CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.NO.852 of 2016
Cuttack this the 21st day of March, 2018

CORAM:
THE HON'BLE DR.MRUTYUNJAY SARANGI, MEMBER(A)

Kathia Behera, aged about 77 years, S/o. Mandra behera, Vill-Ichhapur, PO-Puruna Baulamala, PS-Jenapur, Dist-Jajpur, Retired Sr.Track Man under SSE(P.Way), - At/PO/PS/Dist-Bhadrak.

...Applicant

By the Advocate(s)-Mr.S.Behera

-VERSUS-

Union of India represented through:

1. The General Manager, East Coast Railway, Rail Vihar, , Bhubaneswar, Dist-Khurda.

2. Divisional Railway Manager, East Coast Railway, Khurda Road, At/PO/PS-Jatni, Dist-Khurda-752 959.

3. Senior Divisional Personnel Officer, East Coast Railway, Khurda, At/PO/PS-Jatni, Dist-Khurda-752 050.

4. Assistant Divisional Engineer, East Coast Railway, Cuttack, At/PO-College Square, Dist-Cuttack-753 003.

5. Senior Section Engineer, (P.Way), East Coast Railways, Bhadrak, At/PO/Dist-Bhaedrak.

...Respondents

By the Advocate(s)-Mr.S.K.Ojha

ORDER

DR.MRUTYUNJAY SARANGI, MEMBER(A):

The applicant is a retired Senior Track Man from the East Coast Railways. He claims that from the year 1970 till 1985, he served as a casual labour with 2295 working days and from 28.11.1989, he got the regular scale of pay and continued upto 31.10.2000 when he retired from service. He claims that from

28.11.1989 to 31.10.2000, he had put in more than 10 years of regular service and he is therefore entitled for pension and other retirement benefits. He had submitted representation to the Senior Divisional Personnel Officer, East Coast Railway on 13.2.2002 praying for sanction of pension and other pensionary benefits with effect from 1.11.2000. He followed up by another representation dated 8.9.2003. On 13.3.1006, he submitted another representation to the General Manager, East Coast Railways. He sent another representation to the Divisional Railway Manager, East Coast Railway, Khurda Road (Respondent No.2) on 28.4.2016. Since no action was taken on his representations, he had filed O.A.No.431 of 2016 praying for grant of pension and other retirement benefits. The O.A. was disposed of on 30.6.2016 with a direction to Respondent No.2 to consider his representation dated 28.4.2016 and pass a reasoned and speaking order within three months. The Respondent No.2 vide his order dated 27.7.2016 rejected the representation of the applicant on the ground that his total qualifying service was only 8 years, 7 months and 26 days and he did not possess the 10 years qualifying service for pension (A/12). Aggrieved by this, the applicant has filed the present O.A. praying for the following reliefs:

> "…to quash the impugned order dated 27.07.2016 passed by the Respondent No.2 under Annexure-A/12 and to direct the respondent to sanction pension and other retiral benefits to the applicant

keeping in view the decision of Hon'ble Apex Court and Hon'ble High Court of Orissa and A.P.;

And further to direct the respondent to give interest on delayed payment of pension at the rate of 7.5% per annum till payment is made to the applicant and that should be recovered from respondent no.2 and 3 from their salary;

And to direct the respondents to give all consequential benefits to the applicant".

2. The applicant has based his prayer mainly on the ground that his regular service from 28.11.1989 to 31.10.2000 amounts to about 11 years which entitles him to pension. But the Respondent No.2 has wrongly calculated his years of qualifying service. Moreover, as per the orders of the CAT, Principal Bench in O.A.No. 2639/2013 decided on 26.5.2014 (Ram Saran vs. Union of India & Ors.) and the judgment of the Hon'ble High Court of Andhra Pradesh in the General Manager, South Central Railway vs. Shaik Abdul Khader [2003 (4) ALD 560 ALT GT, the applicant's period of service as a casual labour from 1970 has to be added to his regular service making him eligible for pension and other retirement benefits.

