CENTRAL ADMINISTRATIVE TRIBUNAL

MADRAS BENCH

OA /310/01240/2016

Dated the day of December, Two Thousand Nineteen

P R E S E N T

Hon'ble Mr. T. Jacob, Member (A)

S. Ayyasamy
Rtd. Points Man I
No. 2/11 Jaya Street
Kadapperi
Tambaram West,
Chennai – 600 045. … Applicant

By Advocate **M/s. Ratio Legis**

1. Union of India rep. by
The General Manager
Southern Railway
Park Town, Chennai – 3.

2. The Senior Divisional Personnel Officer
Chennai Division
Southern Railway
Chennai. … Respondents

By Advocate **Mr. Y. Prakash**

O R D E R

(Pronounced by Hon'ble Mr. T. Jacob, Member(A))

The applicant has filed this OA under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

> "To call for the records related to conferment of temporary status to the applicant and further to direct the respondents to re-fix applicant's basic pay with effect from the date of completion of 120 days with effect from their date of initial engagement with all the attendant service benefits as in the case of P.R. Parithivanan and thirty one others in WP No.2554/2002 and 1351/2004 and reiterated by the Hon'ble Supreme Court of India in SLP No.24680-24681/08 and confirmed by the Hon'ble Madras High Court in WP No.8972 of 2006 in favour of Shri. S. Tirunavukkarasu and further confirmed by Hon'ble High Court of Madras in Writ Petition No.3221 of 2012 and the Special Leave Petition filed by the respondent railways was also dismissed and to reckon entire temporary status service of the applicant in full for the purpose of retirement benefits i.e. 37 years instead of 29.5 years and to pass such other order/orders"

2. The brief facts of the case as submitted by the applicant are as follows:

The applicant was engaged as a casual labourer in 1976 and conferred with Temporary status in the year 1981. Being a Group 'D' employee, he was appointed to the post of Station Porter in the pay scale of Rs.196-232 and then promoted as Pointsman 'B' in the year 1993 and Pointsman 'A' in 1998 and superannuated on 30.04.2016. It is further submitted that having been engaged as a casual labourer in 1976, he should have been conferred with temporary status on completion of 120 days but was conferred with effect from 1981 only. Under similar circumstances a batch of casual labourers have sought for conferment of temporary status on completing 120 days of continuous engagement and the said claim was dismissed by

the Tribunal. However, on appeal in WP 2554/2002 and WP 1352 of 2004, the Hon'ble High Court of Madras set aside the dismissal order of this Tribunal, which was confirmed by the Hon'ble Supreme Court in SLPs 24680-24681 of 2008 and the same was implemented by the respondents vide letter No.P(S&T) 443/Misc/Court Cases dated 02.12.2008. Also S.Thirunavukkarasu, a Engineering Department casual labourer similarly situated as that of the applicant had approached the Hon'ble Madras High Court in WP Nos. 8972 of 2002 and the Hon'ble Madras High Court allowed the claim which was implemented by the respondents vide letter No.M/P(E) 524/V/GS/fix./Vol II dated 09.03.2010. The applicant further submits that .OA.901/2011 was filed by Sri. Chandran which was dismissed by this Tribunal. On appeal before the Hon'ble High Court of Madras, in WP.3221 of 2012, the claim of the applicant was allowed and the respondents were directed to treat the applicant on par with the open line casual labourers by extending the temporary status on completion of 120 days casual labour service. It is further submitted that the Railways have preferred a SLP before the Hon'ble Supreme Court of India and the same was dismissed on 02.01.2013. The applicant submitted representations dated 13.08.2014 and 21.12.2015 for re-fixation of pay with reference to the order passed by the Hon'ble Madras High Court and confirmed by the Hon'ble Supreme Court to the 2nd respondent and to reckon the entire temporary service period in full for retirement benefits, which has not elicited any reply. Hence the applicant has filed this OA seeking the above reliefs on the following grounds:

i. Denial of re-fixation of basic pay and other consequential service benefits in terms of the law settled in WP No. 2554/2002 and 1351/2004 further confirmed by the Hon'ble Supreme Court of India in SLP No. 24680-24681/08 and further confirmed by the Hon'ble Madras High Court in Writ Petition No.8972 of 2006, is contrary to the statutory provisions and an act coupled with colourable exercise of authority which is non est in law.

