

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA.

O.A. No. 393 of 2006

Date of order : 28th November, 2011

C O R A M

Hon'ble Mr. Naresh Gupta, Member [A]

Smt. Tara Devi, W/o Bishundeo, r/o village Madan Gachhi, P.O. - Mokama, District – Patna [Bihar]

.....Applicant.

By Advocate : Shri M.P. Dixit

Vs.

1. Union of India through the General Manager, E.C. Railway, Hajipur.
2. The Divisional Railway Manager, E.C. Railway, Danapur.
3. The Sr. D.E. N. [Co-ordination], E.C. Railway, Danapur.
4. The Sr. D.P.O., E.C. Railway, Danapur.
5. The Sr. D.A.O., E.C. Railway, Danapur.
6. The Assistant Engineer, E.C. Railway, Mokama.
7. The Inspector of Works, E.C. Railway, Mokama.
8. The C.M.S., E.C. Railway, Danapur.

.....Respondents.

By Advocate : Shri Nirmal Kumar.

O R D E R

Naresh Gupta, M [A] - This OA has been filed by one Tara Devi against the order of the DRM, E.C. Railway, Danapur dated 18.01.2006 rejecting the claim of the applicant for grant of family pension [Annexure A/8 of OA]. The facts of the case, as presented in the OA, are as follows:

2. The applicant is the wife of one Bishundeo who was said to have been posted as Khalasi under the I.O.W, E.C. Railway, Mokama. The husband of the applicant was appointed in the Railways on 28.01.1964 as Casual Labour and was granted temporary status with effect from 16.01.1980 and after due medical test, declared medically fit in B/1 category. While he was in active service, her husband's whereabouts were not known with effect from 22.09.1990. The Officer-in-charge of Mokama Police submitted his report dated 18.09.1992 to the respondent No. 7 in which it was clearly stated that inspite of the best efforts of the police, the whereabouts of Bishundeo could not be ascertained [Annexure A/4 of OA]. Thereafter, the applicant submitted a representation to the respondents on 24.09.1991 regarding release of settlement dues etc. [photo copy of

representation dated 24.09.1991 in Annexure A/5 of OA].

3. It is stated that the applicant submitted a representation to the B.D.O., Mokama on 18.11.1997, indicating that the said employee, late Bishundeo has a large size family, having his wife [applicant], including six sons and two daughters [married], and the applicant has no other source of income / livelihood except the salary of said Bishundeo, but presently due to missing of said employee, the condition of the family was pitiable and indigent [copy of representation dated 18.11.1997 is in Annexure A/6 of OA]. The report of the Ward Commissioner, Mokama dated 23.08.1999, was also indicative of the pitiable condition of the family. Further, one of the sons, viz., Suryadeo Prajapati had died due to illness as the applicant could not provide medical facilities due to paucity of fund. Thereafter, the applicant filed a case before this Tribunal vide O.A No. 839 of 2004 for family pension, settlement dues and compassionate appointment in favour of her son, Ranjit Kumar. The said O.A was disposed of on 10.12.2004 with a direction to the respondents to treat the OA as representation and pass order accordingly [Annexure A/7 of OA]. As the respondents did not pass any order, the applicant filed a contempt petition on 25.07.2005 vide CCPA No. 121 of 2005 following which the respondents have passed an order dated 18.01.2006 [Annexure A/8 of OA] whereby they have treated the applicant's husband as dead under Section 107 of the Indian Evidence Act but in the impugned order, the claim for family pension was rejected on the ground that her husband was C.P.C Khalasi. Even if the argument of the respondents was admitted, then also the applicant would be entitled for family pension and other benefits as her husband was granted temporary status with effect from 16.01.1980 and was missing from 22.09.1990, i.e., after more than 10 years.

4. It is contended by the applicant that the action of the respondents was illegal, arbitrary, ill-motivated and against Articles 14, 16, 21 and 311 of the Constitution and various judicial pronouncements of Hon'ble Apex Court, High Court and Central Administrative Tribunal on the subject.

5. The applicant also sought appointment on compassionate grounds for her son [but this was not pressed as one of the sons had got the appointment in 1997].

