

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.325/2001.

Thursday, this the 27th day of February, 2003.

CORAM:

HON'BLE MR.T.N.T.NAYAR, ADMINISTRATIVE MEMBER
HON'BLE MR.K.V.SACHIDANANDAN, JUDICIAL MEMBER

V.Lawrance,
Salaried Commission Bearer,
Vegetarian Refreshment Room,
Erode, Southern Railway,
Palghat Division, Palghat. Applicant

(By Advocate Shri Siby J. Monippally)

Vs.

1. Union of India represented by
Deputy Chief Commercial Manager,
Catering & Ticket Checking,
Southern Railway, Madras.
2. Senior Divisional Commercial Manager,
Southern Railway, Palghat Division,
Palghat. Respondents

(By Advocate Shri P.Haridas)

The application having been heard on 22.1.2003, the
Tribunal on 27.02.2003 delivered the following:

O R D E R

HON'BLE MR. K.V.SACHIDANANDAN, JUDICIAL MEMBER


The applicant is now working as a salaried Commission Bearer in the Vegetarian Refreshment Room Erode, within the territorial jurisdiction of Palghat Division of Southern Railway. He entered the service of the Railways as Commission Bearer on 5.6.1961 at Erode. It is averred in the O.A. that A-1 dated 5.6.61 (not clear) issued by the Commercial Department, is a Money Receipt which shows that the applicant was engaged from 5.6.61. In the seniority list issued in 1997, it was found that Mr. D.K.Manoharan and Mr. P.Sampath who entered into service on 4.12.1978 (much later than the applicant) were granted regularisaiton. The applicant made several representations including the representation dated 27.7.98 (A2) to the Deputy



Chief Commercial Manager and since there was no response he filed O.A.194/2000 for a direction to regularise his services. But, without taking into account the relevant facts, the same was rejected by the first respondent vide A-3 order dated 15.2.01. Aggrieved by the said order, the applicant filed this O.A. seeking the following reliefs.

- "a) To direct the respondents to regularise the applicant from 1978 or from the date on which his juniors were regularised as Server/Waiter with all consequential benefits;
- b) to declare that the applicant is entitled to get regularisation as Server/Waiter in the Catering Department of the Railways with effect from 1978 onwards with all consequential benefits.;
- c) To grant such further and other reliefs as the nature and circumstances of the case."

2. The respondents have filed a reply statement admitting that the applicant was working as Salaried Commission Bearer at Vegetarian Refreshment Room, Erode, and they denied the contention of the applicant that he was keeping a very good track record since there is no record maintained to verify his past service. The claim that he entered Railway service as Commission Bearer of VRR/Erode on 5.6.61 is also denied by the respondents. Annexure A-1 Cash Receipt does not show any identification as to whether the amount was remitted towards Security Deposit or on account of any fine. The respondents denied the fact that he was engaged as Commission Bearer on 5.6.61. A Commission Bearer is engaged to sell foodstuff in mobile/static units on commission basis. The muster roll for the period from 1991 to 2000 is the only record which is available at present and on verification of the muster roll, it is seen that he had been stopped from duty from 10.3.92 to 19.3.92, was absent for 20 days from 23.9.93 to

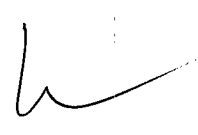


12.10.93 and was again absent for 6 days from 1.4.94 to 6.4.94. Therefore it could only be considered that he had not been regular in attendance. They contended that the name of Shri D.K.Manoharan, mentioned in the O.A., has been deleted from the list of salaried/commission bearers before regular absorption, as his whereabouts were not known. P.Sampath, was absorbed as regular Commission Bearer on 26.3.98. Both of them were engaged as Commission Bearers on 4.12.79. It is averred in the O.A. that, the period of difference in appointment of the applicant and his immediate juniors is more than 18 years. Between the period from 1961 to 1979, many persons were engaged as Commission Bearers and then regularised as Group "D" employees and hence, Shri D.K.Manoharan and Shri P.Sampath cannot be his immediate juniors and the statement made by the applicant that he was engaged as Commission Bearer on 5.6.61 is not correct. The actual date of his engagement is not known. The applicant had never made any representation. The seniority list of salaried/Commission Bearers has been revised several times and they have been absorbed as regular Group "D" employees in the Catering Department and in other departments also. He had never represented except filing the O.A.194/2000 for which he was replied suitably. The case of the applicant has no merit. The case of the applicant has already been decided by Annexure A-3. The last paragraph of A-3 order denying the claim of the applicant is as follows:

" In the circumstances stated above, I am constrained to come to the following conclusion that,

a) There is no proof for your actual date of engagement as commission bearer.

b) Though your name was not included on earlier occasion for absorption and seniority list published there was no objection from you at any time.




c) The above facts and circumstances clearly show that there is a break in your service. You have filed this O.A. concealing the entire information. Therefore it is decided that there is a break in your service and you will be treated as fresh entrant from the date of availability of documents. Your name will be interpolated in the seniority list of Commission Bearers taking into account your date of engagement (fresh entrant) as Commission Bearer on 1.1.91 and you will be considered for regular absorption as per your fresh entry seniority position as and when vacancy arises."


3. Shri Siby J.Monippally, learned counsel appeared for the applicant and Shri P.Haridas, learned counsel appeared for the respondents (Railways).

4. Learned counsel for the applicant submitted that the applicant is legally entitled to get regularisation from 1978 or from the date on which his juniors were regularised and the documents produced would show that he was engaged right from 5.6.61. He pointed out that the Railway recovered from the applicant the excess amount paid in terms of commission for the period between December 1983 to October 1986 vide A-4 order. The relationship between the respondents and the applicant is that of Master and Servant even if there was a break in service for a few days on medical certificate. It is averred in the O.A. that the absence of applicant for 20 days and 6 days do not constitute break in service especially when it was due to an accident in the course of employment. The denial of regularisation in service to the applicant is violative of fundamental rights and amounted to victimization and unfair labour practice. The Commission Bearers were regularised in Railways for the first time in 1978 and therefore, the applicant is entitled to get regularisation from 1978 onwards, according to the learned counsel for the applicant.

5. The learned counsel for the respondents on the other hand submitted that since there was no records maintained to verify




his past service and performance and the proof of statement made in the O.A. that he got a very good track record, the same cannot be accepted for want of material evidence. A-1 to A-4 documents will not prove the case of the applicant nor identify as to the cause of such cash remittance. In Railways, only for regular/temporary Railway servants or a substitute/casual employees, records are being maintained. The only record which is available with the respondents is the muster roll for the period from 1991 to 2000 and according to this document, the applicant was engaged as Commission Bearer with effect from 1.1.91, taking into account his engagement as fresh entrant. The contention of the respondents is that the cash receipts produced do not indicate the purpose of remittance. So it cannot be said as to whether it is to be remitted towards security deposit or not. Rs.100/- vide cash receipt No. B.07556 dated 31.7.1962 and Rs.50/- vide receipt No.A.92579 dated 17.7.63 would not prove that he was engaged from 5.6.1961 as Commission Bearer. In the Seniority list of Commission Bearers published in the year 1995, 1996 and 1997, applicant's name did not find a place. However, he did not raise any objection for not considering him to a Group'D' post when other Salaried/Commission Bearers have been absorbed in Group 'D' as regular bearers/vendors in the same catering department and as Khalasis in other departments. Therefore, it is presumed that there was a break in his service. That is why the applicant had not claimed the benefit. The respondents are not bound to maintain any service records and it is seen that from 1992 onwards there was a break in service in the case of the applicant. The alleged juniors who were mentioned in the O.A. were engaged as Commission Bearers w.e.f.1979 and they are entitled to get regularisation.



6. We have heard the learned counsel for the parties and perused the material, pleadings and the documents placed on record.

7. On going through the documents produced by the applicant dated 5.6.61 (A-1), it is clear that an amount of Rs.100/- has been remitted by the applicant in which it has been recorded as VRR/Erode (Vegetarian Restaurant). In the said document, it was also inscribed that the said remittance is towards security deposit. So also the other receipts produced along with the O.A. which are mentioned in the impugned order regarding payment of Rs.100/- and Rs. 50/- on 31.7.1962 and 17.7.1963 respectively, will show that the applicant was engaged by the respondents. Even in the impugned order one of the contentions of the respondents in denying the benefit is that since the receipts were issued in 1962 and 1963, the applicant cannot be said to be engaged from 1961 onwards. Vide order No.J/P 113/VIII/Tfc/I/E dated 16.09.87 (A/4) issued by the DRM, Palghat, with reference to payment of arrears to Commission Bearers as per Supreme Court's orders, in page 8 it was categorically named the applicant at Sl.No.28 with a direction that " Cases of overpayment of Commission Bearers worked out and recovery made in instalment basis", wherein a sum of Rs. 8591/- has been directed to be recovered from the applicant towards overpayment of Commission with effect from April, 1987. There is no doubt, that it is an indication that the applicant has been considered and treated as Commission Bearer and he was paid excess amount of commission which is sought to be recovered. Under these circumstances, we do not find any reason for the respondents to deny the applicant's regularisation, on the ground that no




