IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PATNA BENCH: PATNA

Registration No.OA-252 of 1995

(Date of order 24.5.1996)

Kumar Nand Kishore Singh Sikriwal .... Applicant

Versus

The Union of India & Others ..... Respondents

Coram: Hon'ble Mr. N.K.Verma, Member (A)

Counsel for the applicant: .. Mr. N.P.Sinha

Counsel for the respondents: .. Mr. Gautam Bose

O R D E R

Hon'ble Mr. N.K.Verma, Member (A):

This is an application by Shri Kumar Nand Kishore Singh Sikriwal, a retired railway employee praying for direction to the respondents (a) to commute retrospectively, the period of absence of the applicant without leave as extra ordinary leave from 8.10.1975 to the date of his joining in April, 1976 and (b) the respondents be commanded to pay retiral benefits to the applicant for his services rendered from 8.8.1949 to 31.1.1986 with effect from 1.2.86 with due interest @ 18% per annum. The facts of the case are that the applicant joined Railways as Assistant Station Master on 9.8.1949. He continued to work in that capacity till 1964 when he was promoted as Station Master. While working as Station Master, Pradhan Khanta, Eastern Railway,

the applicant was placed under suspension with effect from 5.5.1971 along with certain other persons for certain unlawful action taken by him. The said suspension was subsequently revoked and the applicant was transferred to another station at Jarangdih, which he joined on 17.11.71 He was proceeded against under Rule 9 of the Railway Servants (D & A) Rules, 1968 in November, 1973 and was punished with the order of removal passed by the respondent no.3 (Senior Divisional Commercial Manager), Eastern Railway vide his order dated 8.10.1975. The applicant preferred a statutory appeal on 7.10.1975, to the respondent no.2, the Divisional Railway Manager, Dhanbad. The DRM on due consideration of his appeal communicated to the applicant an offer to join on a lower post of Signalar. The applicant under the compelling circumstances, in which he was placed at that time, accepted the offer and accordingly, vide Annexure-A/7, the offer of re-appointment was issued by the Divisional Personnel Officer, Dhanbad wherein it was stated that the applicant was re-appointed as Signaller at the level of Rs.360/- per month in the scale of Rs.260-430 and he was posted at Barkakana, Eastern Railway. He worked in the same capacity till he retired on superannuation on 31.1.1986 by which time he had rendered a further service of 9 years and 9 months. Since his services fell short of 10 years qualifying service, for grant of pension, he was paid only Gratuity of 9½ months for his service from 24.4.1976 to 31.1.1986 and no amount of pension was paid to him though the services rendered by him from 11.8.1949 to 8.10.1975 was about 27 years of service. Thus all his past service were forfeited prior to his re-appointment in 1976. The applicant claims to have made an application for grant of pensionary benefits to the General Manager, Eastern Railway on 26.6.1986 with reminders on subsequent dates on the ground that his statutory appeal dated 27.10.1975 was still pending decision. With no reply from the

respondents the applicant made an application on 24.1.1991 to the President of India for the grant of the said retiral benefits but again there was no reply from that quarter also. The respondents paid the Provident Fund money of the applicant on 3.9.1987 through cheque which would indicate that he remained in continuous service till his superannuation, else the respondents would have paid this amount at the time of removal from service in 1975. It has been averred by the applicant that it was the bounden duty of the respondents to treat the absence from duty from 9.10.1975 till the date of his joining in April, 1976 as extra ordinary leave since the applicant was offered the lower post after his statutory appeal and the result of the said appeal is still not known. The applicant states that as per Rules 6 of the Railway Servants (D & A) Rules, 1968, there is no penalty as re-appointment on a lower post after removal. The appellate authority under the rules 22(2) of the Railway Servants (D&A) Rules are required either to determine, enhance, reduce or set aside the penalty or remit the case to the authority which may impose or enhance the penalty or refer to any other authority with such directions as it may deem fit under the circumstances of the case. The rule nowhere empowers to ask the appellant to accept the lower post. Further, there is no provision under the rules for re-employment except in the case of pre-matured retirement by offering the lower post. Therefore, Annexure-A/7 dated 24.4.1976 is a loosely worded order by the appellate authority and warrants modification or amendment. At the time of re-employment the applicant had rendered nearly 27 years service and with the qualifying service and the weightage admissible on this, entitled to pension.