6. The respondents, in their written statement have stated that the husband of the applicant was working as CPC Khalasi. In view of his disappearance, the railway

administration paid PF amount to his wife [applicant]. No recovery had been made towards GIS. The deceased employee was working as CPC and those working as CPC were not entitled for pension, family pension etc. The respondents have cited the decision of the Hon'ble Apex Court in the case of UOI vs. Rubia Bikaner in CA No. 4373 of 1997.

7. At the outset it may be mentioned that *the right for pension is not a common law right but only a privilege admissible to a person emanating from statute/ orders governing the subject. Normally, if a person or a class of persons are not brought within the ambit of pension payment, it may not be possible for a court, to direct that persons so excluded nevertheless will have to be brought within the coverage, only for the reason that the Court considers it just or equitable. A policy decision of the Government requires to be kept undisturbed, unless, of course, on the face of hostile discrimination.* [Smt. Uma Kumari, widow of late Shri vs. Union of India (UOI) (on 10 December, 2007)- Central Administrative Tribunal, Delhi]

8. The respondents have cited the decision of the Hon'ble Apex Court in the case of Union of India vs. Rabia Bikaner in CA No. 4373 of 1997 wherein it was held that no pensionary benefit are admissible even to temporary Government servants and therefore that retrial advantage is not available to casual labour acquiring temporary status. The question was also considered in the case of Union of India vs. Sakanti & Others [SLP© No. 3341/93] decided on July 30, 1996 wherein it was held that no retrial benefit was available to the widow of a casual labour who had not been regularized till his death.

9. The Railway Board in its letter S. No. 3214, Circular No. 720/E/O-IX dated 26.10.1965 had stated that the Family Pension Scheme for Railway Employees 1964 was applicable in the case of regular employees on pensionable establishment. The casual labour will be brought to pensionable establishment only on their absorption against regular temporary post. This implies that they would come under the purview of the scheme from the date of their absorption.

10. In the rejoinder to the written statement, the applicant has referred to the decision of this Tribunal in OA No. 381/2005 [Parwati Devi's case vs. Union of India] which was allowed and against which the writ petition filed in CWJC No. 7789 of 2007 was dismissed by Hon'ble Patna High Court on 21.01.2008 and also the SLP filed by the Railways dismissed on 15.03.2010. This case was on a better footing as the husband of the applicant was not CPC but a regular Khalasi Group 'D'. It is further stated in the rejoinder that the son of the applicant had been appointed on compassionate grounds in the Railways on 21.03.1997.

11. Heard the learned counsels for the applicant and the respondents on 16.11.2011 and perused the entire record. During the course of the hearing, the learned counsel for the applicant cited the following decisions:

(1) Hon'ble Patna High Court in The Union of India & Ors vs. Parvati Devi in CWJC No. 7789 of 2007- In this case the husband of the respondent, Parvati Devi was

employed in the Railway establishment as Casual Labour substitute and was granted temporary status with effect from 30th December 1989 in the regular pay scale of Rs. 750 to 940 along with allowances. The Central Administrative Tribunal, Patna Bench, allowed in OA No. 381 of 2005 [order dated 29.08.2006] the prayer of Parvati Devi for grant of family pension relying on the case of Parbha Devi vs. Union of India [1996] 7 SCC 27 and Union of India vs. Rabia Bikaner- AIR 1977 SC 2843. In the writ filed by the Union of India against this order of the Tribunal, the Hon'ble High Court observed that the deceased husband was not a casual employee though he was initially appointed as casual. He had gradually obtained the status of substitute worker in regular pay scale and allowances applicable to regular posts. The Hon'ble High Court distinguished the case of Parbha Devi vs. Union of India from that of Union of India vs. Rabia Bikaner in that in the latter case the employee was casual labour and had not graduated to the status of substitutes. The SLP against the order of the Hon'ble High Court was dismissed by the Hon'ble Apex Court [order dated 15.03.2010] on the ground of delay as well as on merit.

(2) Meena Devi Vs. Union of India & Ors. in CWJC No. 5386/2002 [order dated 26.08.2002] 2002(4) PLJR 671- It was held that the widow was entitled for pension where the deceased employee, a casual conferred with temporary status, was empanelled and was ready to be screened [and if in the screening test he emerged successful he would have been made a regular employee] but died before it.

