

CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION No. 530 1996

Date of Decision: 21-11-96

Dr. S. Baliau-Singh Petitioner/s

Mr. G. S. WALIA Advocate for the
Petitioner/s

V/s.

UOI & Ors. Respondent/s

Mr. S. C. DHAWAN Advocate for the
Respondent/s

CORAM:

Hon'ble Shri M. R. KOLHATKAR, M (A)

Hon'ble Shri

(1) To be referred to the Reporter or not?

(2) Whether it needs to be circulated to other Benches of the Tribunal?

M.R.Kolhatkar
(M. R. KOLHATKAR)
M (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

O.A.530/96

November

Pronounced, this the 21st day of December 1996
M.R.Kolhatkar

CORAM:

HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

Dr. S. Balia-Singh
C/o. G.S. Walia,
Advocate, High Court
16, Maharashtra Bhavan,
Bora Masjid Street, Fort,
Mumbai - 400 001.

By Advocate Shri G.S. Walia .. Applicant

-versus-

1. Union of India, through
The General Manager,
Central Railway,
Mumbai V.T.
Mumbai.

2. Secretary,
Railway Board,
Rail Bhavan,
New Delhi - 110 001.

By Advocate Shri S.C. Dhawan .. Respondents

- : O R D E R : -

(Per M.R. Kolhatkar, Member(A))

The applicant retired as a Specialist (Plastic) Surgeon, Byculla Hospital, Central Railway. He sought voluntary retirement and was accordingly retired on 01-04-1987. He initially served under the Government of Orissa for a period from 14-4-1962 to 11-05-1972 and with the Government of Chandigarh from 15-05-1972 to 29-12-1975. Thereafter he applied for the post in the Railway Hospital for appointment

as a Plastic Surgeon for which the maximum age limit is 45 years. The applicant has pointed out that prior to his retirement an order was passed on 29-5-1985 Ex. 'A' conveying the decision to count his past services rendered by the applicant in Govt. of Orissa and Chandigarh as qualifying service for pensionary benefits. The applicant refers to Ex. 'F' which shows the total service rendered by the applicant as 24 years 10 months and 21 days as below :

	<u>Year</u>	<u>Month</u>	<u>Days</u>
1. Service rendered in Govt. of Orissa	10	0	28
2. Service rendered in Govt. of Chandigarh	3	7	14
3. Service rendered in Railways	11	2	09
	24	10	21
	=====	=====	=====

Applicant states that according to rules a railway employee who has completed 20 years of qualifying service is entitled to seek voluntary retirement and is further entitled for additional 5 years of service for the purpose of pensionary benefits; which means that the Railways have accepted 24 years + 5 years = 29 years as the service for the purpose of pensionary benefits. According to the applicant the rules for issue of passes to railway servants are contained in Railway Servants (Pass) Rules, 1986 which are the rules framed by President under Article 309 of the Constitution and rules relating to Post-Retirement complimentary ^{refers} ~~pass are~~ contained in Rule 8(2) which ~~crosses~~ to Schedule IV and according to item (viii) of the Schedule "a benefit of 5 years service on voluntary retirement is granted

towards the qualifying service for the grant of post-retirement complimentary passes on the same conditions as are laid down in Board's letter No.E(P&A)I 77 RT-46 dt. 9-11-77. The Schedule also envisages that a Group 'A' & 'B' Officer with Railway service of 20 years or more but less than 25 years is entitled to two sets of passes and with minimum Railway service of 25 years is entitled to three sets of passes. According to the applicant the railway service is a service which qualifies for pensionary benefits and on a plain reading of the rules he is entitled to three sets of post retirement passes. However, when he took up the matter with the respondents vide his letter dt. 9-8-1989, Ex.'C', which was strongly recommended by the General Manager vide Ex.'D' the same was negatived. According to the applicant even the service of the apprentices is counted towards the qualifying service for pensionary benefits and there is no reason why 29 years' qualifying service should not be counted for grant of post retirement passes to him. According to the applicant the denial of post retirement passes to him is capricious, unconstitutional, illegal, xxxxxxxxxxxxxxxxxxxxxxxx and is contrary to the provisions of the Rules/s discriminatory and violative of principles of natural justice. He has therefore sought the relief of directing the respondents to grant three sets of post retirement passes for each calendar year as and when he applies.

