

Raj Ujarey

Vs

Union of India

Civil Appeal No. 5714 of 1998

(S. Saghir Ahmed, S. P. Kurdukar JJ )

13.11.1998

JUDGMENT

S. SAGHIR AHMAD, J. -

1. Leave granted.

2. The appellant was appointed as Khalasi under the Loco Foreman, Ambala Cantt. and was posted as Coal/Fuel Khalasi at Nangal Dam where he worked up to 15-9-1972. On 16-9-1972, he was spared and transferred to the Carriage and Wagon Department of Northern Railway and was posted as Khalasi at Khanalampura Goods Yard, Saharanpur, where he joined on 20-9-1972. He was again transferred to Ambala Cantt. on 11-6-1978 where he passed the trade test for the post of Semi-skilled Fitter and was promoted to that post. He was further promoted after passing the requisite trade test as Skilled Fitter on 9-5-1979.

3. By an order dated 18-4-1980, the appellant was reverted to the post of Khalasi in the Carriage and Wagon Department. It was this order which was challenged by the appellant in Regular Suit No. 294 of 1980 which was decreed by the VIIIth Additional Munsif, Saharanpur, on 13-11-1981. This judgment was challenged in appeal filed by the Railway Administration in the Court of the District Judge, Saharanpur which was later transferred to the Court of the IVth Additional Civil Judge, Saharanpur. While the appeal was pending in that Court, the Central Administrative Tribunals Act, 1985 came into force and the appeal stood transferred to the Central Administrative Tribunal, Allahabad. The Tribunal allowed the appeal and set aside the judgment and decree passed by the trial court as it was of the opinion that the suit had not been filed in the proper court and consequently directed the plaint to be returned for presentation to the proper Bench of the Tribunal for a fresh decision.

4. The appellant then filed the claim petition under Section 19 of the Central Administrative Tribunals Act, 1985 before the Tribunal at Chandigarh which, by its judgment dated 28-11-1995, dismissed the petition. It is this judgment which is assailed in appeal before us.

5. The respondents had contested the suit as also the claim petition mainly on the ground that the appellant was initially appointed as Substitute Khalasi who later acquired the temporary status. In 1972, when the contract system was introduced in the Loco Shed, he was declared surplus and was absorbed in the Carriage and Wagon Department as a Khalasi. The period of service rendered by the appellant from 1964, when he was first appointed as Khalasi, to 1972 when he was shifted to the Carriage and Wagon Department as Khalasi, was wrongly counted towards his seniority and consequently he was not entitled to be promoted either as Semi-skilled Fitter or Skilled Fitter

although he had passed the requisite trade tests for both the posts. When this mistake was noticed, the reversion order dated 18-4-1980 was issued and he was again posted as Carriage and Wagon Khalasi. The claim was also contested on the ground of limitation.

6. Learned counsel for the appellant has contended that the finding recorded by the Tribunal that the appellant having been declared surplus at Ambala Cantt. in 1972, was not entitled to count the previous service from 1964 to 1972 towards his seniority, was erroneous and was liable to be set aside as the appellant had been confirmed on the post of Coal Khalasi and having acquired permanent status, there was no question of his being declared surplus. It was on account of his permanent status that he was shifted to the Carriage and Wagon Department as Khalasi without his service having been terminated by any specific order. It is also contended that the assertion of the respondents that the promotion orders were made by mistake was wholly wrong as the appellant besides having passed the trade tests for the promotional posts of Semi-skilled Fitter and Skilled Fitter was entitled to count the entire period of service from 1964 to 1972 as Coal Khalasi towards his seniority specially on account of the fact that he was already confirmed on that post with effect from 11-4-1965.

7. Learned counsel for the respondents, on the contrary, contended that the handling of coal in the Loco Department was given to contractors and, therefore, all the posts of Coal Khalasi were surrendered as a result of which the appellant including many others were declared surplus and they were, on compassionate ground, absorbed as Khalasis in the Carriage and Wagon Department and, therefore, the appellant was entitled to count his seniority in the Carriage and Wagon Department only with effect from 1972 when he was appointed in that Department. He was not, it is contended, entitled to count his previous service rendered as Coal Khalasi in the Loco Department from 1964 to 1972, towards his seniority. His promotions consequently were made at a time when he was, on the basis of seniority in the Carriage and Wagon Department, not entitled to be promoted either as Semi-skilled Fitter or as Skilled Fitter, notwithstanding that he had passed the trade tests for the two posts. It is further contended that the appellant should not have, as a matter of fact, been called for the trade tests.

