

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

ORIGINAL APPLICATION No. 374/2012

~~WEDNESDAY~~....., this the 3rd.....day of February 2016

CORAM:

HON'BLE MR.U.SARATHCHANDRAN, JUDICIAL MEMBER

Khadeejakutty, aged 58 years, w/o late Mohammed,
Vadakkethil House, Aloor, Pattithara P.O.,
Thrithala (via), Palakkad District.

- Applicant

(By Advocate Mr. T.A.Rajan)

Versus

1. Union of India represented by the
General Manager, Southern Railway,
Park Town, Chennai.
2. Senior Divisional Personnel Officer,
Southern Railway, Palghat -678 001.
3. Senior Divisional Mechanical Engineer,
Southern Railway, Palakkad -678 001.

- Respondents

(By Advocate Mr.Thomas Mathew Nellimoottil)

This Original Application having been heard on 11-01-2016, this Tribunal
on 03-02-2016 delivered the following:

O R D E R

Per MR.U.SARATHCHANDRAN, JUDICIAL MEMBER

The Applicant in the amended OA is the wife of Shri V.Mohammed, a
retired Railway passenger train driver, who had originally filed this OA. When he
died during the pendency of the OA his wife - the present applicant was permitted
to prosecute the OA amending the pleadings.

2. Applicant's husband was removed from service for the misconduct of

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unauthorised absence vide Annexure A/1 order dt 9.10.1995. On appeal against Annexure A/1 order the appellate authority reduced the penalty of 'removal from service' to 'compulsory retirement' vide Annexure A/2 order dt. 3.1.1996. Though a revision petition was submitted the same was rejected. Till April 2001, no steps were taken by the respondents to grant pension and other pensionary benefits to the applicant's husband. However, thereafter applicant's husband had been given a reduced pension without any gratuity. Therefore he filed OA 814/2004 before this Tribunal. This Tribunal allowed the OA 814/2004 vide Annexure A/3 order dt 6.7.2006 declaring that he is entitled to full pension and full gratuity based on the last pay/ last 10 months' average pay for the total number of qualifying years of service. According to the applicant out of the 494 days calculated by the respondents as non-qualifying service 33 days are to be treated as qualifying service. Therefore the total qualifying service of applicant's husband is 29 years, 10 months and 3 days which has to be reckoned as 30 years for granting pension and gratuity.

3. Applicant is further aggrieved by the factor applied by the respondents for her husband's commuted value of pension i.e.10.78 which according to her ought to have been 12.95. She contends that as her husband was compulsorily retired from service vide order dt. 3.1.2006, he ought to have been deemed to be continued in service till the order of the appellate authority and therefore since the 5th CPC recommendations were brought into effect from 1.1.1996 he was eligible to get pension and gratuity based at the 5th CPC rate of pay. It is also alleged that pension and gratuity were calculated in the lower basic pay Rs. 2640/- without taking into account the DA, IR-I and IR-II which have adversely reflected in the pension and gratuity received by him. Therefore the applicant seeks relief as under:

- I) Direct the respondents to revise the pension and gratuity of the applicant's



husband duly taking into account the qualifying service as 30 years and direct further to grant the difference in pension and gratuity with 10% interest at the earliest.

II) Direct the respondents to revise the commuted value of pension of the applicant's husband with the factor 12.95 and direct further to grant the difference in commuted value of pension with 10% interest at the earliest.

III) Direct the respondents to re-fix the pension and gratuity based on his pay as per 5th Pay Commission report and direct further to grant the difference in pay with 10% interest at the earliest.

In the alternative

IV) Direct the respondents to re-fix his pay and gratuity taking into account of his basic pay Rs.2660/- and DA, IR-I and IR-II and direct further to grant the difference in pay and gratuity with 10% interest at the earliest.

V) Award costs of and incidental to this application,

VI) Grant such other relief, which this Honourable tribunal may deem fit and proper in the circumstances of the case.

4. Respondents resist the OA by contending that the applicant's husband ought to have raised the above contentions in OA 814/2004 and therefore the filing of the OA after the time lag of 9 years is heavily barred by limitation. Respondents point out that the OA is bad for multiplicity of the relief claimed also. According to respondents as per Annexure A/1 penalty advised, the penalty imposed on applicant's husband came into force from 12.10.1995 i.e date on which Annexure A/1 was acknowledged by him. The appellate authority who modified the penalty of removal from service into compulsory retirement had sanctioned 2/3 rate of compensation pension and no gratuity in terms of Rule 53 of Railway Pension Rules and therefore he was granted only 2/3 pension w.e.f. 13.10.1995. However, in OA 814/2004 by Annexure A/3 order dt 6.7.2006 of this Tribunal the respondents granted full pension and gratuity vide Annexure