12. Per contra, the learned counsel drew attention, apart from the two cases cited in the written statement, to the order of this Tribunal in OA No. 08/2009 [order dated 22.12.2010] wherein the deceased husband was appointed to the post of Khalasi and the stand of the respondents was that he was working as Chowkidar CPC status and had not been regularized in service and was, therefore, not eligible for pension/ family pension. They placed reliance on the case of GM, NW Railway & Ors. vs. Chanda Devi (2008) 2 SCC 108, wherein the Hon'ble Apex Court held that when casual labour has been excluded from the definition of permanent employee, he with temporary status could not have become so, and there is no legal sanction and, therefore, it was further directed by the Apex Court that what was protected by conferring status on a casual labour was only his service, and by reason thereof the Pension Rules were not applicable. The Railway Rules make a distinction between casual labour having temporary status, on one hand, and temporary Railway Government servant on the other.

13. The judgments relied upon by the learned counsel for the applicant are on different facts. In Union of India & Ors vs. Parvati Devi, where reliance was placed on Parbha Devi vs. Union of India [1996] 7 SCC 27 and Union of India vs. Rabia Bikaner- AIR 1977 SC 2843, the question which came up for consideration related to grant of family pension to one who had graduated to the status of substitutes. In Meena Devi Vs. Union of India & Ors., the deceased employee, a casual conferred with temporary status, was empanelled and was ready to be screened [and if in the screening test he emerged successful he would have been made a regular employee] but died before it and on this basis, the Hon'ble High Court allowed the prayer for grant of family pension.

14. In the case of **Union of India and Ors. v. Rabia Bikaner etc.**, 1997(2) SC SLJ 263, wherein their Lordships after considering the earlier judgments of Ram Kumar v. Union of India, reported in (1988)2 SCR 138; Prabhavati Devi (supra) and Union of India v. Sukanti & another, SLP (C) No. 3341/93 etc. came to the conclusion that **no retiral benefits is admissible to the widow of the casual labour who has not been regularised till his death**. However, the Hon'ble Apex Court affirmed the judgment of the Prabhavati Devi case on the ground that in the case of Prabhavati Devi the facts were that from the year 1981 to April 27, 1993, the husband of the appellant had worked as casual worker and obtained the status of substitutes who were working, as defined under Rule 2315 of the Railway Establishment Manual, in a regular establishment on a regular scale of pay and allowances applicable to those posts in which they were employed. Since he died while working in the regular post, his widow became eligible to claim the benefits of the pension scheme.

15. A larger Full Bench of the Hon'ble Apex Court, in the case of Smt. Bhagwati Devi v. Union of India in OA No. 1722/2005 and other connected cases decided on 5th September 2007, after referring to a number of judgments, viz. Anita Devi v. Union of India and Ors., Smt. Latifan v. Union of India and Ors., Geeta Rani Santra v. Union of India and Ors., Rukhiben Rupabhai v. Union of India and Ors., Ram Kumar and Ors. v. Union of India and Ors., Smt. Vallam Badia v. Union of India and Ors., Ram Kumar etc., came to the conclusion that **there cannot be any doubt that a person with temporary status, is eligible for pension, only if he is regularized, and, therefore, no question of payment of family pension arises in the eventuality of his death, before this condition is satisfied**.

16. In the case of **General Manager, North West Railway vs Chanda Devi** in CA 5833 of 2007 [date of judgment- 12 December, 2007], the Hon'ble Apex Court dealt with the same issue exhaustively including the scope and applicability of the Railway Services (Pension) Rules which were made in view of the proviso appended to Article 309 of the Constitution of India and came into force from 2.12.1993. It is relevant to extract certain portions from the judgment [in paras 9, 11, 12, 14, 15, 16, 17, 18, 20, 24, 26 and 27].

Rule 2 of the Rules provides for application thereof only in respect of the following category of candidates:

Application - Save as otherwise expressly provided in these rules, these rules shall apply to the following railway servants, namely:-

(1) any Group D railway servant whose service was pensionable before the introduction of Pension System for Railway Servants on the 16th day of November, 1957;

(2) any non-pensionable railway servants who was in service on the 16th day of November, 1957 and who elected to be governed by these rules,

(3) any non-pensionable railway servant who was in service on the 1st day of January, 1986 and did not opt to be governed by the State Railway Provident Fund

(Contributory) Rules; and

(4) any person entering a railway service on or after the 16th November, 1957, except a person who is appointed on contract or re-employed after superannuation or whose terms of appointment specifically provide to the contrary.

