

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 812/94

Transfer Application No: --

DATE OF DECISION: 16 Nov 1995

Smt. Radhabai Krishna Mistry Petitioner

Mr. D. V. Gangal Advocate for the Petitioners

Versus

U.O.I. & Ors. Respondent

Mr. S. C. Dhavan Advocate for the Respondent(s)

CORAM :

The Hon'ble Shri N.K.Verma, Member(A)

The Hon'ble Shri

✓ 1. To be referred to the Reporter or not ? Yes

2. Whether it needs to be circulated to other Benches of the Tribunal ? *X*

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N. K. Verma
(N.K.VERMA)
Member(A)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A.812/94

this the 16 day of NOVEMBER, 1995

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

Smt.Radhabai Krishna Mistry
Dada Patil Wadi, Naupada,
Thane.

(BY Advocate Mr.D.V.Gangal) .. Applicant

-versus-

1. Union of India,
through
General Manager
Central Railway,
Bombay V.T.
2. Divisional Railway Manager,
Bombay Division,
Central Railway,
Bombay V.T.

(By Advocate Mr.S.C.Dhavan) .. Respondents

O R D E R

(Per N.K.Verma, Member(A))

The applicant in this O.A. is the widow of late Krishna Mahadeo Mistry who was appointed initially as a Khalasi and thereafter promoted after a trade test as a Carpenter sometime in 1956. The applicant's late husband was granted temporary status in the year 1967 and thereafter he retired on superannuation on 30-6-1983. He was granted all the benefits like a permanent railway employee while working as a temporary carpenter for the entire period of his employment. However, he was not given any pension or pensionary

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benefits as ~~post~~ retirement benefit on the ground that he had not been regularised in his job either as a Khalasi or Carpenter before his superannuation. The applicant has now come up with a prayer that it was incumbent on the part of respondents to have regularised his service and granted pension to her late husband after his superannuation on 30-6-83 ^{she} and should be given family pension which has unlawfully been denied to her all along.

2. The respondents in their reply to this O.A. have taken the stand that the applicant's husband was working as a monthly rated Khalasi and was not confirmed in any cadre till the date of his retirement and hence no pensionary benefits could be granted to him and the applicant is therefore not entitled to any family pension. They also denied that the ~~applicant was given~~ all the facility available to the other Railway servant as alleged or otherwise. The applicant's husband was not paid any dues under S.R.P.F.Rule and he was only paid his contribution to Provident Fund on his superannuation. The respondents have made a specific statement that the applicant was not ~~governed~~ by any pension rules or S.R.P.F.Rule.

3. During the course of arguments learned counsel for the applicant Shri D.V.Gangal made a very strenuous ~~submission~~ that the respondents have played a fraud on the applicant by not

regularising the applicant's husband on the post of Carpenter where he had worked with all honesty and diligence for more than 20 years. The applicant had made a representation to the General Manager in August '85 followed by another representation on 9-2-89 that he may be paid pensionary benefits under the terms of pension rules revised in 1988 wherein one can be given the pensionary benefit even with the minimum of 10 years service. No reply was given to the representation and he subsequently died on 23-11-1991. Thereafter his widow who is now 65 years of age and without any support from the family, she being childless, applied for grant of family pension as per Annexure-A dt.6-7-1993. Since the respondents did not give any reply to the representation O.A. has been filed.

4. The learned counsel has based the claims of the applicant on the judgment of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another vs. Brojo Nath Ganguly and another, 1986 ATC 103, wherein it was held that the action of the respondents neither in theory nor in practice should be unconscionable. In the case of applicant's husband, although the rules provided for regularisation the respondents failed to regularise him on that post which is an unconscionable inaction and when the law requires a particular thing to be done in a particular way, the thing must be done in that way and the law course will help to see that thing is done in that way of cause that the thing will be