3. The Respondents in their counter reply filed on 13.11.2017 have contested the claim of the applicant. They have submitted that the applicant was first engaged as casual labour on 4.7.1987 and his service was discontinued on 20.10.1987. He was engaged in broken spells from time to time as casual labour. He was employed as casual labour from

29.6.1988 to 20.10.1988, from 24.6.1989 to 23.10.1989 on daily rate basis. He was granted temporary status on 28.11.1989 and allowed to work as casual Gangman on regular scale of pay. On being found suitable in the screening test, he was offered a regular appointment on 31.3.1994 and he joined in a regular service on 4.6.1994. He was conformed as a regular Gangman on 4.6.1995 and retired on 31.1.2000. Calculating his regular service and casual service after attainment of temporary status, the applicant is falling short of 10 years of qualifying service required to make him eligible for pension as per Rule-69(2)(b) of Railway Servants (Pension) Rules. Respondents have claimed that as per Railway Board's instructions contained in letter No.E(NG)/11/78/CL/12 dated 14.10.1980 only half of the service actually rendered to the Railways after attaining temporary status till the date of regularization has to be counted as qualifying service for the purpose of pension (Annexure-R/2). The Respondents have also quoted Rule-31 of Railway Services(Pension) Rules, 1993 wherein it is stated that in respect of Railway Servants in service on or after 22.8.1968, half of the service paid from contingencies, shall be taken into account for calculating the pensionary benefits on absorption in regular employment. In Foot Note-2 of Rule-31, it has been stated that the expression absorption in regular employment means absorption against a regular post. The applicant has not attained the minimum period of service of 10 years and is

therefore, not entitled for pension. He is only entitled to payment of service gratuity in addition to his normal retirement gratuity which has already been paid to him. The Respondents have provided the details of calculation of the qualifying service of the applicant for the purpose of pension. As per this table of calculation contained in the counter filed by them they have taken 50% of casual service actually rendered during the period from 28.11.1989 to 3.6.1994 (temporary status of the applicant) as 2 years 3 months and 2/12 days, 100% regular service rendered from 6.4.1994 to 31.10.2000 as 6 years 4 months 27 days. The net qualifying service for computing pensionary benefits comes to 8 years 7 months and 25 ½ days after deducting 4 days of leave without pay. It is the respondents' contention that the applicant's case has already been adjudicated by this Tribunal in O.A.No.217 of 2002 in which this Tribunal had disposed it of with the following observation:

> "3. I have heard Shri N.R.Routray, learned counsel for the applicant and Shri R.C.Rath, learned Standing Counsel for the Respondents and perused the records placed before me. Sri Rath, the learned Standing Counsel for the Respondents admitted that the qualifying service as worked out by the Department under Annexure-R/5 was wholesome and free from ambiguity. He also admitted that it is not the case of the applicant that any official junior to him in the grade of casual labour live register was considered for regularization before his turn came. In fact, the applicant got regularization in turn. This being the factual position that the applicant got the benefit of regularization in his turn and it is not his case that vacancies were available for regularization but the Respondents

> did not take timely action, nothing survives in this Original Application for adjudication. In the circumstances, the relief prayed for by the applicant in this O.A. is also not available. This O.A. is accordingly dismissed. No costs".

The Respondents have submitted that the case of the applicant is barred by res judicata since the points raised by him in the present O.A. have already been considered in the earlier OAs. They have cited the judgment of the Hon'ble Apex Court in R.Unnikrishnan vs. V.K.Mahanudevan that even an erroneous decision can operate as res judicata and if the case has already been adjudicated on certain facts, the same cannot be re-adjudicated in a court of law. The Hon'ble Apex Court had even held that even if subsequent change in law has been made, still the earlier litigations cannot be reopened. In similar cases in O.A.No.425/02(Baidhar Behera vs. UOI & Ors) disposed of on 13.11.2002 and O.A.No.632/06 (Gatia Jena vs. UOI & Ors) & O.A.No.635/06 (Kailash Das vs. UOI & Ors) disposed of vide common order dated 31.07.2009 respectively, this Tribunal had already rejected the prayers made by the respective applicants holding that no minimum pension is admissible unless an employee possesses minimum 10 years of qualifying service.

4. In the rejoinder filed by the applicant on 21.12.2017, the applicant has reiterated the fact that he was engaged as a casual labour in the year 1970 and not in the year 4.7.1987 as mentioned by the respondents in the counter. He had worked for 2295 days as casual labour from the year 1970 till

20.8.1986. This period was not taken into account by the railway authorities while calculating his service for pension and related benefits. The applicant claims that as per the Railway Board's letter dated 2.4.1981, those casual workers who had worked in short spells for a period aggregating less than 120 and 180 days shall be entitled to the benefit of temporary status/scale of pay as soon as their total service aggregates to a period of 120/180 days. The Respondents have not taken into account the period of service rendered by the applicant as a casual labour from 1970 till 20.8.1986. The applicant also submits that res judicata will not be applicable in the present case since in O.A.No.217 of 2002, the applicant had prayed for retrospective regularization from the year 1990-91 whereas in the present O.A. his prayer is to count the past casual service for the purpose of pensionary benefits. Similarly in the subsequent O.A.No. 431/2016, this Tribunal had directed for consideration of the applicant's representation which had been done and has given rise to a fresh cause of action due to rejection of his prayer in the representation.

