CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

DATED THURSDAY, THE TWENTYSEVENTH DAY OF JULY ONE THOUSAND NINE HUNDRED EIGHTYNINE.

P R E S E N T

Hon'ble Shri S.P Mukerji, Vice-Chairman

&

Hon'ble Shri G.Sreedharan Nair, Vice-Chairman.

ORIGINAL APPLICATION NO.75/87

1. A.Chinna Ammini
2. K.Kunjammal
3. Philomina Mary
4. H.Beebeejan
4. S.Lilly .. Applicants

Vs.

1. Union of India , represented by the General Manager, Southern Railway, Madras.
2. The Senior Divisional Personnel Officer , Southern Railway, Palghat. .. Respondents

M/s. B.Gopakumar, Chincy Gopakumar .. Counsel for the applicants

Mr M.C Cherian .. Counsel for the respondents

O R D E R

Shri S.P Mukerji, Vice-Chairman

Smt. A.Chinna Ammini and four other women casual Mazdoors who have been working in the Southern Railway have filed this application dated 1.6.1986 under Section 19 of the Administrative Tribunals Act, praying that the respondents should be directed to reinstate the applicants in service and to give them all benefits as if they had not been denied employment with effect from 20.1.1982. The brief material facts of the case are as follows.

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2. The five applicants started working as Women Mazdoors in the Southern Railway from various dates between 23.9.71 and 1.8.77. They had all been given temporary status, but their grievance is that with effect from 20.1.82 they are not being engaged despite repeated representations. They approached the High Court of Kerala in O.P No.4272 of 1983 claiming absorption as temporary workmen and challenging the denial of work by the respondents without complying with the provisions of Chapter VA of the Industrial Disputes Act. The Writ Petition was disposed of by the judgment dated 26 November, 1984 with the direction to the respondents that their (applicants') representations should be disposed of by the Railways within a period of two months. When, according to the applicants, no action was taken by the respondents, they served a notice on 16.3.85 and a representation on 2.8.85 pointing out that they were being kept out of service when their juniors have been retained. Even after individual representations were sent in December, 1985, no positive action was taken. In the meantime the applicants filed another Writ Petition O.P No.9827 of 1985 before the High Court of Kerala, praying that they should be declared to be not affected by denial of service on and after 20.1.82 and for a direction to the respondents for reinstating them in service with all consequential benefits. This Writ Petition was closed by the judgment dated 30.10.85 with the observations that the petitioners could initiate

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Contempt Proceedings if the judgment of 26.11.1984 in O.P No.4272 of '83 was not complied with or to seek its review in case the judgment was not clear. The contention of the applicants is that having put in 240 days work, they are entitled to the protection under Chapter VA of the Industrial Disputes Act and that the sudden stoppage of their work is illegal, being violative of Articles 14 and 16 of the Constitution as their juniors have been retained. They have also indicated that termination of their service without any notice postulated under para 2303 of the Indian Railways Establishment Manual is also illegal.

3. The respondents have indicated that the applicants had been engaged sporadically with prolonged breaks as and when work for which women labourer could be engaged was available. They have categorised casual labourers as Mapla Khalasis, Welders, Rivetters, Khalasis, Women Khalasis etc. who can be engaged for specific types of work only when that type of work is required to be done and sanction for the work is available. Illustratively they have indicated that Mapla Khalasis are engaged for bridge work, male Khalasis for heavy manual work like laying ballast and women Khalasis for lighter manual work. The respondents have indicated that they have no documents to identify the complete details of the nature of work, sanction etc. regarding the applicants. They have clarified that seniority lists are maintained on a section-wise basis for each category of casual labourer like the men Khalasis, women Khalasis , mapla Khalasis etc.

According to them the applicants could not be engaged after 20.1.82 as there was no work which could be executed by women Khalasis in the concerned section. Without denying that their juniors in other categories have been retained in service, the respondents have stated that no woman Khalasi has been retained in their section after the aforesaid date. There was no sanction for engagement of women Khalasis after that date. They have further stated that the respondents were not aware of the Writ Petition No. O.P 4272 of '83 till they received the judgment of the High Court dated 26.11.84. After obtaining a copy of the Writ Petition from the then Counsel for the applicants , the respondents declared the temporary status of the applicants from the date they had completed the number of required days of continuous work and arrangements were made to pay the difference in wages due to them. They have assured that consequential benefits on the declaration of their temporary status will be given to them including the claim for de-casualisation and absorption into regular service. They have denied discrimination by stating that no other casual woman Khalasi has been absorbed in regular service. As regards violation of the provisions of the Industrial Disputes Act, the respondents have stated that this could be agitated by the applicants separately. They have urged that the Orders of the High Court on the aforesaid two Writ Petitions do not cover the question of termination

of service and that the applicants are debarred from raising the same issues before the Tribunal, by the principles of estoppel and resjudicata.