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done in that way. Therefore, the applicant's husband must be deemed to be regularised in the service as a Carpenter w.e.f. 1967 itself and therefore he should be granted pension as a deemed regular employee of the Railways. By that count the applicant therefore becomes eligible for grant of family pension after the death of applicant's husband. In further support of this contention he cited the two cases decided by the Calcutta Bench of the Tribunal by a single Member in February and March '93 viz. Bhagabati Nayak (Smt.) vs. U.O.I. & Ors., (1993)25 ATC 139, Jamini Bala Bera vs. Union of India & Ors., (1993)25 ATC 254. In both the cases the widows of temporary status casual labour who had not been given pensionary benefits were given the relief of payment of family pension in the light of the observation of the Bench that the husbands of those applicants were deemed to have been regularised in their jobs as they had the qualifying service by all means and therefore the applicants became entitled to family pension. Shri D.V. Gangal also referred to a provision of Indian Contract ^{Act} wherein it has been stated that any action is found to be taken against a declared public policy the same has to be struck down by the court. The Hon'ble Supreme Court has given direction to the Railways to regularise the employment of all the casual employees who had the ~~the~~ qualifying service as per a scheme to be introduced by them and the

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applicant's husband's service should have regularised. If they had failed to do so, the mistake of the Railway cannot be visited upon the applicant's husband and also the applicant herself who has now been reduced to penury at this old age of 65. However, learned counsel for the applicant was gracious enough to submit that the applicant will not press for arrears due to her husband as pensionary benefits. However, she would like to claim the family pension w.e.f. 23-11-1991.

5. Shri S.C.Dhavan, learned counsel for the respondents, stated that admittedly the applicant's husband was only a temporary status casual labour who superannuated in 1983. During the period of his service he never made any grievance out of the inaction on the part of the respondents in not regularising his service. None of his juniors were given preference in regularisation so as to cause a severe injury to the rights of the applicant's husband. He is not covered by any rules granting pension. The temporary status casual labour have been given a number of benefits excluding the pensionary benefits as per the provisions of Railway Manual and hence the question of denial of pensionary benefits to the applicant's husband does not arise. In any case regularisation of the applicant's husband was a matter which could not be taken up by a third party. It is a personal right which can be exercised by the employee himself as has been decided by the Hon'ble Supreme Court

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in Indrapal Yadav's case. Hence the applicant has no right to complain against the non regularisation of applicant's husband and non payment of pensionary benefits to her. Thereafter Shri Dhavan also referred to the case of Smt. Bina Sanyal & Anr. v. U.O.I. 1993(2)ATJ 288 wherein a division bench of ~~this~~ Tribunal also held that legal heirs of deceased employee cannot challenge the order of dismissal or removal passed against a Govt. servant. Thereafter, in the case of Smt. Jubeda Mohammad Iqbal vs. U.O.I. 1994(2)ATJ 648 ~~xxxx~~ a division bench of Ahmedabad Bench held that in case of dismissal and removal the right to sue does not survive in personal matters with the legal representatives. The learned counsel also pointed out that the Govt. O.M. dt. 14th January '88 by which the pension rules were modified by the Govt. is not directly applicable to the applicant's husband as he was neither a temporary nor a quasi permanent Govt. servant. Shri Dhavan also pointed out that the Ram Kumar's case (Ram Kumar v. U.O.I., AIR 1988 SC 390) cited in the Calcutta Bench judgment brought to notice by the learned counsel for the applicant does not reflect properly the ratio decided by the Supreme Court. Ram Kumar's case was for determining the retiral benefits of pension to temporary railway servants and casual labour acquiring temporary status. In para 12 of the judgment it has been clearly stated that :

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"It is the stand of the learned Additional Solicitor General that no pensionary 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 retiral benefit of pension is not admissible to either category of employees."

This decision was delivered on 2-12-1987 i.e. much before the Govt. O.M. dated 14-1-1988 was issued whereby temporary Govt. servants were also permitted to avail pensionary benefits. However, this benefit was not extended to the temporary status casual labour. In para 7 of Ram Kumar's judgment details of various benefits acquired by the temporary status casual labourers were given. They are as follows:

- "(1)Termination of service and period of notice(subject to the provisions of the Industrial Disputes Act,1947)
- (2)Scales of pay.
- (3)Compensatory and local allowances.
- (4)Medical attendance
- (5)Leave Rules
- (6)Provident Fund and terminal gratuity
- (7)Allotment of railway accommodation and recovery of rent.
- (8)Railway passes
- (9)Advances
- (10)Any other benefit specifically authorised by the Ministry of Railways."