ii. In the wake of the law in WP No. 2554/2002 and 1351/2004 and confirmed by the Hon'ble Supreme Court of India in SLP No. 24680-24681/08 and further confirmed in Writ Petition No.8972 of 2006 by the Hon'ble Madras High Court, there could be no distinction between casual labour as open line or construction / project denial of temporary status on par with the open line staff on completion of 120 days with effect from their date of initial engagement is in gross violation of Para 2001 of the Establishment Manual and hence unsustainable in law.

iii. After capitulating to the law settled against denial of re-fixation of basic pay and other consequential service benefits in terms of the law settled in WP No. 2554/2002 and 1351/2004 further confirmed by the Hon'ble Supreme Court of India in SLP No. 24680-24681/08 further confirmed in Writ Petition no. 8972 of 2006 by the Hon'ble Madras High Court and on bestowing parity among the open line and construction/project casual labourers, denial of temporary status with effect from the date on which 120 days of continuous engagement with effect from their date of initial engagement was completed is in gross violation of Railway Board's letter No. E(NG) II/82/LG-5/4 dated 06.06.1983 and para 2005(a) of IREM and hence impermissible in law.

iv. In as much as P.R. Parithivanan and 31 others and S. Thirunavukkarasu similarly situated to the applicant, have been conferred with temporary status on completing 120 days with effect from their initial engagement, denial of similar treatment to the applicant tantamount to discrimination and therefore the said action is in gross violation of Article 14 & 16 of the Indian

Constitution and hence unsustainable in law.

v. In the light of the fact that the Hon'ble Supreme Court has ruled in catena of cases that 'Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot over-ride written or settled law', the benefit of the said judgment should be extended to all those similarly situated and those similarly situated should not be driven to seek judicial intervention and any attempt by the respondents to deny the benefit of re-fixation of pay extended to Sri. P.R. Parithivanan and thirty one others in WP No. 2554/2002 and 1351/2004 further reiterated by the Hon'ble Supreme Court of India in SLP No. 24680-24681/2008 and Shri. S. Tirunavukkarasu in terms of the judgment in WP No. 8972 of 2006 is against the principle of equity, fair play and justice and hence untenable in law.

vi. In as much as law in WP No. 8972 of 2006 was settled with reference to the law settled in Inder Pal Yadav and others Vs Union of India and others (1985 (2) SCC 648 and also Robert D'Souza Vs Executive Engineer, Southern Railway and another (1982 SCC (l&s) 12), denial of temporary status to the applicants on completing 120 days with effect from their initial engagement is untenable since the impugned action is inconsistent with Art 141 of the Indian Constitution and hence liable to be declared as void.

vii. 50% of the casual labour service for the period from 1976 to 1981 and on the entire period of temporary status service from 27.10.1981 to 02.07.1991 shall have to be taken into consideration for the purpose of retirement benefits and thus the applicant stands eligible for 37 years of total service instead of 29.5 years as mentioned in the service certificate and hence the non-consideration of service benefits for 37 years while in service for the MACP and as well after superannuation for the purpose of retirement benefits is against the Railway Board Letter No. RBE No. 36/2010.