4. In their rejoinder the applicants have reiterated that the termination of their services were violative of provisions of Industrial Disputes Act and para 2302 of the Railway Establishment Manual as their juniors have been retained in service. They have argued that since they have been declared to have attained temporary status and given the regular pay scale , they cannot be denied the rights of temporary employees. They have clarified that they were doing the work of Khalasis which is done both by the male as well as female Khalasis. By terminating their service without notice or compensation, the termination of their service is illegal.

5. We have heard the arguments of the learned Counsel for both the parties and gone through the documents carefully. We would first of all take up the question of the application being barred by the principle of resjudicata because of the two Writ Petitions No.4272 of '83 decided on 26.11.84 and O.P No.9827 of '85 decided on 30.10.85 filed by the applicants before the High Court of Kerala. We have gone through these two judgments appended with the main application and find that since these two judgments are not on merits and do not adjudicate upon the various issues of law and facts, they cannot act as resjudicata debarring the applicants from moving the Tribunal under Section 19 of the Administrative Tribunals Act.

The first Writ Petition No.4272 of 83 was filed by the applicants seeking relief for absorption as temporary workmen and challenging the termination by the respondents of their services without complying with Chapter VA of the Industrial Disputes Act. This petition was disposed of by two para observations as follows:-

> " If the representations in the nature of Ext.P1 have been received by the respondents and have not so far been disposed of, it is only appropriate that such representations are considered and disposed of as expeditiously as possible and in accordance with law.
>
> There will, therefore, be a direction that the representations in the nature of Ext.P1, if such representations have been duly received by the 2nd respondent, will be considered and disposed of in accordance with the existing orders relating to decasualisation in the respondent Railways. This shall be done within a period not exceeding two months from the date of receipt of a copy of this judgment by the 2nd respondent. "

The second Writ Petition O.P No.9827 of '85 sought more or less the same reliefs as have been prayed for in the instant application before us. The Writ Petition was disposed of at the admission stage without contest with the following judgment:-

> " If the direction in Ext.P5 is sufficiently clear and if it is being violated by the authorities, the petitioners can initiate action for contempt. If the decision is not sufficiently clear, it is for the petitioners to seek review of the judgment. There is no point in getting repeated directions from this court over and over again on the same subject-matter. Without prejudice to the above course of action which the petitioners, if they are so advised, may take, the writ petition is closed. "

In the above judgment Ext.P5 was the judgment of the Kerala High Court dated 26.11.84 delivered on the first Writ Petition. The second Writ Petition also, by any stretch of imagination, cannot be considered to have been disposed of by a speaking order on merits. The principle of

resjudicata has been discussed by a Constitution Bench of the Supreme Court in their classic judgment in Daryao and others v. State of U.P and others, AIR 1961 SC 1457. In that judgment presuming the jurisdiction of the Supreme Court under Article 32 as more or less similar to the jurisdiction of the High Court under Article 226 , the applicability of the bar to petitions under Article 32 by the principle of resjudicata because of prior decision of a Writ Petition under Article 226 was lucidly discussed in the following terms:-

> " If a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move the Supreme Court under Art.32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art.32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which are already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that

> such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Art.32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32 because in such a case there has been no decision on the merits by the Court. " (Emphasis added)

Since in the instant case before us, the first Writ Petition was dismissed because an alternative remedy of pending representation was still to be exhausted and the second Writ Petition was disposed of because an alternative remedy of review of the judgment in the first Writ Petition or moving an application for contempt was available, these two judgments cannot act as a bar of resjudicata against the instant application before us. Further, since these two Writ Petitions were not disposed of on merits by the application of the mind of the Court on the issue of the legality of termination of service of the petitioners was ever applied, the summary dismissal of the Writ Petitions is not a bar to this application. It is true that as discussed by the High Court of Punjab and Haryana in Teja Singh v. Union Territory of Chandigarh and others, 1981(1) SLR 274, that dismissal simplicitor of a Writ Petition by one word is a bar to filing another Writ Petition on the same issues and reliefs. It was however clearly indicated in that judgment that such a dismissal is no bar to suits and proceedings other than that of writ petitions. Since this Tribunal exercises a composite jurisdiction of not only the High Court of the extraordinary writ jurisdiction, but also of the ordinary jurisdiction of a Civil Court, an application under Section 19 of the

Administrative Tribunals Act cannot be treated exclusively as a Writ Petition , which is an extra-ordinary jurisdiction of the High Court. Thus the bar of resjudicata flowing from one Writ Petition to a subsequent Writ Petition will not per se be operative under all circumstances against an application under Section 19 of the Administrative Tribunals Act. In the facts and circumstances, considering that the two aforesaid Writ Petitions were neither dismissed on merits with or without a speaking order, nor have the applicants re-invoked the writ jurisdiction by the application before us, we reject the preliminary plea of resjudicata and estoppel taken up by the respondents.