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The concluding line of this para-7 also says that "on eventual absorption in regular employment half the service rendered with temporary status is counted as qualifying service for pensionary benefits." This part of the judgment therefore clearly indicates that a temporary status^{casual labour} cannot have any qualifying service for pensionary benefits unless he is absorbed eventually in the regular employment. The applicant's husband had at no time was absorbed as a regular employee, hence the question of grant of pensionary benefits does not arise.

6. Calcutta Bench has also quoted the ratio of State of Haryana v. Piara Singh, 1992 SCC(L&S)825. In this case three member Bench of the Hon'ble Supreme Court had ruled, ~~wherein~~ the adjudication was against a division bench decision of Punjab & Haryana Court in the matter of regularisation of adhoc/temporary govt. employees of Haryana state. In para 33 of the judgment the Supreme Court had ruled that:

".....from the mere continuation of an ad hoc employee for one year, it cannot be presumed that there is need for a regular post. Such a presumption may be justified only when such continuance extends to several years. Further, there can be no 'rule of thumb' in such matters. Conditions and circumstances of one unit may not be the same as of the other. Just because in one case, a direction was given to regularise employees who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction

must follow irrespective of and without taking into account the other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the relevant facts and circumstances of that case. It cannot be mechanical act but a judicious one.

Judged from this standpoint, the impugned directions must be held to be totally untenable and unsustainable."

The ratio of Piara Singh cannot be read ~~with~~ this matter of grant of regular employment to the temporary status casual labour as a deemed regularisation as has been observed by the learned Single Member in the Calcutta Bench cases referred to by the learned counsel for the applicant. It has to be remembered that Piara Singh's case was basically a special leave petition from the State of Haryana against the directions of the High Court of Punjab & Haryana directing regularisation of service of those adhoc employees, casual labour and work charged establishment staff who could not be regularised for the reason that they did not satisfy one or the other of the conditions prescribed by the Punjab & Haryana Govt. from time to time. The High Court had given directions as enumerated in para 16 of the judgment. As will be observed, the Hon'ble Supreme Court in para 33 negatived the directions of the Punjab & Haryana High Court in the manner as stated above. The Hon'ble Supreme Court ~~in para 34 also~~ referred to the judgment of the apex court in Jaswant Singh v. Union of India, 1980 SCC(L&S)36, wherein the definition of staff engaged on work charged establishment

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was given by the Hon'ble Supreme Court. In paras 42-44 of that judgment it has been stated that:

"A work-charged establishment broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to 'works'. The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the work.

The entire strength of labour employed for the purpose of the Beas Project was work-charged. The workcharged employees are engaged on a temporary basis and their appointments are made for the execution of a specific work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. They do not get any relief under the Payment of Gratuity Act nor do they receive any retrenchment benefits or any benfits under the Employees State Insurance Schemes.

But though the work-charged employees are denied these benefits, they are industrial workers and are entitled to the benefits of the provisions contained in the Industrial Disputes Act. Their rights flow from that special enactment under which even contracts of employment are open to adjustment and modification. The work charged employees, therefore, are in a better position than temporary servants like the other petitioners who are liable to be thrown out of employment without any kind of compensatory benefits."

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In para 36 of the judgment the Hon'ble Supreme Court in Piara Singh's case ~~said~~ also negatived the High Court direction for regularisation on completion of one year of service to all the workmen as per the definition of I.D. Act on par with the work-charged employees. The Supreme Court said that:

"We find this direction as untenable as the direction in the case of adhoc/temporary employees. Insofar as the persons belonging to the above categories and who fall within the definition of workmen are concerned, the terms in which the direction has been given by the High Court cannot be sustained. While we agree that persons belonging to these categories continuing over a number of years have a right to claim regularisation and the authorities are under an obligation to consider their case for regularisation in a fair manner, keeping in view the principles enunciated by this Court, the blanket direction given cannot be sustained....."

