from Inter Pal Yadav's case (Annexure-A5) that the Railway submitted a scheme for absorption of casual employees in which they have stated that Ministry of railways in principle directed that casual employees who ~~had~~ been granted temporary status and continuously working in the Railway ~~are~~ to be "treated as temporary on completion of 360 days of continuous employment". This is admittedly incorporated for granting them service benefits which are applicable to the regular employees. It is true that the Railway did not accept these

casual employees as temporary railway employees for all purposes. They will become regular railway employees only after their absorption after following the normal procedure for absorption. Till then a casual employee having temporary status remains as such but eligible to get all service benefits available to a temporary employee notwithstanding regularisation.

8. The proposition put forward by the learned counsel for the applicant is that in Inder Pal Yadav's case the Supreme Court accepted the scheme of the Railway indicating that casual labourers who have completed 360 days should be deemed to be temporary employees for getting all service benefits and the Court/Tribunal should in individual case examine whether full benefit of the fiction covered by the decision of the Supreme Court was given to an employee. He also submitted that the protection of last pay is is a condition of service and a service benefit available to a casual employee.

9. In fact, applicant claims the protection of his pay, which he had earned on account of his dint of labour and sincere service under the Railway in the capacity as casual Technical Mate. Under the circumstances stated above, the question is whether this right which has accrued in his favour can be continued while fixing his pay in the post of Assistant Draftsman considering Annexure-A1 order if it is held to be validly passed by the Chief Engineer. It is to be remembered in this connection that the very purpose of the fiction for deeming a casual employee as temporary employee under the scheme is for the limited purpose of conferring all service benefits to him and hence it should be interpreted in favour of the employee. It is also the duty of the Court or Tribunal to see that in a

given case the benefit of the fiction was conferred on an employee in its full form. The representation of the railway in the form of scheme submitted before the Supreme Court was that the casual employees who have completed 360 days would be deemed as "temporary" for the purpose of granting all service benefits on par with regular railway employees. In State of Bombay vs. Pandurang Vinayak & others, AIR 1953 SC 244, the Supreme Court while considering the scope of a deeming provision of statute and fiction thereof held as follows:-

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and it should be carried to its logical conclusion. (Vide Lord Justice James in Ex parte Walton; In re Levy, (1881) 17 ch. D.746 at p. 756(A)....."

10. I am also examine the rights of casual employees in the IREM. Chapter XX of IREM, Volume-II, 1990 Edition, defines a casual labourer. Para 2001 reads as follows:-

"2001. (i) **Definition of Casual Labour.** - 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."

Casual labours will be employed normally in open line and project. A casual labour is employed for day to day working in open line. But in projects they are engaged for execution of railway projects such as new lines, doubling conversion, construction of building, tracks, etc. Casual labours engaged on open line who continuously work for more than 120 days without break will be treated as temporary (temporary status). The casual labours on project who have put in 180 days of continuous employment are entitled to 1/30th of the minimum of the appropriate scale of pay plus Dearness Allowance. When, once temporary status is

conferred on a casual labourer he attains that status which will continue so long as he is in continuous employment in the railway. He is entitled to the rights and benefits admissible to temporary railway servants as laid down in Chapter XV of the IREM, Volume-I. According to para 1501 of Chapter XV,

"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".

In Chapter XV, except the definition of temporary railway employees and 'substitutes', the conditions applicable to them are not specifically dealt with. Rights and privileges admissible to casual labour with temporary status are enumerated in para 2511 of the old IREM. Para 2512 deals with the absorption of casual labour in regular service. Para 2511 of the old manual which was drafted decades ago cannot be treated as a complete code containing all the privileges and service benefits available to a casual employee in the light of the decisions of the Supreme Court in various cases concerning the rights and privileges of casual labourers having continuous ~~and~~ service. So the arguments of the learned counsel for the railway that the casual labours are only eligible for the rights and privileges enumerated in para 2511 of old IREM cannot be accepted. The casual labourers ~~are~~ eligible for additional service benefits which are not included in para 2511 in the light of the various decisions of the Supreme Court/Tribunals on the subject.

11. In Inder Pal Yadav's case the Supreme Court, as indicated above, has quoted with approval the scheme prepared by the Railway for absorption of casual employees

in the project. The relevant portion is as follows:-

"5.1 As a result of such deliberations the Ministry of Railways have now decided in principle that casual labour employed on projects (also known as 'project casual labour') may be treated as temporary on completion of 360 days of continuous employment....."

12. In the next decision, Annexure-A6 (Mahalingam's case), the Supreme Court, after following Inder Pal Yadav's case, observed that the appellants therein are "entitled to be reinstated as temporary employees and to be dealt with in accordance with the scheme affirmed in that case".