4. The respondents have filed their reply statement. It is stated in the reply that the applicant was engaged as Casual Labour w.e.f. 27.06.1981 and on completion of

four month continuous service, he was granted temporary status in scale Rs.196-232 w.e.f. 27.10.1981. Page-3 of the service register proves that the applicant was engaged as an Open Line Casual Labour and not similarly placed as that of the applicants in OA.532/2002. After grant of temporary status, the applicant was empanelled for regular absorption in the Traffic Branch in scale Rs.750-040 as a Station Porter w.e.f. 02.07.1991 and promoted as Pointsman 'B' in scale Rs.800-1150 w.e.f. 29.12.1993 and further promoted as Pointsman 'A' in scale Rs.3050-4590 w.e.f. 12.06.1998. He retired from service as Pointsman 'A' on 30.04.2016. As per Rule 31 and 20 of Railway Service Pension Rules, 1993, 50% of the Casual Labour service from the date of temporary status from 27.10.1981 to 11.07.1990 and 100% service from 11.07.1990 till the date of superannuation on 30.04.2016 was worked out and the total qualifying service comes to 29.5 years. The applicant was not a project casual labour. He was granted temporary status on completion of four months continuous service and was rightly treated as Open Line Casual labour. Hence the respondents pray for dismissal of the OA.

5. Heard the learned counsel for the respective parties and perused the pleadings and documents on record.

6. Having regard to the above facts and circumstances of the case, the point for consideration in this OA is whether the service of the applicant under temporary status can be reckoned as qualifying service for pension and other retirement benefits.

7. At the outset, the respondents have raised preliminary objection on the ground of limitation and states that the applicant is only agitating denial of temporary status

from 1976 which is a clear admission that his temporary status ought to have been reckoned from the date of initial engagement and on completion of 120 days is sufficient proof that the cause of action relates back to the year 1976. The applicant is only a Fence Sitter as he did not agitate the grant of temporary status in the year 1981 and after more than 39 years he is contending that he should have been granted temporary status in the year 1976. Hence the case deserves to be dismissed on the ground of delay and laches, it is contended.

8. On merits, it could be seen on perusal of the copy of the Service Register produced by the respondents that the applicant was engaged on daily rated basis as an Open Line Casual Labour on 27.06.1981 and was granted temporary status w.e.f. 27.10.1981. He was regularly absorbed as Station Porter e.m.f. 02.07.1991. He was promoted as Points man 'B' w.e.f. 29.12.1993 and as Points man 'A' w.e.f. 12.06.1998 and retired as Pointsman 'A' on 30.04.2016. The Casual Labour whether in the open line or engaged in Projects, who are conferred with temporary status is entitled to the regular time scale of pay with the benefit of annual increment, DA, HRA and CCA. But the casual labour engaged in Projects on completion of 180 days of continued employment are eligible to be treated as monthly rated workers and should be paid consolidated wages at the rate of the minimum scale of pay which is equal to the minimum of the scale of pay plus Dearness Allowance without the benefit of increment. The applicant's qualifying service has been worked out in accordance with Rule 31 and 20 of the Railway Services (Pension) Rules, 1993. Accordingly 50% of casual labour service from 27.10.1981 to 11.07.1990 and 100% service from

11.07.1990 till the date of superannuation on 30.04.2016 was worked out to 29.5 years. Accordingly the applicant was paid the settlement benefits. It is the case of the applicant herein that similarly situated persons have been granted the benefit of temporary status on completion of 120 days as Open Line Casual Labour. He relies upon the Railway Board instructions circulated vide RBE No.215/2009 dated 04.12.2009 to take into account 50% of temporary status casual labour service on absorption in regular employment towards the minimum service of 10, 20 and 30 years for the grant of benefit under the MACP Scheme on the analogy that the same is also reckoned as qualifying service for pension followed by another instruction circulated vide RBE No.36/2010 dated 25.02.2010 which states that the entire temporary status service of substitutes followed by regularisation without break may be taken into account towards the minimum service of 10, 20 and 30 years for the purpose of grant of benefit under the MACP Scheme. The burden of proof lies on the applicant to prove that he was engaged in 1976. No proof has been submitted by the applicant in support of his case. He has also not produced any service card issued by the supervisory officer to prove that he was engaged as open line casual labour in 1976. As per the entry in the Service Register, the applicant was engaged on daily rate of pay w.e.f. 27.06.1981 as open line casual labour and granted temporary status on completion of four months continuous service on 27.10.1981 and hence his basic pay was not re-fixed. Further, he was not engaged as Project Casual Labour and hence the Railway Board's letter dated 06.06.1983 referred to by the applicant is applicable only in the case of project casual labour. In as much as the applicant has

not proved his case that he was engaged from 1976, his claim for re-fixation of his basic pay with effect from the date of completion of 120 days with effect from the date of initial engagement with all attendant service benefits cannot be considered In such view of the matter the decisions referred to by the applicant in support of his case cannot be taken into consideration in the facts and circumstances of the case.