material evidence was available in respect of his service with the respondents whereas the respondents' own documents would show that the applicant was working under them since 1987. Hence, the contention of the respondents that ~~that~~ they had not maintained the records also will not be justified to deny the claim of the applicant.

8. Further, A-3 is an order passed granting payment of arrears to Commission bearers as per the order of the Hon'ble Supreme Court. Hon'ble Supreme Court in *Shining Tailors V. Industrial Tribunal-II U.P.* and others reported in 1983(2) L.L.J. 413 held that even persons who were being paid remuneration on piece rate were 'workmen' coming within the definition of the I.D.Act. (TA-K 316/87) In that case, their Lordships observed as follows:

".....the right of removal of the workman or not to give the work has the element of control and supervision. If these aspects are considered decisive, they are amply satisfied in the facts of this case. The Tribunal ignored the well laid test in law and completely misdirected itself by showing that piece rate itself indicates a relationship of independent contractor an error apparent on the record disclosing a total lack of knowledge of the method of payment in various occupations in different industries. The right of rejection coupled with the right to refuse work would certainly establish master servant relationship and both these tests are amply satisfied in the facts of this case."

Though the applicant in this case had received payment/remuneration in the form of commission, depending on the quantum of sales, nevertheless since the Railway Administration had the control and supervision not only over the work, but also on the mode of execution of work of the employees, the relationship between the Railway Administration and the applicant is master and servant and we have no hesitation in holding that



the applicant is entitled to the benefit of regularisation. Now a question comes before us is as to what is the date from which regularisation can be granted to the applicant. The specific contention of the respondents is that there were intermittent breaks in service and that the service records of the applicant are not available with them. The applicant became a salaried commission bearer in 1991 according to the Muster roll of the Railway Administration. In these circumstances, it is a matter to be looked into as to what was the reason for the long delay in considering him as a Salaried Commission Bearer and non-regularisation. Since the respondents specifically pleaded that two similarly placed persons have been already absorbed in Group 'D' post long back and the applicant slept over the matter, his claim for regularisation from 1978, i.e. the date his alleged juniors have been regularised, cannot be accepted. Since nothing has been clearly brought on record to show that he was actually working with the respondents during that period without any break and also he did not pursue the matter at the appropriate time when his juniors have been regularised while working together at the same capacity, the delay that has been caused in making the said claim is to be viewed as inordinate and without any explanation. The law will not come to the rescue of the applicant who had slept over his rights for long and for no reasons. In the absence of any evidence, we are of the view that we cannot direct the respondents to regularise the applicant right from 1978. But of course, on a perusal of document dated 16.9.87 (A4) we find that he has been considered as a Commission Bearer alongwith others and overpayment made to him was ordered to be recovered from 1.4.87. This is a very cogent and clear material evidence that on 1.4.87 he was working as Commission



Bearer. Therefore, we declare that the applicant is entitled to be treated as Commission Bearer with effect from 1.4.87 and is entitled to continuity of service with all consequential benefits, like regularisation of service in Group 'D' post etc.

9. In the result, we hold that A-3 order is not based on any valid ground and therefore, faulted. Accordingly, we set aside and quash A-3 order dated 15.02.2001 with a direction to the respondents to treat the applicant as Salaried/Commission Bearer with effect from 1.4.87 giving continuity of service and regularise him on a group 'D' post if he is otherwise found eligible. However, he may not be entitled for monetary benefits till 1.1.91. We also make it clear that the respondents will ascertain the date of superannuation of the applicant as per records.

10. In the conspectus of facts and circumstances, we direct the respondents to comply with the above directions within a period of three months from the date of receipt of a copy of this order. No costs.



(K.V.SACHIDANANDAN)
JUDICIAL MEMBER



(T.N.T.NAYAR)
ADMINISTRATIVE MEMBER