5. I have heard the learned counsels from both the sides. During arguments, the learned counsels for the respondents cited a number of case laws. In O.A.No.776/2010, in which orders were pronounced on 13.2.2017, this Tribunal had held that 50% of casual service with temporary status along with 100% regular service till retirement worked out to four years

one month and nine days. In the present O.A., the applicant had only 8 and ½ years' service and therefore, he was not entitled to pensionary benefits. The Respondents have cited the judgment of the Hon'ble High Court Orissa in Smt**.** Reena Trivedi vs. State of Orissa & Ors. (AIR 2013 (NOC) 205 (ORI) wherein it has been held that even if a party does not pray for relief in the earlier writ petition which he ought to have claimed in earlier petition, he cannot file successive writ petition claiming that relief since it will be bared by principles of constructive res judicata. Similarly, in R.Unnikrishan vs. V.K.Mahanudevan (2014) 2 Supreme Court Cases (L&S) 135 the Hon'ble Apex Court had observed that even an erroneous decision can operate as res judicata. It is trite that law favours finality to binding judicial decisions pronounced by competent courts that are competent to deal with the subject matter. Similarly in Uday Ram vs. Central State Farm & Ors. (AIR 1986 Raj. 186), the Hon'ble High Court had held that even if a party does not pray for the relief in the earlier writ petition, he could not file a successive petition claiming the same relief which he ought to have claimed in the earlier one. In Ramchandra Dagdu Sonavane vs. Vithu Hira Mahar (AIR 2010 SC 818), the Hon'ble Apex Court had laid down the law that if by any judgment and order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial

of an identical issue in a subsequent proceedings between the same parties.

6. I have taken into account the arguments and the case law cited by the respondents on res judicata in the present case. It appears from the record that the issue before this Tribunal in O.A.No.217 of 2002 was the prayer of the applicant for regularization. This Tribunal had observed that the applicant got the benefit of regularization in his turn and it was not his case that vacancy was available for regularization, but the respondents did not take any timely action. Similarly in O.A.No.431 of 2014, this Tribunal had not decided the issue on merit and had only directed the respondents to consider his representation dated 28.4.2016 and pass a reasoned and speaking order within a period of three months from the date of receipt of the Tribunal's order. That being so the case law cited by the respondents will not be applicable and the principle of res judicata will not act as a bar in the present case.

7. The case laws cited by the respondents deal with the applicability of res judicata laying down the principle of finality of adjudication. But in the present case, the crux of the problem is the calculation of period of casual service for entitlement towards pension which is different from the issues raised ealier. I, therefore, reject the prayer of the respondents on the issue of res judicata and proceed to consider the case on merits.

8. The applicant has relied upon the decision in the General Manager, North West Railway & Ors. vs. Chanda Devi [2008 (1) SCC (L&S) 399].

9. The facts of the case make it abundantly clear that the applicant was granted temporary status with effect from 28.11.1989 and got regularized in 4.6.1999. For the purpose of pension, his service has been counted as 100% regular service and 50% in which he had worked under temporary status capacity. The Hon'ble High Court of Orissa had considered similar cases in Writ Petitions (Civil) No.2136, 6474, 3136 and 5266 of 2002 and had quoted Paragraph-2005 of the Indian Railway Establishment Manual, Vol.II as per which 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 and then the benefit will be admissible only after their absorption in regular employment. Such casual labourers 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 this benefit. The Hon'ble High Court at Para-7 of the judgment in aforementioned Writ Petitions has stated that the rule guiding employment states any service rendered prior to conferring

temporary status on the employees, though can be taken for the purpose of certain service benefits, the same cannot be taken into account while calculating the qualifying service for the purpose of determining pension. In Paragraph-8 of the judgment, the Hon'ble High Court observed that when the relevant clause in the Indian Railway Establishment Manual provides for the procedure for reckoning the qualifying service for the purpose of pensionary benefit, any order passed by the Tribunal contrary to the same or violative of the same should be set aside. No person can claim any right on a basis which is de hors, the statutory rules nor can there be any estoppel. Further in such cases, there cannot be any consideration on the ground of hardship. If the Rules do not provide for grant of pensionary benefit, it is for the authority to decide and frame appropriate rules but the court cannot direct payment of pension to an employee who has not completed ten years of qualifying service. (Union of India & Ors. vs. Rakesh Kumar (2001) 4 SCC 309.