R/1 order dt 26.3.2007. According to respondents out of the total service of applicant's husband's non-qualifying service was one year 4 months and 14 days and therefore after deducting the same his net qualifying service was fixed as 29 years 8 months and 13 days which was treated as 29.5 years. Applicant's husband did not raise any objection regarding his qualifying service immediately after sanctioning pension in 2008 and hence the present OA which has been filed after nearly 10 years is to be rejected. According to respondents the contention of the applicant that he had 33 days of qualifying service more is not correct. However, applicant has not produced any evidence to substantiate the claim that he was on duty or on permissible leave during the aforesaid 33 days. Respondents state that no other records are available with the Railway to verify the claim of the applicant. The claim made by the applicant for making applicable the commuted value of 12.95 to the applicant is not allowable because the date of his application for commutation pension is 25.07.2002 and hence commutation has become absolute only on that day. According to respondents at that time the applicant was over 57 years of age and the commutation factor 10.78 for the age at the next birth day i.e. 58 years was reckoned. The respondents relied on Annexure nos. R/1 & R/2 in support of this contention.

5. Respondents contend that the claim that the applicant's husband ought to have been treated as deemed to be in service till the date of modified punishment is impermissible in view of the Railway Board letter in which it has been made clear that the reduced penalty of compulsory retirement will take effect from the date of original penalty and therefore the applicant's husband is not entitled to pension and gratuity based on the 5th CPC pay revision. It is also contended that as the applicant's husband was on extraordinary leave, pay drawn by him from November, 1994 was taken into account for computing the last 10 months

average pay. There is no rule for taking into account DA, IR-I & IR-II for determining the average pay. Applicant's husband being a running staff was given benefit of 55% basic pay representing the pay element in addition to the pay. Respondents pray for rejecting the OA.

6. Heard learned counsel appearing for both sides. Perused the record.

7. During the final hearing of this OA, Shri T.A.Rajan, learned counsel for applicant submitted that relief no.3 & 4 sought in the OA are not pressed. Therefore the prayer concerning the qualifying service and commutation value in respect of applicant's husband alone need to be considered.

8. Referring to a decision of the Kerala High Court in *Mathai M.V. v. Accountant General (A&E), Trivandrum and others* 2015 (5) KHC 106, learned counsel for applicant submitted that while calculating the length of qualifying service for pension the impact of leap years occurring during the actual length of service of the employee also should be taken into account. The reasoning of the High Court can be discerned from the following extracts from the judgment :

"8. As rightly pointed out by the learned Senior Counsel for the petitioner in the calculation made by the respondents, the impact of leap years has not been taken to account. This is a crucial aspect in this case as the benefit of 27 years is denied only for the shortage of one day. If it is 26 years and 5 months, it cannot be rounded to 27 years as per Rule 57 of Part III KSR. There would be one leap year in every four years. The leap year being relevant in the particular context of this case, a further probe into it is germane.

9. In Webster's Dictionary, the leap year has been defined as :



"a year in the Gregorian calendar having 366 days, with an extra day, February 29, intercalated to compensate for the quarter day difference between an ordinary year and astronomical year".

10. In the new Millennium Dictionary, the leap year has been given the meaning as :

every fourth year when February has 29 days".

11. In Black's Law Dictionary, the day which is added in every 4th year, is noted as "Blissextile" and the meaning of it is given as under:

"The day which is added every fourth year (leap-year) to the month of February, in order to make the year agree with the course of the sun".

12. Therefore, the leap year with an extra day, comes in every four years and in 26 years, there were six leap years and therefore, the petitioner gained a minimum of 6 extra days. Therefore, I see valid force in the argument advanced by the learned Senior Counsel for the petitioner. Over and above the calculation arrived at that the petitioner's service is 26 years 5 months and 29 days which is done based on ordinary years, there would be six extra days where the petitioner is worked in the school. As the shortage in the petitioner's qualifying service is only one day to complete 26 years and six months, the six extra days accumulated to his credit on account of the intervening six leap years during the service period assumes importance and the same is crucial to calculate his total qualifying service".

9. Shri Rajan submitted that in the light of the aforesaid ruling of the High Court of Kerala applicant's husband is entitled to get the benefit of one day for every leap year during the entire period of his service by adding to his total qualifying service. According to respondents the applicant's husband had only 29 years, 8 months and 13 days as qualifying service which was taken into as 29.5 years. As per the rules qualifying service of 3 months or more but less than 9 months should be treated as 1/2 year and accordingly the qualifying service of the applicant's husband was fixed as 29.5 years.