2. Respondents have opposed the O.A. Firstly,

it is contended that the O.A. is barred by limitation because the cause of action, if any, arose in 4-5-1988 when his request was negatived whereas the O.A. has been filed on 25-1-1996. According to them qualifying service for pension does not entitle the applicant to post retirement passes whose issue is governed ^{separate} by a set of rules. This rule specifically refers to "railway service" and since the applicant's railway service is only of the length of 11 years two months and 9 days which is less than 20 years, the applicant was not entitled to post retirement passes as per rules and his request was rightly rejected by railway administration vide reply dt.4-5-1988, Ex.R-I, which states as below:

"As Dr.Baliarsing, has not completed the prescribed qualifying service for the grant of post-retirement Complimentary passes, it is regretted that the same cannot be granted in his favour."

In the written statement ^{para 9} respondents have taken the stand of denying that 5 years of added service is also counted for the purpose of post retirement passes. In the face of specific rule viz. Rule (viii) in the Schedule the counsel for the respondents at the argument stage stated that even taking into account the five years of service the total **railway service** of the applicant would only amount to 16 years, two months, and 9 days and therefore falling short of requisite length of 20 years the applicant would not be entitled to post retirement complimentary passes.

3. Respondents have also contended that their action is neither vitiated by mala-fide nor it is discriminatory. Respondents have contended that the applicant has not challenged the vires of the rules and therefore this Tribunal is bound to give effect to the statutory rules framed under Article 309 of the Constitution. Further it is contended that the complimentary passes are not pensionary benefits but they are a concession and as laid down by the Full Bench CAT in Liaquat Ali v. U.O.I. 1995(3)(CAT) SLJ 503 the applicant cannot agitate a grievance for enforcement of a concession. Essentially the contention of the respondents is that the term railway service must be given plain meaning thereof and the entire period of service must be with the Railways and that alone entitles an employee to claim benefit of post retirement complimentary passes.

4. Counsel for the applicant has contended that the qualifying service for the railway pension is also the qualifying service for the post retirement passes. In this connection he refers to sub-rule (viii) of the Schedule in which the term qualifying service occurs in the context of benefit of 5 years of service on voluntary retirement. According to the counsel for the applicant the addition of five years of service on voluntary retirement is by way of a legal fiction and when a legal fiction is created full effect is required to be given to it. On the same analogy effect is also required to be given to legal fiction relating to service under non railway departments like Orissa Govt. service and Chandigarh Govt. service as ^{Railways service} L

In this connection he refers to this Tribunal's judgment in Subir Ray v. General Manager, Western Railway & Ors. 1996(1)CAT MAT 523 in which the Tribunal by relying on the authority of English cases and Supreme Court cases ~~base~~ clarified the scope of legal fiction. In this connection he particularly relied on para-8 of Subir Ray's judgment which is reproduced:

"8. In this connection, I refer to the observations of various authorities on the matter of operation of a legal fiction.

"Referring to the following observations of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 at p. 132 the Supreme Court in I.T. Commission v. Teja Singh, AIR 1959 SC 352 explained the scope of a legal fiction :-

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the punitive state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

In B.P. Andre v. Superintendent, Central Jail, Tihar, AIR 1975 SC 164, the Supreme Court further pointed out:

"It is now well settled law that where a legal fiction is created, full effect

must be given to it and it should be carried to its logical conclusions."

He also relies on Union of India and Another vs. S.Dharmalingam, 1994 SCC(L&S) 496 which elucidates definition of CCS(Pension)Rules,1972, the head note of which reads as below :

"CCS(Pension)Rules,1972 - Rr.30 and 3(q), 13 & 26(2)-Applicability of R.30-Held, benefit of this Rule is available to an employee who was already in service and has been allowed to count his past service as qualifying service-Plea of the Government that such an interpretation of the Rule will confer double benefit, rejected-Words and phrases- 'Qualifying service' "