10. A similar matter was also adjudicated by this Tribunal in O.A.No.579 of 2012 in which it was emphasized that the benefit of 50% of temporary status can be taken for calculation of service for the purpose of pensionary benefits by virtue of the Board's instruction vide Estt. Srl.No.239/1980.

11. The applicant has relied on the judgment of the Hon'ble Andhra Pradesh High Court in General Manager, South Eastern

Railway vs. Shaik Abdul Khadar [2003 (4) ALD 560] in which it has been laid down at Para – 8 as follows:

> "8.If this sub-para read with para-20 and also with rule-31, there remains no doubt that on absorption whole of the period for which a casual labour worked after getting temporary status would have to be counted and half of the period has to be counted of the period for which a casual labour worked without being absorbed. Once he is given temporary status that means that he has been absorbed in the department. Even para 2005(a) has been drafted in the same way because of the fact that even such casual labour who have attained temporary status rare allowed to carry forward the leave at their credit in full to the new post on absorption in regular service. Therefore, we have no doubt in our mind that once temporary status is granted to a person who is absorbed later on in regular service carries forward not only the leave to his credit but also carries forward the service in full. Half of the service rendered by him as casual labour before getting the temporary status has to be counted. Therefore, we do not feel that the Tribunal was wrong in coming to the conclusion it has, although we may not agree with the reasons given by the Tribunal. The view taken by us is further strengthen by mandate of rule-20 of Railway Services (Pension) Rules …."

12. A similar order was made by the CAT, Principal Bench in O.A.No.2639 of 2013 (Ram Saran vs. Union of India) in which the CAT, Principal Bench had relied on the common judgment dated 23.11.2007 in Civil Writ Petition No.631-633 of 2006 in the matter of Union of India vs. Shri Raj Kumar & Ors. which reads as follows:

> Learned counsel for the Review Applicant-petitioner submits that the above writ petition had been withdrawn since the Special Leave petition that had been filed by the Railways challenging the order of the High Court of Andhra Pradesh, which had dismissed the Writ Petition filed by the Railways against the order of the Central Administrative Tribunal at Hyderabad. Counsel submits that the petitioners have now learnt that

the Special Leave Petition had been withdrawn on humanitarian grounds as the respondent had died. The order passed by the Supreme Court does not contain any such indication. Besides it had been put to learned counsel for the Review Applicant if the view taken by the Central Administrative Tribunal, Hyderabad as also the High Court of Andhra Pradesh, had been assailed by the Railways in any other petition. To that, counsel replied that as per his knowledge, no such petition has been filed challenging similar view taken by the High Court of Andhra Pradesh. The Review Petition also does not disclose any error apparent on the fact of it.

In the circumstances, we find no justification for allowing the present petition.

5.The very issue was decided by the Apex Court in Special Leave to Appeal (Civil) No.(s) 20041/2008 – Union of India & Others vs. Sarju decided on 30.09.2011. The relevant part of the said order reads as under:

> Sarju (respondent in SLP © No.20041/2008) was engaged as casual labour on 17.1.1960. He was given temporary status with effect from 1.1.1981 and regularized with effect from 1.4.1988. On attaining the age of superannuation, he was retired from service on 30.11.2001. The application filed by him under Section 19 of the Administrative Tribunals Act, 1985 (for short, ' the Act') for counting his temporary service as part of qualifying service for the purpose of calculation of the retiral benefitrs was disposed of by the Tribunal vide order dated 1.3.2006, the operative portion of which reads as under:
>
> "In view of the law laid down by the Hon'ble Andhra Pradesh High Court as well as CAT, Cuttack Bench, there is no basis/ground to take different view. In the result, the O.A. is allowed. The respondents are directed to recalculate the pension with arrears from due date (the date of superannuation) with all incidental benefits after counting the full service from the date of grant of temporary status i.e., 1.4.1981. These exercises should be completed within a period of four months from the date of receipt of a copy of this order. There shall be no order as to costs".

13. In view of the laid down case laws and in view of the fact that the preponderant judicial precedent is in favour of counting 50% of the actual days rendered on casual basis with full benefit for the temporary status as well as regular period as decided by the Principal Bench (supra) and all the case laws discussed in the above judgment, I am of the view that the applicant is entitled to a recalculation of his service counting half of the actual days engaged as casual labour and full period from the date that he was granted temporary status and subject to his attaining 10 years of service he will be entitled to pension.

14. In the light of the above discussions, the Respondents are directed to recalculate the qualifying service of the applicant as at Para - 13 above and if found eligible pass necessary orders within a period of eight weeks from the date of receipt of this order and grant him pensionary benefits including regular pension from the date of his retirement. No costs.

(DR.MRUTYUNJAY SARANGI)
MEMBER(A)

BKS