7. In the light of these observations of the Hon'ble Supreme Court the directions given in para 51 is only directory and not mandatory when it says "So far as the work-charged employees and casual labour are concerned, the effort must be to regularise ^(emphasis supplied) them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject ~~to~~ also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years - a presumption may arise that there is regular

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need for his services. In such a situation, it becomes obligatory for the authority concerned to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person"

8. Shri Dhavan therefore strenuously argued that the Hon'ble Single Member of the Calcutta Bench had given the reliefs in those two cases as per-incuriam without taking into account the principles enunciated by the Supreme Court in Piara Singh's case which cannot be read in the manner as has been done by the learned Hon'ble Member. He referred to the judgment of the Hon'ble Supreme Court in the case of Dr. Arundhati Ajit Pargaonkar vs. State of Maharashtra and Ors., AIR 1995 SC 962, wherein it has been held that a temporary employee is not entitled to claim that she should have been deemed to have been regularised as she had been working without break for nine years. "Eligibility and continuous working for howsoever long period should not be permitted to over-reach the law." Applicant's husband was not employed in a work charged establishment where he could have regularised as a skilled Carpenter without being first absorbed as a Khalasi in the Group 'D'. Shri Dhavan also reiterated that under Pension Rules 101(1) retirement benefits are available only to the permanent servants and family pension is also under Rule 108(2) is available to the family of such permanent Govt. servants. The applicant was never regularly appointed as Govt. servant and has not exercised any option for pension and family pension under this scheme and therefore the applicant had no locus-tandi to claim the same. Finally, he referred to a division bench judgment of this very bench of the Tribunal in the case of

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Smt. Jainabai Shaikh Babu vs. U.O.I. & Ors., 1993(2)

ATJ 394 wherein a similar claim by a widow of non regularised temporary status casual labour was dismissed. Para 4 of the judgment very clearly discusses the various averments and arguments in favour of the applicant and against the applicant in the light of the decision of the Supreme Court in the case of Ram Kumar and ors. vs. U.O.I.

AIR 1988 SC 390.

9. Shri D.V. Gangal after submission of the learned counsel for the respondents came out with rebuttal quoting a decision of the Single Member bench of this very Bench decided on 14-8-95 in O.A. No. 424/94 wherein the widow of a temporary status casual labour working as a Gardner for about 20 years was given the relief of family pension treating the applicant's husband as holding a permanent post on the date of his compulsory retirement on 29-12-1980. In that case though the widow was not paid arrears of pension admissible to the applicant's husband the relief of arrears of family pension and grant of family pension to the widow was given. He also brought to notice another judgment of the Supreme Court dt. 23-2-1993, Bhaskar Gajanan Kajrekar vs. Administrator, Dadra & Nagar Haveli & Ors, 1993 II CLR 678 wherein the appellant was directed to be treated as having retired as ^a confirmed employee and fixed his pension and other post retiral benefits on that basis. He was also given the relief of payment of pension and arrears thereof with 12% interest

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on the arrears. Lastly Shri D.V.Gangal made a plea for deciding the matter in the ~~beacon light~~ of the ~~directive~~ principles of the constitution and ~~ensure that the applicant is not the victim of~~ ~~reductio ad absurdum.~~

10. I have given serious consideration of the averments, pleadings and arguments advanced by learned counsel for ~~both~~ both the parties. On the first sight, the claim of the applicant who is a poor widow having come to the fag end of her life seems to be a very plausible and acceptable. ~~.....~~ The applicant's husband had worked for more than 20 years as a monthly rated casual labour (Khalasi) and later as a Carpenter till superannuation. However, the fact that during the period that he was working in the status of a temporary casual labour this matter was ~~never~~ agitated by him, ~~cannot also be~~ overlooked. The ~~deceased~~ employee after his retirement on 28-8-85 brought to the notice that he had passed the screening test and also medical examination sometime in 1967 and he should have been regularised from that date and extended the benefit of pension. However this application of 1985 was not pursued very seriously and there was no reply, to it by the respondents. His further application on 9-2-89 is also on the grant of pensionary benefits wherein he ~~is~~ himself has said that he continued as temporary and monthly rated service till 30-6-1983 i.e. the date of superannuation. His application dt. 15-12-89 ~~dis~~ admission that he was monthly rated Carpenter