The Manual was made for the purpose of simplification of various circular letters issued by the competent authority from time to time. It is divided in separate chapters. Chapter XIX provides for apprentices, Chapter XX provides for casual labour.

Indisputably, the Railway servants, if appointed on a regular basis, would enjoy a status having regard to the provisions contained in Article 309 of the Constitution of India. Recruitment Rules are applicable to the temporary and permanent government servants and they are governed by the Rules framed under the proviso appended to Article 309 of the Constitution of India. Their services are indisputably protected under Article 311(2) thereof.

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.

Rule 2002 lays down the rights and privileges admissible to casual labour.

2002. Entitlements and privileges admissible to Casual Labour - Casual Labour are not eligible for any entitlements and privileges other than those statutorily admissible under the various Acts, such as, Minimum Wage Act, Workmen's Compensation Act, etc. or those specifically sanctioned by the Railway Board from time to time.

Rule 2005 clearly lays down the entitlement and privileges admissible to casual labour who are treated to be temporary, i.e. given temporary status in the following terms:

2005. Entitlements and Privileges admissible to Casual Labour who are treated as temporary (i.e. given temporary status) after the completion of 120 days or 360 days of continuous employment (as the case may be).--(a) Casual labour treated as temporary are entitled to the rights and benefits admissible to temporary railway servants as laid down in Chapter XXIII of this Manual. The rights and privileges admissible to such labour also include the benefit of D & A Rules. However, their service prior to absorption in temporary/ permanent/ regular cadre after the required selection/screening will not count for the purpose of seniority and the date of their regular appointment after screening/ selection shall determine their seniority vis-a-vis other regular/temporary employees. This is, however, subject to the provision that if the seniority of certain individual employees has already been determined in any other manner, either in pursuance of judicial decisions or otherwise, the seniority so determined shall not be altered.

Casual labour including Project casual labour shall be eligible to count only half the period of service rendered by them after attaining temporary status on

completion of prescribed days of continuous employment and before regular absorption, as qualifying service for the purpose of pensionary benefits. This benefit will be admissible only after their absorption in regular employment. Such casual labour, who have attained temporary status, will also be entitled to carry forward the leave at their credit to new post on absorption in regular service. Daily rated casual labour will not be entitled to these benefits.

(b) Such casual labour who acquire temporary status, will not, however, be brought on to the permanent or regular establishment or treated as in regular employment on Railways until and unless they are selected through regular Selection Board for Group D Posts in the manner laid down from time to time. Subject to such orders as the Railway Board may issue from time to time, and subject to such exceptions and conditions like appointment on compassionate ground, quotas for handicapped and ex-servicemen etc. as may be specified in these orders they will have a prior claim over others to recruitment on a regular basis and they will be considered for regular employment without having to go through employment exchanges. Such of them who join as Casual labour before attaining the age of 28 years should be allowed relaxation of the maximum age limit prescribed for Group D posts to the extent of their total service which may be either continuous or in broken periods.

(c) No temporary posts shall be created to accommodate such casual labour, who acquire temporary status, for the conferment of attendant benefits like regular scale of pay, increment etc. After absorption in regular employment, half of the service rendered after attaining temporary status by such persons before regular absorption against a regular/ temporary/ permanent post, will qualify for pensionary benefits, subject to the conditions prescribed in Railway Board's letter No. E(NG)II/78/CL/12 dated 14-10-80. [Letter No. E(NG)II/85/CL/6 dated 28-11-86 in the case of Project casual labour].

(d) Casual labour who have acquired temporary status and have put in three years continuous service should be treated at par with temporary railway servants for purpose of festival advance/ Flood Advance on the same conditions as are applicable to temporary railway servants for grant of such advance provided they furnish two sureties from permanent railway employees.

(e) Casual labour engaged on works, who attain temporary status on completion of 120 days continuous employment on the same type of work, should be treated as temporary employees for the purpose of hospital leave in terms of Rule 554-R-I (1985 Edition).

