

O.A.No.....61..... of 1998

DATE OF DECISION...19-1-2000...

Shri Swadhin Dutta.

PETITIONER(S)

Shri A.K. Roy.

ADVOCATE FOR THE
PETITIONER(S)

-VERSUS-

Union of India & Ors.

RESPONDENT(S)

Shri S.Sengupta, Railway counsel.

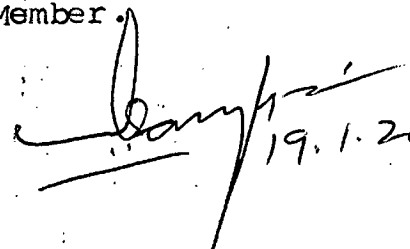
ADVOCATE FOR THE
RESPONDENT(S)

THE HON'BLE SHRI G.L.SANGLYINE, ADMINISTRATIVE MEMBER.

THE HON'BLE

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the judgment ?
4. Whether the Judgment is to be circulated to the other Benches ?

Judgment delivered by Hon'ble Administrative Member.


19.1.2000

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CENTRAL ADMINISTRATIVE TRIBUNAL, GUWAHATI BENCH.

Original Application No. 61 of 1998.

Date of Order : This the 19th Day of January 2000.

The Hon'ble Shri G.L.Sanglyine, Administrative Member.

Shri Swadhin Dutta,
Son of late Nani Gopal Dutta,
Resident of Bhiara Bhawan,
Gate No.3, Maligaon,
Guwahati-11.

. . . Applicant

By Advocate Shri A.K.Roy,

- Versus -

1. Union of India
represented by the General Manager,
N.F.Railway,
Maligaon, Guwahati-11.
 2. The General Manager,
N.F.Railway, Maligaon,
Guwahati-11.
 3. Financial Advisor & Chief Accounts Officer,
N.F.Railway, Maligaon, Guwahati-11.
 4. Chief Cashier,
N.F.Railway, Maligaon,
Guwahati-11.
- . . . Respondents.

By Advocate Shri S.Sengupta, Railway counsel.

O R D E R

G.L.SANGLYINE, ADMN.MEMBER,

After retirement from the Defence service the applicant served as a Junior Clerk in the office of the Chief Cashier, N.F.Railway with effect from 1.12.1964. While in service in the Railway he applied for the post of Lecturer in Hojai College and he was offered appointment as Lecturer in the College in the scale of pay of Rs.700-1600/- as per the norms of the University Grants Commission. He applied for extra ordinary leave without pay for a period of 6 months with effect from 1.12.1981 with permission to accept the appointment during the leave period as per existing rules. However, instead of giving extra ordinary leave the Chief Cashier, N.F.Railway released the applicant to join the

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College by letter dated 30.11.1981 by laying down certain terms and conditions as mentioned therein. He was released by order dated 1.12.1981 on the stipulated terms and conditions. His lien was extended for a further period of one year by letter dated 14.11.1983 with effect from 2.12.1983 or the date of absorption in the College whichever is earlier on the terms earlier stipulated. The applicant was ultimately permanently absorbed in the College with effect from 2.12.1984 and the applicant offered his resignation on 6.2.1985 with effect from 2.12.1984. His resignation was accepted by order dated 24.6.1985 issued by the Chief Cashier, N.F.Railway, Maligaon. The applicant was not paid pension and gratuity. The respondents informed the applicant that since he did not render 20 years of qualifying service before joining the College, i.e. on 2.12.1981, his case for pension cannot be considered. The applicant submitted several representations and the Railway authorities informed him that since he violated the conditions laid down in the office Order dated 1.12.1981, it was deemed that the applicant had resigned from service on 2.12.1981. Therefore, he was not entitled to pensionary benefits. The applicant submitted Original Application No. 39 of 1991. This O.A. was disposed of on 30.8.1995. In para 6 of that order it was recorded that the question that arose was as to whether the respondents could deny the benefit of the lien to the applicant on the ground of violation of the conditions of the order dated 1.12.1981. The Tribunal came to the conclusion that the matter needed scrutiny by the respondents. Therefore in para 11 of the order directions were issued as follows :

- "(1) The FA & Chief Accounts Officer, N.F. Railway, Guwahati, Respondent No.2 is hereby directed to re-examine the claim of the applicant for pension and DCRG in the light of the circumstances discussed above in this order.