6. Coming now to the merits of the case, it is admitted by the respondents that subsequent to the judgment delivered by the High Court of Kerala in the first Writ Petition No.4272 of'83 , the applicants were given temporary status. It is now established law that casual employees in the railways with temporary status cannot be dismissed without notice and compensation under the Industrial Disputes Act. It has been held by the Calcutta Bench of the Tribunal in Samir Kumar Mukherjee & Ors v. General Manager, Eastern Rly & Ors, A.T.R 1986(2) C.A.T 7 that even purely seasonal staff engaged as volunteers to assist ticket checking staff of railways, after continuing for more than a year in railway employment, cannot be dis-engaged suddenly without notice or reasons. It was held by the

Ahmedabad Bench of the Tribunal in Sukumar Gopalan & others v. Union of India and others, 1987(2) S.L.J(CAT) 394 as under:-

> " It is undisputed that casual labourers of Railways projects and other departments , are governed by the Industrial Disputes Act 1947. Hence the mandatory provisions of the Act have to be followed while retrenching them. A workman who has completed one year i.e,who has worked during the preceding 12 months(counted back from the date of proposed retrenchment) for a period of 190 days in case he is employed below ground, or 240 days in other employment shall be entitled to the benefits under the said Act. Such workman must be given a notice of retrenchment compensation at the rate of 15 days average pay for every completed year of service or any part thereof exceeding six months. Nothing is shown on record as to how much compensation was determined and on what basis and whether such payment was paid as a matter of fact or not. In Union of India & Ors. v. Ram Kumar, 1986(3) S.L.J(CAT) 459, it has been held that in accordance with the para 149 of the Indian Railway Establishment Manual , a temporary employee (casual labourer who has attained temporary status), can not be discharged without being given one month's notice and since no such notice was given to the plaintiff, when he was discharged, the order of the discharge, was illegal. The services of a casual labourer who has acquired a "temporary status" , can be determined by the rules applicable to temporary Railway Servants.(see Note to para 2505 in Chapter XXV of the Indian Railway Establishment Manual). "

In the above case the order of termination of service of the petitioner was set aside and the respondents were directed to reinstate the petitioner with full back wages. The Allahabad Bench of the Tribunal in Chhangu Lal & Ors. v. Assistant Engineer, Cross Bar Santhapan, Allahabad and 3 others, A.T.R 1987(1) C.A.T 654 , it was held that casual labourer employees of the Telecommunications Department who have put in more than 240 days in a year are governed by the various provisions of the Industrial

Disputes Act and they cannot be retrenched without payment of retrenchment compensation. They are also entitled to the protection and benefits of Section 25(F) of the I.D Act. Still in another case of the railways, the Calcutta Bench of the Tribunal in Union of India and others v. Kartick Chandra Banerjee , A.T.R 1987 C.A.T 218 (Short Note) held that in accordance with Rule 149 of Indian Railway Establishment Code and para 2511/2514(11) of the Indian Railway Establishment Manual and Section 25(F) of the Industrial Disputes Act, the termination of service of a railway employee who has acquired temporary status cannot be effected , without payment of retrenchment compensation and without complying with provisions of Section 25(F) of the I.D Act. The termination or removal from service in that case was held to be illegal. Since in the instant case before us, no notice or compensation whatsoever was given or intended to be given to the applicants , whose services stood terminated,even after they were given temporary status, the termination of their service or employment is wholly illegal.

7. We cannot by any stretch or construction of the Directive Principles of article of Fundamental Rights under Articles 14, 16 and 39 of the Constitution of India, uphold the reasoning given by the respondents that while male Khalasis could be retained in employment , the applicants merely because they belong to the opposite sex could not be engaged. The ground taken by them that the women labourers are intrinsically incapable of undertaking heavy physical work may be poetically correct, but socially unacceptable. The

criterion of strength based exclusively on sex or gender is an anathema to the principle of equality. There can be stronger females than males both from the physical as well as biological, moral, spiritual and mental angles. A normal healthy woman can be much stronger than a debilitated frail male. To deny employment blindly on the bland criterion of strength based exclusively on the criterion of sex is not only unrealistic, but also discriminatory of the lowest order. Unless a statutory provision is made, maintenance of separate seniority lists on the basis of gender alone is ab initio void and cannot be resorted to for denying employment to the applicants. The Indian Railways, as one of the largest employers not only in the country but also in the world, cannot reasonably be deemed to be unable to provide suitable employment to women workers whom they had already engaged and to whom they had conferred temporary status.

8. In the facts and circumstances we allow the application with the direction to the respondents that the applicants should be given suitable notional employment with effect from the dates their juniors, male or female continued to be employed, with all consequential benefits of seniority and increments. They should be deemed to have been actually employed with effect from the date of communication of this order with payment of arrears of wages and allowances only with effect from the date of such communication. In the circumstances there will be no order as to costs.

27-7-1989

(G.SREEDHARAN NAIR)
VICE CHAIRMAN

27.7.89

(S.P MUKERJI)
VICE CHAIRMAN

n.j.j