8. The main issue, therefore, between the parties was whether the period of service rendered by the appellant, from 1964 to 1972 as Coal Khalasi in the Loco Department, was liable to be counted towards his seniority in the Carriage and Wagon Department where he was appointed in 1972 or it was to be ignored altogether. It is obvious that if the appellant had already acquired the permanent status in the Loco Department, he would be entitled to the benefit of previous service rendered by him in that Department for the purpose of his seniority in the Carriage and Wagon Department where he was appointed in 1972.

9. The finding recorded by the Tribunal on this issue is cryptic. It has been recorded only by reason of the fact that the Tribunal was of the opinion that the appellant had failed to prove that he was sent on transfer to the Carriage and Wagon Department as Khalasi and not as a fresh appointee. The Tribunal has observed that the mere fact that a railway pass was issued to the appellant for proceeding to Khanalampura Goods Yard, Saharanpur and that joining time was also allowed to him could not mean that he was sent there on transfer. These factors could not legally constitute the basis for recording a finding that the appellant was not entitled to count the service rendered by him in the Loco Department from 1964 to 1972 as Coal Khalasi, towards his seniority in the Carriage and Wagon Department. As a matter of fact, the duty of the Tribunal was to have investigated whether the appellant who was initially appointed as Substitute Khalasi and who had, admittedly, acquired the temporary status had, at any time, been confirmed as Coal Khalasi or his status as a Temporary

Khalasi continued till he was allegedly declared surplus in 1972. This could be found out only by a perusal of the service records which was not done by the Tribunal nor were the relevant records produced by the respondents before the Tribunal to enable it to come to the correct conclusion on this vital question. It was for this reason that we, by our order dated 3-2-1998, directed the respondents to produce the original service record before us. It is in pursuance of this order that the respondents have produced the original service-book of the appellant and other relevant records before us. The second page of the service-book contains the following entry :

# "Confirmed as Coal Khalasi w.e.f. 11-4-1965. sd/- APO III" There are also the following entries made by the APO III : "The following periods of service have been verified from the available service records and will qualify for pension : From 5/6/64 to 31/3/65 1/4/65 to 31/3/66 1/4/66 to 31/3/67 1/4/67 to 31/3/68 1/4/68 to 31/3/69 1/4/69 to 31/3/70 sd/- APO III 1/4/70 to 31/3/71 sd/- APO III"##

10. The third page of the service-book contains the entries regarding the appellant's having passed the trade tests for the posts of Semi-skilled Fitter and Skilled Fitter and his consequent promotions on those posts.

11. Mr. N. N. Goswami, learned Senior Counsel appearing for the Union of India, drew our attention to the order of appointment dated 30-5-1964 by which the appellant was appointed as Substitute Khalasi. This document loses its significance as the personal file of the appellant contains another document dated 30-3-1965 by which the appointment of the appellant as Substitute Coal Khalasi was regularised as Temporary Coal Khalasi. Then there is the endorsement made in the service-book that he is confirmed as Coal Khalasi with effect from 11-4-1965. Reading these documents together, it is apparent that though the appellant was initially appointed as Substitute Khalasi in 1964, he acquired temporary status by virtue of the order dated 30-3-1965 and permanent status with effect from 11-4-1965 as per the entry contained in his service-book.

12. Mr. Goswami then drew our attention to the "Notice" issued by the Divisional Office, Northern Railway, New Delhi, in September 1972 which indicates that a number of Coal Khalasis, including the appellant, who were rendered "surplus from the shed under LF UMB due to changeover to the contract system with effect from 16-9-1972" were absorbed on other alternative posts. The appellant was absorbed as Coal Khalasi in the Carriage and Wagon Department and was posted at Khanalampura Goods Yard, Saharanpur. A "Note" appended to this order reads as under :

Note. - The absorption of the above-noted staff is purely as a temporary measure. They will not have any right of absorption in the category other than for which they are empanelled. They will be considered for posting back on occurrence of vacancies on the loco side as Khalasis. Changes may be advised promptly.