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on 30-6-1983. There was no indication in this representation that the applicant's husband has at any time claimed regularisation as a Khalasi or a Carpenter from the time he worked as a monthly rated Casual labour. The question of grant of pensionary benefits to the applicant's husband therefore cannot be treated as a serious preposition and therefore the question of the same being claimed now by the applicant as a widow of the casual labour does not arise. There is a force in the argument made by Shri Dhavan about the Calcutta Bench judgment as per-incurium, having wrongly interpreted the ratio of the judgment of both Ram Kumar v.U.O.I. and State of Haryana v. Piara Singh cited above. I also feel with utmost respect to the Single Member of the Calcutta Bench that both Ram Kumar's case and Piara Singh's case are of no avail in the matter of giving a deemed regularisation to the applicant's husband who had never gone through any trade test in Group 'C'. While the Supreme Court's directions are directory that every attempt must be made for the regularisation of a casual labour that direction cannot be used as a rule of thumb and grant regularisation to all casual labour employee for a long years who may not be having the requisite qualifications and who may not be fulfilling the other conditions prescribed for regularisation. The Supreme Court has also ~~not~~ laid down that the regularisation has to be only in the category of Group 'D' and not

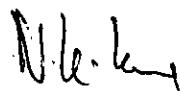
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in a higher grade. It was for these reasons perhaps the applicant's husband never wanted regularisation as Khalasi and merely continued in Group 'C' till he superannuated. The only point in which he was really interested was extension of pensionary benefits to him on the analogy of a temporary government servant as per the O.M. dt. January, 1988 but/has been very clearly decided by the Hon'ble Supreme Court a ~~temporary status casual labour~~ is ~~is~~ not entitled to the pensionary benefits. Hence the judgment of the single bench cited by the learned counsel for the applicant to my mind ~~is~~ appears to be a judgment ~~is~~ per incurium. A single member of this bench has negatived a similar case vis. Smt. Jainabai Shaikh Babu and I am in respectful agreement with the judgment and also reiterate that the family pension cannot be claimed by a widow whose husband was not a regular/permanent/temporary servant in the railway. She also cannot claim the benefits of family pension as a heir of the deceased employee as this was a personal claim which can only be litigated by the Govt. servant himself. ~~is~~ Palande's case recently decided by the Single Member of this Bench can be distinguished on the ground that in that matter the applicant's husband was an Ex-Serviceman who was later on employed by the respondents as a Gardener and served in that capacity for almost 20 years (he had completed 19 years, 9 months and 9 days of service);

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Palande was compulsorily retired on 23-12-1980 as a quasi-permanent employee and his pension was denied by the respondents in May, 1981. ~~Since~~ he was not entitled to pensionary benefits on the ground of being a quasi-permanent employee. The order regarding retirement benefits to temporary employees came into force one day after the compulsory retirement of the applicant's husband. It was in view of these special circumstances, the learned Single Member of this bench granted the relief of considering the applicant's husband as a temporary government servant with 20 years of service and gave the benefit of the family pension to the applicant. B.G. Kajrekar's case was also referred to that judgment wherein the applicant was a regularly employed police constable with 23 years service. He was denied confirmation on the ground that ~~since~~ there were no recruitment rules for the post he was holding. Thus no pensionary benefits were conferred ~~on~~ him. The facts and circumstances in the instant case, are totally different. The applicant's husband superannuated as a monthly rated casual labourer and was not covered by any pension rules. In spite of all my sympathies for the applicant, I can't hold that the applicant's husband shall be deemed to be a regular Govt. servant when he retired and thereby was entitled to the benefits of pension and family pension to the applicant.

11. In view of these, the O:A. fails and it is dismissed with no order as to costs.


(N.K.VERMA)
Member(A)