A casual labour who has attained temporary status and has been paid regular scale of pay, when re-engaged, after having been discharged earlier on completion of work or for non-availability of further productive work, may be started on the pay last drawn by him. (This shall be effective from 2nd October, 1980).

benefits are admissible even to temporary railway servants and, therefore, that retiral advantage is not available to casual labour acquiring temporary status. We have been shown the different provisions in the Railway Establishment Manual as also the different orders and directions issued by the Administration. We agree with the learned Additional Solicitor General that retrial benefit of pension is not admissible to either category of employees.

A clarification was, however, subsequently made in Ram Kumar and Others Vs. Union of India and Others [1988 (1) SCC 306], stating; The only other question to be seen is with regard to entitlement to pension. It appears that the Board on the basis of the Fourth Pay Commission report has provided for pension at the time of superannuation even to those who are temporary employees. In paragraph 12 of our order on the basis of material then placed before us, we had taken the view that temporary employees were not entitled to pension on superannuation. We direct the Railway Board to consider the claim of temporary employees who are before us for pension at the time of superannuation or otherwise in view of the fact that the Board has taken its own decision differently.

Every casual labourer employed in the railway administration for six months is entitled to temporary status. Thereafter, they will be empanelled. After empanelment, they are required to be screened by the competent authority and as and when vacancies for temporary posts in the regular establishment are available, they should be appointed in the order of merit after screening. On their appointment, they are also required to put in minimum service of one year in the temporary post. In view of the above position, if any of those employees who had put in the required minimum service of one year, that too after the appointment to the temporary post, died while in service, his widow would be eligible to pension under the Family Pension Scheme, 1964. In all these cases, though some of them have been screened, yet appointments were not given since the temporary posts obviously were not available or in some cases they were not even eligible for screening because the posts become available after the death. Under these circumstances, the respondent-widows are not eligible for the family pension benefits.

The contrast between a casual labour having a temporary status and a temporary servant may immediately be noticed from the definition of a temporary railway servant contained in Rule 1501 occurring in Chapter XV of the Manual.

1501 (i) Temporary Railway Servants

Definition - 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 absence of any statutory rules framed, executive instructions can be issued in relation to the matter governed by the constitutional provisions. In Khem Chand

(supra), this Court had noticed the relevant constitutional provisions and opined that the Railway Manual was an amalgam of various circulars issued from time to time. Such executive instructions or rules framed would be statutory in nature.

.....

The Gujarat High Court in our opinion therefore, committed a fundamental error in opining otherwise. It failed to notice that when casual labour has been excluded from the definition of permanent or temporary employee, he with temporary status could not have become so and there is no legal sanction therefor. It is for the legislature to put the employees to an establishment in different categories. It may create a new category to confer certain benefits to a particular class of employees. Such a power can be exercised also by the Executive for making rules under the proviso appended to Article 309 of the Constitution of India.

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What was protected by conferring temporary status upon a casual employee was his service and by reason thereof the pension rules were not made applicable. A workman had not been and could not have been given a status to which he was not entitled to.

17. During the course of hearing in the instant OA, the learned counsel of the applicant pointed out that various documents annexed to the OA [A-1, A-2 and A-3 in which the post is noted as 'Khalasi'] bring out that the deceased employee was appointed, and referred to, as Khalasi in Group 'D' which was in regular cadre. However, in the WS, the respondents have referred to him as 'CPC Khalasi' [temporary status conferred on casual labourer gives him the privilege of CPC (Central Pay Commission) scale rate of pay, leave, passes etc. and, as indicated above, **after absorption in regular employment, half of the service rendered after attaining temporary status by such persons before regular absorption against a regular/ temporary/ permanent post, will qualify for pensionary benefits.**]. There is no indication anywhere in the record that the deceased employee was in regular Group 'D' category.

18. The respondents are accordingly directed to check the exact status of the applicant's husband (deceased Railway employee) and then decide and pass orders within a period of four months from the date of issue/ production of this order the question of grant or otherwise of family pension with reference to the Railway Services (Pension) Rules made with reference to the proviso appended to Article 309 of the Constitution of India, the executive instructions/ circulars issued on the subject and taking note of the decisions of the Hon'ble Apex Court referred to in paras 14, 15 and 16 of this order. With this the OA stands disposed off. No order as to costs.

Naresh Gupta
[Naresh Gupta] Member [A]