13. Relying on these two decisions of the Supreme Court, the learned counsel, Shri Sivan Pillai, argued that a project casual labour on attainment of temporary status is to be treated as a temporary employee for all purposes if he has satisfied all the requirements under the scheme. If that be so, the fixation of pay of the applicant in the post of Assistant Draftsman is to be made under para 1313 (FR 22) of the Indian Railway Establishment Code, Volume-II.

14. I have also examined paragraph 1313. It deals with fixation of initial substantive pay of a railway servant who is appointed substantively to a post on 'time scale pay'. Since the applicant was not an employee substantively appointed in a post before selection as Assistant Draftsman, the provisions of para 1313 would not apply to him. A temporary status employee cannot be elevated to the position of a temporary railway employee who has been defined in para 1501 of the IREM, Volume-I, already extracted above. A casual employee with temporary status has been specifically excluded. But notwithstanding the exclusion, a casual employee who was granted temporary status and enjoying a scale of pay and drawing a particular salary can be treated as "temporary" under the scheme

referred to in Inder Pal Yadav's case for granting all service benefits. The Railway themselves have decided to treat such casual employees as "temporary" for the limited purpose of granting service benefits as stated above.

15. Under the above circumstances the pay drawn by a temporary status casual Technical Mate is nothing but a service benefit. A railway employee getting a regular pay in that capacity can make a claim for protection if he is otherwise eligible for the same under the extant orders, even after his absorption as a regular Assistant Draftsman, after completion of his apprenticeship. If fact, in the instant case such a view was taken by the Chief Engineer who passed Annexure-A1 order on 25.5.90 presumably for giving him the protection of pay.

16. Learned counsel, Shri M.C.Cherian, vehemently opposed this view on the ground that there is no continuity of service and the applicant's continuance as a casual Technical Mate was not regularised by a regular absorption to the post. According to him, a regular absorption of a casual Technical Mate may be necessary for granting all service benefits in the line of promotion available to him in the railway service. I am unable to endorse the view of the learned counsel. An accrued right of a railway employee regarding his pay cannot be denied to him particularly in the light of Annexure-A1 on the ground argued by the learned counsel. It is admitted that on account of applicant's engagement from 1983 to 1989 as a temporary status casual Technical Mate in the railway, he has earned a pay of Rs.1320/-. When he was absorbed in a new post in the railway he cannot be denied the service benefit which he has earned before his regular selection as Assistant

Draftsman in the same establishment, viz. the Railway. There is no bar in any of the rules and orders produced before me for considering this service benefit and granting protection of pay to the applicant if he is otherwise eligible for the same even after his appointment as Assistant Draftsman particularly when the Chief engineer has already passed Annexure-A1 order taking such a view. This order has already conferred a legal right on the applicant to claim protection. If it is not permissible under law, it can be treated as personal to the applicant in order to avoid general application so as to do justice to him. It will only help him to enjoy the service benefit even after the completion of the apprenticeship and appointment as Assistant Draftsman. In this view of the matter, according to me, on the facts and circumstances of this case, ^{the} applicant is entitled to claim protection of pay in the light of Annexure-A1 order. I have already taken ^{circumstance} ² ~~same~~ view in more or less similar ~~case~~ in R.N.Pillai vs. Chief General Manager (Telecom), Trivandrum & others (OA No.25/91) and observed as follows:-

"Having heard the matter, I am of the view that the substantive pay of Rs.1230/- as shown in Annexure-IV LPC is an amount earned by the applicant on account of his working at Bombay.

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"Moreover, Annexure-IV LPC issued by the Bombay Office clearly shows that the substantive pay drawn by the applicant is Rs.1230/- which he is entitled and to be protected even though he has been transferred to Kerala Circle in a lower post on a compassionate ground at least as a personal benefit accrued in his favour on account of working at Bombay."

The SLP filed by the Department against the said judgment was dismissed by the Supreme Court.

17. The argument of the learned counsel for the respondents that if such an interpretation is given to the

scheme of the railway referred to in Inder Pal Yadav's case and grant the benefit of protection of pay to the applicant, it may open a flood gate and a number of employees similarly situated may raise similar claims causing huge financial commitment to the railway, does not appeal to me very much. The apprehension is misplaced.² The applicant's claim raises under a peculiar circumstance. It is to be examined in the light of Annexure-A1 order. If a railway employee who has worked from 1983 to 1989 and earned some benefits as indicated above, that cannot be completely eschewed after the selection and appointment to a new post, if such employee is eligible for continuous engagement of the same benefit in all other respect it should be given to him in the light of the interpretation given by the officers of the railway themselves viz. the Chief Engineer and others.