Pension is a property of the individual and cannot be alienated under anybody's orders to his disadvantage. It has been averred by the applicant that even the President of India has no authority to forfeit the pension. The authorities had powers to remove the applicant from service but they had no right to forfeit the pensionary benefits of the applicant. It has been further averred that prior to 1978, before the incorporation of the 44th amendment the right to property was guara -nteed by Article 31 and at the time of his removal from service the applicant had absolute right to the pension which was his property. However, this right was not protected by that order of 1976. However, as per para 1805 of the Railway Establishment Manual Vol.II, the auth-orities are comp-etent to regulate the intervening period between the date of pre-matured retirement or otherwise on re -instatement of the Railway Servant as extra-ordinary leave or dies n-on. The applicant, therefore, prays that this period should be treated as extraordinary leave and he may be granted pensionary benefits for the entire period of service rendered by him.

2. The applicant had filed OA No.66 of 1993 before this Bench of the Tribunal on 12.4.1992 which was dismissed by the Hon'ble Tribunal o n 17.3.1993 on the ground that th application was barred by limitation. A review petition was also rejected by the same Bench and thereafter the applican filed the SLP No.6670 of 1994 before the Hon'ble Supreme Court which has remitted the matter vide order dated 5.12.9 to adjudi-cate the applicant's claim afresh on all the points of controversy between the parties. The Supreme Cou has held that the applicant's claim for grant of pensiona benefits atleast for the period within limitation from the date of fi-ling of the application and in future

could not be treated as time barred even assuming that there was an earlier period for which the claim had become time barred. The Supreme Court observed "The Tribunal completely overlooked th-is aspect that appellant's claim was based on a recurring cause of action." Thereafter this fresh OA has been preferred.

3. The Railways in their reply have come up with the statement that the applicant made a mercy appeal before the appellate authority, who, while maintaining the finding of the gu -ilt , took a very sympathetic view in the matter and the applicant after being considered was offerred the re-appointment of a Signaller, which he accepted. As per the Rule 309 of Manual of Railway Pension Rules, 1950 and Rule 14(viii) of the Rai-lway Service (Pension) Rules 1993, the period of employment will not constitute service for pensionary benefits in case of removal o-r dismissal. Therefore, the applicant on being re-appointed to the post of Signaller was given all benefits which was admissible under the rules. Railways have further stated that the applicant on being re-appointed to the post of Signaller never during the intervening period between 24.4.1976 and his retirement in April, 1986 ever challenged his re-appoin-tment and thereafter for computing his past services for pensionary benefits and thus the claim is hopelessly time barred under Section 21 of the A.T.Act, 1985. The respondents however, w ere not able t o produce the letter dated 16.4.76 which contained the various stipulations governing his re-appoin-tment as it was not possible to dig out this letter after nearly 20 years of the issue of the same. The Railways have heavily relied upon the pension rules which say-s that if a person stands removed from service, the service rendered by him shall not be taken into account for the purpose of pension. Re-appointment or re-employment

is not barred in cases of removal as distinct from the case of dismissal. The applicant was removed from service and was re-appointed as per the extant rules and he was paid all the retiral dues considering his services for 9 years, 9 months and 5 days as Signaller. His status between the period of his removal and re-appointment cannot be converted into extra-ordinary leave as this is not admissible as per the rules.

4. In the course of arguments Shri N.P.Sinha, learned counsel for the applicant strenuously tried that the order of removal was on appeal not upheld and the appellate authority i.e. Divisional Superintendent of Railways converted that order into one of reduction in rank to a lower post of Signaller and called it re-appointment which was totally exceeding his jurisdiction as the appellate authority. As per the Railway Servants (D&A) Rules, he was not empowered to give such a kind of order, yet an order to that effect was passed and since the applicant was at the point of starvation at that time, he acquiesced in that, howsoever wrong or loosely worded it was. Annexure-A/7 which was an order of temporary re-appointment under the signature of Divisional Personnel Officer was handed over while the applicant was present in the office. It is an undeniable fact that the appeal preferred by the applicant dated 27.10.1979 was not disposed of as there is no mention of this appeal in temporary re-appointment order. The Railways have not denied this point, and thus, it is established that the appellate authority did not exercise his powers in proper and fair manner. He seems to have exercised his power as unchannelled and unrestricted authority who could pass any order without validity in law or even by statutory rules. A Govt. servant under Article 311(2) of the Constitution enjoins protection and cannot be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of the charges. The Railway Servants (Conduct and Appeal) Rules under this controvery has stipulated very