10. Respondents state that no piece of paper was submitted in support of his claim that he has actually worked 33 days as stated in para 5 of the OA. Applicant has produced Annexure nos. A/7 & A/8 pay slips along with the rejoinder to show that her husband had rendered full 30 days of service in June, 1995 and 31 days of service in July 1995. Applicant relies on Annexure A/9 & A/10 to show that her husband had worked on train No. 6683 on 4.5.94 and 14.5.94 also. Learned counsel for the respondents referring to the second additional reply statement filed by the respondents submitted that in Annexure A/9 & A/10 there is no mention of the applicant's husband and therefore they cannot be relied upon. Similarly respondents have also contended in the additional reply that Annexure A/7 & A/8 pay slips cannot be verified after the lapse of nearly 20 years in view of the circumstances that the preservation period of the connected records was already over. According to respondents Annexure A/7 & A/8 salary slips for the months of June and July 1995 cannot be relied upon because as per the leave chart he was treated as on extraordinary leave which was treated as non-qualifying service from 16.5.95 to 15.7.95(13 days). However, it appears that Annexure A/7 & A/8 the pay slips for the months June and July 1995 - which are computer print outs - reveal that the applicant's husband had worked for 30 days and 31 days respectively during the month for which the pay slip was issued. This Tribunal is of the view that despite the contention of the respondents that preservation period of the aforesaid documents is over the authenticity of the Annexure A/7 & A/8 cannot be ordinarily disputed by them. Similarly the log books of the trains in which the applicant's husband claim to have worked on 4.5.94 and 14.5.94 also require to be verified whether applicant was a member of the crew of those trains. Though his name is not figuring in either Annexure A/9 or A/10 this aspect can be verified with other records relating to the train and the details can be corroborated with the records of the persons mentioned therein. In view of the afore mentioned document produced by the applicant it appears to this Tribunal that the respondents require to have a re-look into the

actual number of days the applicant's husband claims to have worked as stated in the OA.

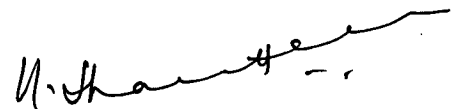
11. It was contended by the learned counsel for respondents that the claims relating to the qualifying service of the applicant's husband ought to have been made within one year from the date of pension payment order. However this being a matter relating to pension which is a recurring payment any deficiency occurring at the initial calculation will have a cascading effect on the pension\ family pension. Therefore it is settled position that the strict rule of limitation cannot be made applicable to pension matters as they give rise to a recurring cause of action.

12. Yet another challenge by the applicant is the commutation factor employed by the respondents for the commuted value of her husband's pension. According to respondents as per the Railway Service (Commutation of Pension) Rules, 1993 commutation of pension shall become absolute on the date of receipt of application in form No.1 in the Head Office and the amount shall be calculated in accordance with the commutation factor based on the age on the next birth day of the pensioner. Annexure R/3 is the chart indicating the commutation value for pension. In the case of the applicant's husband respondents have reckoned the age as 58 years on the ground that R/2 application for commutation was received by them only on 25.07.2002. It has to be remembered that even as per the contentions of the respondents the reduced penalty imposed on the applicant's husband has to be taken effect from the date of imposition of the original penalty. Thus going by the respondents' own version the applicant's husband ought to have been treated compulsorily retired from the date of original penalty i.e. 9.10.1996. The respondents took a

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long time for sanctioning Pension and gratuity to the applicant's husband. It appears that applicant's husband could therefore file application for commutation only on 25.07.2002 for no fault of his. In fact he ought to have been granted pension at least from the date of Annexure A/2 appellate authorities order, with restropective effect from 9.10.1995. Therefore this Tribunal finds some merit in the contention of the applicant that her husband was only 50 years of age as on 13.10.1995 and therefore the factor applicable for commuted value of pension is 12.95.

13. In the above circumstances this Tribunal directs the respondents to have a re-look into the total qualifying service of the applicant's husband in view of the leap years intervening. Respondents shall also reconsider the claims made by the applicant of the 33 days as stated in para 5 in the OA, in the light of Annexure nos. A/7 to A/10 documents. In the event of any change found to be made as increase in the total qualifying service of applicant's husband, respondents shall issue a revised pension payment order and shall grant all consequential benefits to the applicant. Respondents shall reckon 12.95 as the factor applicable for commutation of the applicant's husband's pension and the difference in the commuted value of the pension shall be paid to the applicant on behalf of his legal heirs. The above exercise shall be completed by the respondents within 3 months from the date of receipt of a copy of this order.



(U.SARATHCHANDRAN)
JUDICIAL MEMBER