- (ii) The respondent No.2 will decide in accordance with the relevant rules as to whether violation of the conditions of the letter dated 1.12.81 could be a ground to deny the benefit of the lien as the order itself provided only that on failure to abide by the conditions the applicant could be re-called.
- (iii) In the even of the respondent No.2 coming to the conclusion that the denial of benefit of the lien was not permissible he shall consider extending the benefit of pension to the applicant taking into calculation the period of three years of service for which period the lien would be available."

In compliance with the directions the respondents issued an order dated 4.3.1996 rejecting the claim of the applicant as below :-

". My observation against the relevant sub-paras of para 11 of the above said order are put herein below in seriatim, sub-parawise -

i. The request of the applicant for grant of pension and D.C.R.G in the light of the circumstances narrated in the order has been thoroughly gone through and no rules and procedures could be found out which would warrant reversal of the previous action of the Railways administration on the subject;

ii) &

iii) As all actions of the executives in the Government Department are to be exercised within the framework of the relevant rules, laws, the circulars and instructions of the Railway Board (Ministry of Railways), Ministry of Home Affairs, Ministry of Finance etc. on the subject and the employer and employee relations are based on the set rules and mutual contract and there is little scope of declaring any violation of the said contractual stipulations as legal one. These points have also been elaborately discussed in paragraphs 3 & 4 of the Hon'ble Tribunal's aforesaid order.

As Shri Dutta was serving in the non-Government Organisation, the onus to deposit his required contribution etc. to the Railways for service in other organisation for retention of his lien on the Railways was on him, if he desired to keep his lien on the Railways. Shri Dutta was continuing in his new profession in the College and never expressed his intention to come back to his Government post and the plea of recalling him also neither arose nor can it be a valid ground to

rectify the illegality and breach of contract by him which already brought the contract to a nullity by own volition of Shri Dutta."

Thereafter the applicant submitted further representations with reference to the order dated 4.3.1996. Since there was no reply he submitted O.A.No.219/97. The O.A was disposed of with the direction to the General Manager, N.F.Railway to dispose of the representations of the applicant. Consequent upon the directions the Annexure-Y order was issued. In that order the Railway authority had taken the plea that according to O.M.No.F1(11)-E-III(B)/75 dated 7-11-1975 appointment of serving Government servants made either by promotion or by direct recruitment in competition with open market candidates, whether on a permanent or temporary basis will not be regarded as deputation. Hence retention of lien after release from the Railway and joining to the new post was not permissible under the provision of the rules in force as above, but inadvertently he was released from the Railway on the terms and conditions laid down in the order dated 1.12.1981. The respondents admitted that the release of the applicant on the terms and conditions set out in the order dated 1.12.1981 was a lapse on the part of the Railway administration. But since the release on those terms and conditions was not in accordance with the relevant rules, laws, circulars and instructions of the Government on the subject, the applicant cannot be granted pensionary benefit under the Railway Pension Rule. The respondents further maintained that the applicant did not complete 20 years of qualifying service in the Railway. The applicant has therefore submitted the present Original Application. In this application he has prayed for quashing and setting aside the Annexure-R order dated 4.3.1986 and Annexure-Y order communicated by

letter dated 2.1.1998 and to direct the respondents to count his service in the Railway upto 2.12.1984 and to pay him the pensionary benefits including gratuity.

2. The application has been keenly contested by both sides. I have heard learned counsel. The contents of the office order No.Cp/156 dated 1.12.1981 are re-produced below for convenience :

Having been selected for appointment as lecturer in Bengali at Hojai College vide principal and Secy's letter No.HC/G-6/7374 dated 4.11.81, Shri Swadhin Dutta, Sr.Clerk drawing pay at Rs.428.00 plus Rs.35/- special pay P.M. in scale Rs.330-560/- is relieved from this office w.e.f. 01.12.81 (AN) on the following terms and condition :-

1. His lien will be retained in this office for a period of two years (in exceptional case upto 3 years). If he is not permanently absorbed within the above period from the date of his appointment in the new post he should immediately on expiry of the said period either resign from the Railway service or revert to his parent office.
2. His pay in the Ex-cadre post will be fixed in the pay scale of that post subject to the condition that his pay in the new post should not exceed 30% of his pay or Rs.100/- whichever is more.
3. He will have to deposite the leave salary and pension contribution with this Railway regularly at the prescribed rate during the period of his lien is retained in this office, failing which he will be recalled for breach of the undertaking.

Sd/-
Chief Cashier,
N.F.Railway, Maligaon."