stringent steps to be followed before inflicting any of these punishments and these are clubbed under the major penalties under Rule 6. A statutory appeal has also been provided against orders passed by the disciplinary/appointing authority which has to be dealt with in accordance with Rule 22 of the Rules and the appellate authority has to consider all the circumstances of the case and make such orders as deemed fit, just and equitable. Rule 23 prescribes that the authority which made the order on appeal against shall give effect to the order passed by the appellate authority. Thus, it would be seen that the order of the disciplinary removing the applicant had to be confirmed by the appellate authority through a reasoned order passed by him. Unfortunately no such order exists and the letter at Annexure-A/7 only refers to the various stipulations made regarding his appointment. This is a totally unconnected document with reference to his appeal. If the respondents plea that it was a mercy appeal and the then DRM in his generosity considered sympathetically and did away with the procedural requireement, the same cannot be sustained in law. As on date the appeal does not seem to have been considered and disposed of in terms of Rule 22 and 23. As per the Rule 18, an appeal was permissible against the order imposed by the disciplinary authority and so long that appeal has not been disposed of, the removal of the applicant cannot be considered to have been confirmed in law. Thus, the argument of the learned counsel for the applicant that the applicant was not legally removed from service when he was re-appointed on 24.10.1976 appear quite reasonable and logical.

5. The learned counsel for the respondents was asked by me to produce the order of 16.4.1976 by which the terms and conditions of the applicant's re-appointment were stipulated. Shri Bose was not able to produce this document

in spite of his serious attempts to do so. The respondents could also not come out clean with the facts whether the appellate order in the matter was passed or not. However, Mr. Bose was able to produce for my perusal a photostat copy of the Manual of Railway Servants Pension Rules,1950. which stipulates in Rule 309 that "No pensionary benefit may be granted to a Railway Servant on whom the penalty of removal of dismissal from service is imposed; but to a Railway servant so removed or dismissed, the authority who removed or dismissed him from service may award compassionate grant(s) - corresponding to ordinary gratuity and/or death-cum-retirement gratuity, and/or allowances to ordinary pension, when he is deserving or special consideration; provided that the compassionate grant(s) and/or allowance awarded to such a Railway servant shall not exceed two-thirds of the pensionary benefits which would have been admissible to him if he had retired on medical certificate." Para 310 states "Para 309 vests the officer removing or dismissing the Railway servant from service with an absolute discretion to grant or not to award any compassionate grant(s) and/or allowances, the only restriction being that, if awarded, it shall not exceed the maximum of two-thirds of the pensionary benefits that would be admissible to the Railway servant concerned on retirement on invalid gratuity/pension. Each case has to be considered on its merits and a conclusion has to be reached on the question whether there were any such extenuating features in the case as would make the punishment imposed, though it may have been necessary in the interests of Government, unduly hard on the individual. In considering this question it has been the practice to take into account not only the grounds on which the Railway servant was removed or dismissed, but also the kind of service he has rendered.

Where it can be legitimately inferred that the Railway servant's service has been dishonest there can seldom be any good case for award of compassionate grant(s) and/or allowances, but special regard is also occasionaly paid to the fact that the Railway servant has a wife and children dependent upon him, though this factor by itself is not, except, perhaps, in the most exceptional circumstances, sufficient for the grant of compassionate grant(s) and/or allowances.

6. Admittedly, the applicant when he was removed from service in 1975, he was governed by under these Rules 309 of the pension rules which were applicable to all permanent Railway servants except those who are removed or dismissed from service or resigned from it before completing 30 years qualifying service.

7. The question which needs to be adjudicated now is whether the applicant was removed from service on 8.101975 as duly confirmed by the appellate order of the Divisional Superintendent of Railways on the appeal filed by the applicant in 1975. The averments, pleadings and arguments having brought out nothing on record to establish that the appellate order considered and rejected the orders of the disciplinary authority upheld. If the orders ofthe disciplinary authority was not upheld, the order of removal became non-est. on the other hand if itis convassed that the order of removal was kept intact, but the applicant was offered re-appointment as the removal did not debar him from further employment in any deparment or in the Railways, then again, the whole order has to be there to confirm that the applicant was removed from service and that became effective ~~from~~ before the date the re-appointment order was issued. It is settled principle of law that once an appeal is made as per the Discipline & Appeal Rules or as per the law, further proceeding is to abate till the final conclusion of appeal or litigation is known. Thus, it is very difficult for me to upheld that the applicant stood removed from service