He also relies on Supreme Court judgment in the case of Shakuntala Sharma(Mrs.) vs. High Court of H.P. at Shimla and another, 1994 SCC (L&S) 672 in which the Supreme Court held that when the rules in its operation are inequitous, unjust and violative of Art.14 the same are to be struck down. The counsel for the applicant prays that what he is praying for is not strike down the relevant rule relating to railway service but to interpret ^{to} the same ^{he} properly. In this connection relies on the division bench judgment of CAT, Jodhpur Bench, (1996)34 Jagdishwar Bhatt v. U.O.I. ATC 92, decided on 27-2-1996 which again was a similar case in which a Divisional Medical Officer who retired without completing 20 years of service(i.e. after completing 18 years, 7 months 28 days) was allowed the ~~xxxxxxxxxxxxxxxxxxxx~~ the benefit of weightage of 25% of qualifying service under Rule 45 of Railway Servants Pension Rules. The Tribunal therefore granted the relief of issue of post retirement complimentary passes on the

footing that he has completed more than 20 years of service.

5. Learned counsel for the respondents however, would argue that in the case of Jagdishwer Bhatt does not apply to the facts of the case. In that case the applicant retired on superannuation pension and not as in the present case by voluntary retirement. He fell short of 20 years of service by a short margin which was made up by counting 25% years of qualifying service in terms of Rule 45. In the present case the applicant's railway service would still be about 16 years under Rule 67 only viz. 11 years plus 5 years and therefore the judgment in the case of Jagdishwer Bhatt does not help him.

6. Counsel for the respondents relies on decision of the Supreme Court in the case of State of U.P. vs. U.P. University Colleges Pensioners' Association, 1994 SCC (L&S) 747. In that case the State of U.P. had issued a new scheme of pension and provident fund for the employees of aided Degree Colleges of the State and the question was that of comparison of the pensionary benefits available to the aided college teachers and the same available to the Govt. teachers. In para 8 of the judgment the Hon'ble Supreme Court observed as below:

"8. Insofar as his submission relating to the basis of computation of pension, we would observe that in principle we do not find any objection in computing the pension on the basis of last pay drawn at the age of 58 years. This is for the reason that demand of the Association being basically grounded on the better pensionary benefit available to Govt.

teachers, the State was amply justified, while considering the question of liberalising the pension qua the aided teachers, to peg the computation of pension with reference to the pay at the age of 58 years, which is the retirement age of Government teachers. This apart, as to how much of liberalisation should have been conceded is a matter of policy and if the Government decided to go as far as visualised by the G.O. of April 28, 1980, it is not open to any court to interfere with the same as the policy contained in the G.O. cannot be said to be either unreasonable or against public interest, which are the only two grounds available to a court to interfere with policy matter while reviewing the same judicially."

Counsel for the respondents would argue that Tribunal cannot direct the railway administration to liberalise the rules relating to post retirement passes. This contention cannot be accepted because the issue involved is not that of a direction to liberalise existing rules but that of interpreting the rules in the light of instructions issued by the Railway administration from time to time. Counsel for the respondents then relies ^{on} ~~on~~ the case of I.S. Sain vs. U.O.I. & Ors, 1994(2)ATJ 20, in which it was observed that the Tribunal cannot substitute itself for the controlling authority or the participating department. The counsel also relies on Supreme Court judgment in State of Rajasthan vs. Sevanivatra Karmachari Hitkari Samiti reported at 1995(1)SLJ(SC) 199. In para 19 ~~of~~ of the judgment the Hon'ble Supreme Court observed that "The wisdom in a policy decision of the Govt., as such, is not justiciable unless such policy decision is wholly capricious, arbitrary and whimsical thereby offending the Rule of Law as enshrined in Article 14 of the Constitution or such policy decision offends any statutory provisions or the provisions of the Constitution. Such as

aforesaid, the Court need not embark on uncharted ocean of public policy". In my view these judgments relate to the scope of judicial review by the Tribunal of the policy matters and have no applicability in the present case because what the Tribunal is concerned with is only to interpret the rules and not to give a direction to amend the policy. Another judgment cited by the counsel for the respondents was Union of India v. P.N. Menon & Ors. which is a case decided by the Supreme Court in Civil Appeal No.517 of 1987 on 17-3-1994. In this case the Supreme Court was concerned with the question of competence of the Govt. to fix a cut-off date in the matter of payment of a portion of dearness pay for the purpose of retirement benefits. The Court after considering D.S. Nakara's case held that the fixation of the date by the Govt. in that particular case 30-9-77, could not be called arbitrary. This judgment is also not applicable because the issue is different viz. one of interpretation of rules regarding post retirement passes.