9. The respondents have vehemently opposed the prayer of the applicant on that ground that the applicant ought to have agitated the issue of non grant of temporary status on completion of 120 days at the appropriate time and is agitating the issue after more than 40 years after retirement from service in 2016. The respondents have mainly relied upon the Judgement of the Hon'ble Supreme Court in the case of R.C. Sammanta and ors. vs. Union of India and ors reported in JT 1993 (3) SC 418 wherein it has been held that delay deprives a person of the remedy available to him in law, a person, who has lost his remedy by lapse of time, loses his right as well. In the case of S.S. Rathore vs. State of Madhya Pradesh reported in SLJ 1990 (1) SC 98, the Hon'ble Apex Court has held that in every such case only when the appeal or or representation provided by law is disposed of, cause of action shall first accrue and where such order is not made, on the expiry of six months from the date when the appeal was filed or representation was made, the right to sue shall first accrue. Further the Principal Bench of this Tribunal in a similar case in OA.1449/2002 dated 12.03.2007 in the case of Raghubir Singh & Ors. vs. Union of India & Ors., referring to various Judgement of the Hon'ble Supreme Court has held that the application is barred by limitation under Section 21(2) of the Administrative Tribunals Act 1985 as

well as the Laches Sec.21(2) prescribes a statutory bar from agitating the claims which is beyond three years from the date of Administrative Tribunals Act had come into force. Therefore, any claim before the year 1981 ought to be automatically rejected because of want of jurisdiction to entertain such grievances.

10. For proper appreciation of the case, it is necessary to refer to certain provisions of the attendant pension Rules, the Indian Railway Establishment Manual and executive instructions and the decision of the Apex Court in Prem Singh vs State of UP and Others and also the provisions of Rule 18, 20 and 31 and also the decision of the Hon'ble Apex Court in the case of Union of India vs. Rakesh Kumar. (2017) 13 SCC 388. In addition, the basic definition of the terms, “pension” and “qualifying service” as per the Pension Rules would make it clear as to whether the claim of the applicant is legal and justified.

> Definitions
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> Sub Rules under Rule 3
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> (19) “pension” includes gratuity except when the term pension is used in contra distinction to gratuity but does not include dearness relief.
>
> (22) “qualifying service” means service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these rules;
>
> Rule 20 of the Railway Pension Rules, 1993 reads as under:-
>
> “20. Commencement of qualifying service.—Subject to the provisions of these Rules, qualifying service of a railway servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:
>
> Provided that officiating or temporary service is followed, without interruption, by substantive appointment in the same or another service or post:

Provided further that—

(*a*) in the case of a railway servant in a Group D service or post who held a lien or a suspended lien on a permanent pensionable post prior to 17-4-1950, service rendered before attaining the age of sixteen years shall not count for any purpose; and

(*b*) in the case of a railway servant not covered by clause (*a*), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.

* * *

Rule 31 of the Pension Rule states as under:-

31. Counting of service paid from contingencies.—In respect of a railway servant, in service on or after the 22nd day of August, 1968, half the service paid from contingencies shall be taken into account for calculating pensionary benefits on absorption in regular employment, subject to the following condition, namely:-

(*a*) the service paid from contingencies has been in a job involving whole-time employment;

(*b*) the service paid from contingencies should be in a type of work or job for which regular posts could have been sanctioned such as posts of malis, chowkidars and khalasis;

(*c*) the service should have been such for which payment has been made either on monthly rate basis or on daily rates computed and paid on a monthly basis and which, though not analogous to the regular scales of pay, borne some relation in the matter of pay to those being paid for similar jobs being performed at the relevant period by staff in regular establishments;

(d) the service paid from contingencies has been continuous and followed by absorption in regular employment without a break:

Provided that the weightage for past service paid from contingencies shall be limited to the period after 1-1-1961 subject to the condition that authentic records of service such as pay bill, leave record or service book is available.