from 8.10.1975. In the conspectus of the circumstances the order at Annexure-A/7 can only be considered to be an appellate authorities order by which the penalty of removal has been modified to that of reduction in rank on a lower pay scale although the order is not clothed in the proper wording and in a format prescribed for such appellate orders. It is a totally illegal and irregular order passed by the appellate authority which was implemented and acquiesced in by the applicant because of his personal adversity at that point of time. However, this cannot be used against him now when he has come out for the pensionary benefits to which he became conscious only when his past services were washed off. It is undeniably established that past services are forfeited in case of dismissal and removal from service as per the Pension Rules, 1950 and also for the pension rules for all the railway services. But Rules 309 and 310 of the pension rules have given powers to the punishing authority absolute discretion to grant or not to award any compassionate grant or allowances which can be upto 2/3rd of the pensionary benefits to a dismissed or removed railway official. The railway respondents were within their powers to have exercised this discretion in favour of the applicant when he made his representation for grant of pensionary benefits on the basis of 27 years service which he had rendered before being removed by the disciplinary authority. What they have done is a mechanical approach of granting only his post reappointment period for calculation of gratuity admissible to officials who have not completed even 10 years qualifying service for retirement. This seems to be totally unsustainable in the eye of law.

8. Rule 20 of the Pension Rules states "qualifying service of a railway servant shall commence from the date he takes charge of the post in which he is first appointed either substantively or in an officiating or temporary

capacity. Provided that officiating of temporary service is followed without interruption, by substantive appointment in the same or another service or post." Very elaborate provisions have been m-ade in Chapter III of this pension rules by which even service paid from contingency and service of substitute is taken into account for computing the qualifying service. The applicant had nearly 27 years service at the time of his alleged removal from service which was further increased by 9 years 9 months and 5 days after he was re-appointed. The only interruption is because of the disciplinary authority's orders of removal, which has not been sustained by the orders of the appellate authority. The intervening period, therefore, has to be covered by grant of such leave due and admissible to the applicant as per his service records, or by grant of extraordinary leaves which shall count towards pensionary benefits.

9. I have given a very serious consideration to all the aspects of this case, more so, in view of the directions of the Hon'ble Supreme Court that the Tribunal must adjudicate between the claims of the parties. In this I am also helped by the judgment of the Hon'ble Supreme Court in the case of A.P.Srivastava v. Union of India & Others reported at J.T.1995. In that case a temporary Govt. employee of 20 years of service was retired compulsorily in accordance with FR456 (J)(ii) and the question was whether he ceases his right to receive pension. The Hon'ble Supreme Court held that a temporary Govt. servant would be entitled to pension even if he is required to retire by the employer in exercise of powers under Rule 56 (j) of the Fundamental Rules. The Court held that"it has been held (by) by this Court time and again that pension is not a charity or bounty nor it is a conditional payment solely dependent on the sweet will of the employer. It is earned for rendering a long service and is often described as a deferred portion of payment of past services. It is in fact in the nature of Social Securit plan provided for a superannuated Govt. servant. If a temporary

Govt. servant who has rendered 20 years of service is entitled to pension, if he voluntarily retires, there is no justification for denying the right to him when he is required to retire by the employer in public interest. In other words, the condition precedent for being entitled to pension in case of temporary Govt. servant is rendering 20 years service." The court further held "In view of the legal provisions that an order of compulsory retirement is not a punishment and pension is a right of the employee for services rendered, we see no justification for denying such right to a temporary Govt. servant merely on the ground that he was required to retire by the employer in exercise of power under Rule 56(j) of the Fundamental Rights." Taking inspiration by the ratio of this judgment, it is held that the removal of the applicant was not a punishment legally and properly inflicted upon him. He was inflicted the punishment of reduction in rank of a lower scale of pay which was illegally and mistakenly called re-appointment. The Annexure-A/7 is not a proper order which can stand the legal scrutiny. However, as that order has been implemented and complied with both by the applicant and the respondent it has become a faet accompli giving the applicant a continuous service and takes him out of the net of removal. If the applicant was not removed from service, legally and properly, his qualifying service rendered by him prior to the removal order in 1975 shall count towards his pensionary benefits together with the additional service rendered by him after his joining in April, 1976.

ORDER

10. In view of these observations the OA succeeds. The applicant shall be granted pensionary benefits taking into account the entire period of service rendered by him till the date of his superannuation. The break in service durin g the alleged period of removal and re-appointment

shall be covered by grant of extraordinary or any kind of leave due to him as per rules. However, the arrears of pension shall not be payable to him for the period he slept over the matter on his own. He would be paid the arrears of pension only from the date he approached this Tribunal through an application on 12.4.1992 for sanction of extraordinary leave and retiral benefits.

(N.K.VERMA)
MEMBER(A)

Akhtar