The case of the respondents in short is that the applicant was wrongly granted retention of lien in the Railway service for the period from 2.12.1981 to 1.12.1984 he served in Hojai College, which was not a Government educational institution. He cannot therefore be granted pension by the Railway as his qualifying service with the Railway was less than 20 years

as on date of his release to join service in the College. Erroneous actions of the officers of the Railway taken contrary to laws, rules, circulars, instructions etc. issued by the competent authority, which resulted in favour of the applicant cannot give him right to receive pensionary benefit. The applicant on the other hand supported the action of the Chief Cashier as reflected in the aforesaid order dated 1.12.1981 and the order extending retention of lien dated 14.11.1983 and submitted that the actions were according to rules, policies and instructions of the Government. The fact that resignation of the applicant was accepted with effect from 2.12.1984 would further support that the service of the applicant in the Railway was upto 2.12.1984. In fact such resignation was only a technical resignation. In fact, as per law, resignation cannot be accepted with retrospective effect and his service in the Railway should have been counted upto 24.6.1985, the date of issue of the order accepting resignation of the applicant. It was also submitted that there was nothing wrong in the action of the Chief Cashier. The Hojai College is ^{an} an aided College under deficit system of Grant-in-Aid. The post against which the applicant was appointed was a Government sanctioned permanent post and salary was paid by the Government from the Government revenue. Scale of pay was fixed according to the norms prescribed by the University Grants Commission. Selection for regularisation was conducted by the State Selection Board constituted by the State of Assam and regularisation was made by the Governor of Assam through the Director of Public Instructions, Assam who controls the whole matter of appointment, removal, termination, promotion, service conditions, salary etc. and the Governing Body of the College has nothing to say in

regard to the post. As the post is a Government sanctioned permanent post and is under the State Government, deputation to the post could be made and after due consideration of the status of the College and the post the F.A & C.A.O, N.F. Railway forwarded the application of the applicant for the post and granted the lien. After permanent absorption in the post of Lecturer the applicant had tendered technical resignation as per rule. When the applicant was permanently absorbed in the College in such circumstances the date of acceptance of resignation will be treated as the date of retirement and there is no question of the period of service of the applicant with the Railway fall^{-ing} short of the qualifying service of 20 years. At any rate, even if it is assumed that the applicant was wrongly granted the lien, it was not the fault of the applicant and therefore by applying the principle of equity and conscien^{-ce} / pensionary benefit, cannot be denied by excluding the period of 3 years from the calculation of 20 years qualifying service.

3. The applicant is a Master Degree holder and after having served the Railway for about 17 years he applied on 3.10.1981 for a post of Lecturer in Bengali in Hojai College with a no objection certificate issued by the F.A. & C.A.O, N.F. Railway, Maligaon. He was selected for appointment to the post subject to the approval by the Director of Public Instruction, Assam as a temporary Lecturer against a Government sanctioned permanent vacancy. The selection was subject to regularisation of his service by the State Selection Board and the Director of Public Instruction, Assam as provided in the Assam Aided College Employees Rules, 1960 and it is further governed by the Gauhati University and the Government of Assam Rules as in force from time to time. The Director of Public Instruction, Assam approved the appointment subject to selection by the State Selection Board. Subsequently the Selection Board approved his appointment. On being appointed the applicant prayed

that he may be granted 6 months extra ordinary leave without pay with effect from 1.12.1981 with the permission to accept appointment during leave in accordance with para 2108(b) of RII. He further stated that notice for resignation or voluntary retirement as required will be submitted by him in due course. The respondents however, released him from Railway service to join the new appointment on the conditions as stipulated in the order dated 1.12.1981 re-produced hereinabove. Probably while issuing the order dated 1.12.1981 the provisions of Code No.244 of the Indian Railway Establishment Code (Vol.I) were kept in mind. The Code No.244 is re-produced herein below :

"244. Forwarding of application to another post in railway service or outside the Railways.-Permission to a railway servant to submit an application for a post, to appear for an examination for a post, or to transfer his services to another post in railway service or in another office or Department under the Government of India or under a State Government shall not ordinarily be refused unless the head of the office or department in which he is employed considers that the grant of permission would not be consistent with the interests of the public service.

Railway Ministry's decision-(1) The applications from serving employees for employment elsewhere, submitted otherwise than in response to advertisements or circulars inviting applications, should not be forwarded.

(E(NG)65-RC-1/186 dated 29.1.1966)

(2) The lien of a permanent Railway servant appointed under another Central/State Government or office may be retained on the Railway for a period of two years (three years in exceptional cases). If he is permanently absorbed within this period in the new post, he should immediately on expiry of the said period, either resign from the Railway service or revert to his parent office. Applications should be forwarded only if an undertaking to abide by these conditions is given by the staff concerned.