7. I have perused the judgment of Jagdishwar Bhatt v. U.O.I. I notice that the Tribunal has taken note of the fact that instructions of various zonal railways in relation to post retirement complimentary passes have tended to take a liberal approach. Tribunal noted that there is no minimum length of service and the Tribunal had accepted the contention that qualifying service for pension would also be the service for complimentary passes. In this connection it would be worthwhile to reproduce paras

9 and 10 of the judgment.

"9. In view of the above, we hold that the denial of post-retirement passes to the applicant is grossly unfair and unreasonable. The respondents are reading into the stipulation of Rule 8(1) of the Railway Servants(Pass)Rules,1986, in negative manner by interpreting 20 years of service as actual service. There is no mention of 20 years of actual service anywhere either in the Railway Services(Pension)Rules,1993 or in the Pass Rules which were brought to our notice. The Pension Rules requires only 20 years' qualifying service for pension. We find a lot of force in the contention of the learned counsel for the applicant that the provisions of this Rule and Schedule are highly discriminatory inasmuch as the benefits are extended to a retired official who had retired under a cloud or as a penal measure and the benefits are also available to a widow of the Railway servant whereas this is not available to an employee who served the railways satisfactorily till he was superannuated for no fault of his own. If the Railways have themselves prepared a scheme for employing the officers with the age of 42 years at the time of entry, it is obvious that such officers will not be able to complete 20 years of actual service before their superannuation. They will be entitled to a pension and other retiral benefits only after adding the weightage of 25% actual service as envisaged in the Pension Rules. If the Railways had taken such a lot of pain to ensure that the officers joining in the Railways at the age of 42 years are not denied pensionary benefits, they should also take care that the post-retirement passes are also granted to them which are given to all the Railway servants in recognition of their long association of services in the Railways.

10. The OA, therefore, succeeds. The respondents are hereby directed to allow the post-retirement passes to the applicant on the ground that he has more than 20 years of qualifying service entitling him to the set of passes as per Rule 34 of the Travel Concession to Railway Employees Passes and PTOs. The Railway shall also amplify the words 20 years' service with the proviso '20 years of qualifying service' in the Schedule IV of the Railway Servants(Pass)Rules,1986. No costs."

It therefore appears to me that the case of the applicant is clearly covered by the judgment in Jagdishwar Bhatt. In the case of applicant it is also to be noted that he was recruited late because the age limit for appointment is prescribed at 45 years; the candidates were also required to have ten years of experience and the applicant, has pointed out, that a person who is appointed at 45 years would not complete 20 years of railway service even if he retires on superannuation. Certainly the intention of the rule making authority was not to deny the benefits of qualifying service as distinguished from actual service for the purpose of issue of passes. It appears to me that grant of benefit under Rule 45 in respect of railway employees who are recruited late but who superannuated or in terms of Rule 67 which is the present case viz. grant of benefit of five years of service for employees who retire voluntarily is both by operation of a fiction. The qualifying service is a term used in pension rules and is not used in the railway service pass Rules, 1986 but para (viii) in Schedule IV of the Pass Rules, makes it clear that the term qualifying service from the pension rules is also made applicable for purpose of issue of post retirement complimentary passes. The implication of legal fiction which operates to add 25% of the qualifying service under Rule 45 or 5 years under Rule 67 would also operate to assimilate the service under State Govt./ Union Territory administration as qualifying service for the purpose of issue of passes. So far as the issue

of limitation is concerned no doubt the OA has been filed well after the communication of the negative reply by the respondents but since the entitlement to post retirement complimentary passes is a recurring entitlement the applicant cannot be non-suited on the ground of delay which would, however, affect his eligibility for past benefit. Since the post retirement complimentary passes are issued only annually the question of past benefits therefore does not arise.

8. In the light of above discussion the O.A. succeeds. The respondents are directed to issue post retirement complimentary passes to the applicant as per rules on the footing that he has completed more than 25 years of service. If the applicant applies during the current calendar year he may be issued post retirement complimentary passes for the current year also as per rules and the post retirement complimentary passes ^{be} issued in his favour for subsequent years as and when he applies subject to rules. There will be no order as to costs.

M

M.R.Kolhatkar
(M.R.KOLHATKAR)
Member(A)