Note:-

(1) The provisions of this Rule shall also apply to casual labour paid from contingencies.

(2) The expression “absorption in regular employment” means absorption against a regular post.”

Tandem with the above provisions are certain Master Circular and IREM, issued by the Railways. The same are as under:-

25. Para 20 of Master Circular No.54:-:

"20. Counting of the period of service of casual labour for pensionary benefits.—Half of the period of service of casual labour (other than casual labour employed on projects) after attainment of temporary status on completion of 120 days' continuous service if it is followed by absorption in service as regular railway employee, counts for pensionary benefits. With effect from 1-1-1981, the benefit has also been extended to project casual labour."

26. Next provision need to be noted is Rule 2005 of IREM, which is as follows:

2005 IREM:

"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-à-vis other regular/temporary employees. This is however, subject to the provisions 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."

11. A detailed analysis by way of compare and contrast had been made by the

Apex Court in the case of Rakesh Kumar (supra) wherein, the Apex Court has held as under:-

> '28. The perusal of Para 20 of the Master Circular indicates that only half of the period of service of a casual labour after attainment of temporary status on completion of 120 days' continuous service if it is followed by absorption in service as a regular railway employee, counts for pensionary benefits.
>
> 29. Para 2005 of the Indian Railway Establishment Manual also contains the same scheme for reckoning the period for pensionary benefit. Para 2005 contains the heading:
>
> "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)."
>
> 30. The above heading enumerates the privileges admissible to casual labour who are treated as temporary. Clause (*a*) of Para 2005 provides:
> "2005. (*a*) … 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."

12. After referring to various decisions of different High Courts, the Apex Court has, ultimately authoritatively pronounced as under:-

> 53. In view of the foregoing discussion, we hold:
> 53.1. The casual worker after obtaining temporary status is entitled to reckon 50% of his services till he is regularised on a regular/temporary post for the purposes of calculation of pension.
> 53.2. The casual worker before obtaining the temporary status is also entitled to reckon 50% of casual service for purposes of pension.
> 53.3. Those casual workers who are appointed to any post either substantively or in officiating or in temporary capacity are entitled to reckon the entire period from date of taking charge of such post as per Rule 20 of Rules1993.

13. Referring to the above judgment, the respondents have stated that 50% of the Casual Labour service from 27.10.1981 to 11.07.1990 and 100% service from 11.07.1990 to till date of superannuation (30.04.2016) have been reckoned as qualifying service and the qualifying service worked out to be 29.5 years. Accordingly, the applicant was paid the settlement benefits.

14. The applicant continued as a Casual Labour with temporary status till 1990 and his regularisation is perfectly legal. He was thus absorbed as a regular employee w.e.f. 11.07.1990. The applicant's service as casual labour and after conferment of temporary status was paid only out of contingency fund and only 50% of service will count for qualifying service in terms of Rule 31. His claim for reckoning full period of casual labour service as qualifying service for pension is unsustainable.

15. While the above is the situation, the fact remains that qualifying service as per definition is one and the same both in respect of Pension as also Gratuity. Further, pension includes Gratuity by its own definition. Thus, though the claim of the applicant to the extent of reckoning full term of casual labour is not acceptable, if he had not been paid Gratuity taking into account 50% of the casual labour service the same is his irrefutable entitlement. His claim is for revising the retirement benefits and as such, this OA partly succeeds to the extent that the applicant is entitled to reckon 50% of casual labour service as qualifying service to be added to the regular service, not only for pension but also for Gratuity and if he has not been paid taking into account the 50% of casual labour service, the difference in gratuity arising out of

the same, shall be paid and it is accordingly ordered. Time calendared for compliance of this order is three months.

16. The OA is disposed of on the above terms. No costs.

(T. Jacob)
Member (A)
.12.2019

/kam/