18. In the instant case the peculiar position is that the applicant accepted the offer of appointment thinking that he will only get a stipend of Rs.1200/- while undergoing the apprenticeship. But he was alerted by the Chief Engineer on account of his decision as contained in Annexure-A1 and he has also drawn the money, which in fact was spent by him bonafide believing that the amount is legally due to him. It will be inequitable to direct him to repay the amount at this stage. This Tribunal has taken such a view in similar circumstance pertaining to grant of HRA to the Government employees on a mistaken basis in C.R.Sagar vs. Union of India & Others (OA 1381/91) and held as follows:-

"7. In the light of the aforesaid decision rendered by this Tribunal, we have only to dismiss the application holding that the applicant is not entitled to HRA since he is occupying accommodation provided by the Government. But we make it clear that it would be inequitable to recover the HRA already paid to the applicant under mistaken impression that the applicant is eligible to HRA."

However, [] the applicant's rights were considered under the peculiar circumstances arising in this case as explained above, on account of the view taken by the Chief Engineer and the conferment of a legal right of claiming protection of his last pay. [] He [] approached this Tribunal when that right was taken away from him illegally and in an irregular manner. Only persons similarly situated like the applicant in whose favour identical orders have been passed alone will approach before this Tribunal for relief. Hence, the apprehension of the learned counsel of the respondents is thoroughly unfounded and does not merit consideration. I reject the same.

19. The applicant further submitted that the respondents have extended the same service benefits to Shri S. Bhagyaraj, who was also a casual Technical Mate under the Chief Engineer (Construction), Madras, on his appointment to Group-C post and the denial of same benefit to the applicant is discriminatory and arbitrary. This was denied by the respondents in para 9 of the reply in the following manner:-

"9. In the case of Shri S. Bhagyaraj referred by the applicant, he was initially engaged as a Casual Labour technical mate and later selected as Apprentice Asstt. Draftsman in scale Rs.1200-2040 through railway Recruitment Board. His stipend was first erroneously fixed at Rs.1260/- instead of Rs.1200/- and the same was reviewed and refixed at Rs.1200/- and the over payment has also been recovered. As the stipend and pay of Shri Bhagyaraj has already been revised the applicant cannot quote this case as a precedent for the upward revision of his stipend."

The details of cancellation and the reasons and circumstances thereof are not placed before me for consideration. However, simply because Shri Bhagyaraj has suffered the/ will not estop the applicant from raising the contention and getting relief which he is legally entitled under law.

20. Applicant's claim for getting protection of pay has not been specifically considered by the respondents after regular absorption as Assistant Draftsman on completion of training. It requires to be considered by the competent authority in accordance with law.

21. It is relevant in this circumstance to refer to the law laid down by the Supreme Court in fixing pay of a Government employee and the scope of judicial review. The Supreme Court in Supreme Court Employees Welfare Association vs. Union of India, AIR 1990 SC 334 held as follows:-

"It is not the business of this Court to fix the pay scales of the employees of any institution under Art. 32 of the Constitution. If there be violation of any fundamental right by virtue of any order or judgment, this Court can strike down the same but, surely, it is not within the province of this Court to fix the scales of pay of any employee in exercise of its jurisdiction under Art. 32 of the Constitution."

22. It is clear from the above decision that the Court/Tribunal will only examine whether a fundamental right or a legal right has been violated when an order has been passed considering the rights of a Government employee as indicated above. Hence, I leave the issue of granting protection of pay to the applicant after his regular appointment as Assistant Draftsman to be decided by the competent authority in accordance with law.

23. In the result, having regard to the facts and circumstances of the case, I quash Annexures-A2 & A4 and allow the O.A. I make it clear that in the light of the above discussion the applicant has a right to claim protection of pay on the peculiar facts and circumstances of this case particularly in the light of Annexure-A1 which would revive ^{since} when I have quashed Annexures-A2 & A4.

24. There will be no order as to costs.


N. Dharmadan
(N.DHARMADAN)
JUDICIAL MEMBER
17.10.93.

v/-

LIST OF ANNEXURES:

1. Annexure-A1 .. Copy of memorandum No.P.563/I/1/CN/TS dated 25.5.90.
2. Annexure-A2 .. Copy of letter No.XEN/CN/ALLP. dated 16.5.91.
3. Annexure-A4 .. Copy of letter No.P.563/CN/ALLP dated 23.10.91.
4. Annexure-A7 .. Copy of letter No.W.35/CN/ALLP/ Oct-90 dated 3.12.90.
5. Annexure-A5 .. Copy of Supreme Court judgment in Inder Pal Yadav's case.
6. Annexure-A6 .. Copy of Supreme Court judgment in T.Mahalingam's case.
7. Exhibit-R1 .. Copy of letter No.P.563/I/1/CN/ TS dated 12.12.89..