(E(NG)-11-69-AP.21 dated 7.3.1975.)

(3) The applications submitted by railway servants in response to advertisement issued by UN Agencies or other International Organizations in newspapers should not be forwarded. When a Railway servant applies on his own volition for a post under a foreign Government/

U.N.Agency, he should mention in his application seeking permission that on his securing appointment under the foreign Government he will resign or retire from Railway service if the retirement is due under normal rules. On receipt of the application, the competent authority should examine, and decide whether permission should at all be granted to him. If the permission is granted the railway servant may be advised to apply for the post direct. The application should not be forwarded through the Department to avoid the impression that the Government is sponsoring the individual for the post under the foreign Government.

(E(NG)-II-68 AP.13 dated 10-10-69, MHA O.M.No.27/53/77/EDP dated 22-3-78 and No.78E(O)-II/2/21 dated 6-6-1978.)"

In 1986 onwards when the matter of granting pensionary benefit to the applicant was considered a view was taken without considering the provisions of this code. The respondents were twice directed by this Tribunal to look into the claim of the applicant for pensionary benefits and gratuity. However, it appears that the core of the matter was not addressed to by them, namely, whether in the facts of the case the post of Lecturer to which the applicant was appointed as a post under the State Government of Assam. In the order dated 2.1.1998 the respondents rejected the claim of the applicant to count the period of 3 years as lien by taking support of the O.M.No.F1(11)-E/III(B)/75 dated 7.11.1975 issued by the Ministry of Finance, Department of Expenditure, which according to them reads : "Appointment of serving Government servants made either by promotion or by direct recruitment in competition with open market candidates, whether on a permanent or temporary basis will not be regarded as deputation." Nothing has been shown whether this O.M. has superseded or overruled the Indian Railway Establishment Code No.244 and the decisions of the Railway Ministry thereunder mentioned above, IREM 3902 and other Railway circulars. In fact, it is seen from the

note of the Chief Cashier dated 31.7.1986 and those of the superior officers onwards dealing with the pension matter of the applicant submitted before this Tribunal that there was no application of mind to the nature of the post. This was not reflected in the letter dated 14.5.1986 of the D.P.I., Assam also. In those notes there was no mention of the office memorandum dated 7.11.1975. Thus it is clear that the order dated 2.1.1998 is without reference to the facts on records. In fact, it appears that the respondents took different stands at different time. For example in Annexure-3 to the written statement dated 21.12.1987 it appears that the applicant lost the period of 3 years as he had violated certain terms and conditions. In Annexure-12 to the written statement dated 3.5.1988 it was stated thus :-


"On joining the Hojai College as Lecturer granting lien to Shri S.Dutta was however not regular as the Hojai College was not a Govt. college which has been received subsequently, by the competent authority and his lien to this Railway was disallowed and his release from this office w.e.f. 1.12.81 was treated as his resignation from service from that date (i.e.1.12.81)."

Further, while in the order dated 2.1.1998 reliance was placed on the O.M. dated 7.11.1975, the learned counsel for the respondents relied on the Master Circulars of the Railway in support of the contentions of the respondents. In the light of the above I dispose of this application with a direction to the respondents to consider afresh the claim of the applicant for pensionary benefits. While considering the matter they will have to specifically determine whether the said post of lecturer was a post under the State Government of Assam. For this purpose enquiry may be made from the Government of Assam. They shall also take into consideration among others the provisions of Indian Railway Establishment Code (Vol.I) No.244, with Railway Ministry decisions thereunder. Indian Railway Establishment Code (Vol.II) No.2433, Indian Establishment Manual para 3902, Office

Memorandum No.F1(11)-E-III(B)/75 dated 7.11.1975 and any other rules relevant to the matter of retaining lien. It is specifically directed that the respondent No.3, Financial Adviser & Chief Accounts Officer, N.F.Railway, Maligaon, Guwahati shall personally hear the applicant before issuing the fresh order. He shall also take into consideration the facts on records. The order shall be communicated to the applicant within 3 months from the date of their receipt of this order.

Since the matter is to be re-considered by the respondents the other issue whether on equity and conscience the applicant can get relief is not considered at present. If the applicant is still aggrieved with the order of the respondents, he may approach the appropriate authorities including this Tribunal for redressal of his grievances.

Application is disposed of. No order as to costs.


(G.L.SANGLYINE)
ADMINISTRATIVE MEMBER