# sd/- Asstt. Personnel Officer/III N. Rly., New Delhi"##

13. It is on the basis of this "Note" that Mr. Goswami contended that it was not a case of transfer of the appellant from the Loco Department to the Carriage and Wagon Department but was a case of absorption as a temporary measure of the appellant who was declared surplus as Coal Khalasi in the Loco Department. He contended that this was enough to indicate that the appellant was not holding a permanent status and was consequently treated to have been appointed afresh in 1972 as Khalasi in the Carriage and Wagon Department and his seniority was rightly reckoned from that date with the result that the promotion orders in 1978 on the post of Semi-skilled Fitter and in 1979 on the post of

Skilled Fitter, could not have been legally issued as the appellant, on the basis of his seniority, was not even entitled to be called for trade tests much less to be promoted on the posts in question. The promotions were given to the appellant on these posts only because the Administration, by mistake, had given the benefit of service rendered in the Loco Department from 1964 to 1972 towards his seniority in the Carriage and Wagon Department.

14. Having perused the original record and having found that the appellant, who was initially appointed as Khalasi in 1964, was given temporary status in 1965 and was confirmed from 11-4-1965, we are of the positive opinion that it was not a case of mistake on the part of the Administration, as contended by Mr. Goswami, but they had rightly given the benefit of previous service to the appellant who was, as a consequence thereof, rightly called for trade tests for the posts of Semi-skilled Fitter and Skilled Fitter and having passed those tests, was rightly promoted on those posts. There is, however, a limited reservation. Whether the service rendered by the appellant from the date on which he was appointed as Substitute Khalasi up to the date on which he acquired "permanent" status would be counted for seniority or not is a question which is to be decided by the authorities in the light of the relevant provisions of the Service Rules contained in the Railway Establishment Code or the Manual or circular letters of the Railway Board. We may, however, make it clear that we are not deciding any dispute of seniority as between the appellant and those who were already working in the Carriage and Wagon Department when the appellant came there.

15. What will be his seniority position in the Carriage and Wagon Department and where will he be placed in the seniority list is to be considered and decided by the authorities of the Department and not by us as this dispute is not before us.

16. On account of what has been said above, the reversion order dated 18-4-1980 passed by the respondents was wholly illegal and cannot be sustained.

17. There is yet another infirmity in the impugned order of reversion. The appellant had been allowed the benefit of service rendered by him as Coal Khalasi in the Loco Department from 1964 to 1972 as that period was counted towards his seniority and it was on that basis that he was called for the trade tests which the appellant had passed and was, thereafter, promoted to the posts of Semi-Skilled Fitter and Skilled Fitter. If the benefit of service rendered by him from 1964 to 1972 was intended to be withdrawn and promotion orders were to be cancelled as having been passed on account of mistake, the respondents ought to have first given an opportunity of hearing to the appellant. The appellant having earned two promotions after having passed the trade tests, could not have been legally reverted two steps below and brought back to the post of Khalasi without being informed that the period of service rendered by him from 1964 to 1972 could not be counted towards his seniority and, therefore, the promotion orders would be cancelled. In a situation of this nature, it was not open to the respondents to have made up their mind unilaterally on facts which could have been shown by the appellant to be not correct but this chance never came as the appellant, at no stage, was informed of the action which the respondents intended to take against him.

18. The respondents, curiously, overlooked the service record of the appellant which contained material documents to indicate that the appellant had already acquired permanent status. These documents could not have been legally ignored but the respondents, for reasons best known to them, did otherwise. We cannot but categorise their conduct as wholly arbitrary and bad in law.

19. The Tribunal had also dismissed the claim of the appellant on the ground of limitation. This

finding, in our opinion, is also not correct.

20. The appellant was reverted by order dated 18-4-1980. It was in 1980 that he filed the suit for several reliefs, including the relief for declaration that the order dated 18-4-1980 by which he was reverted was wrong and illegal and that he was entitled to continue on the post of Fitter to which he was promoted on 9-5-1979. The suit was decreed by the trial court by its judgment dated 13-11-1981 against which the Railway Administration had filed an appeal. During the pendency of the appeal, Central Administrative Tribunals were established under the Administrative Tribunals Act, 1985 and, therefore, the appeal was transferred to the Allahabad Bench of the Tribunal which, by its judgment and order dated 18-4-1988, allowed the appeal and set aside the decree passed by the trial court with a direction that the plaint shall be returned to the appellant for being filed before the appropriate Bench of the Tribunal. Thereafter, the appellant filed the original application on 12-12-1988 with an application for condonation of delay, in which it was indicated that he had received back the plaint on 20-8-1988, though in the affidavit in support thereof, this date is indicated as 20-10-1988. There was, thus, a delay of about one-and-a-half months in the filing of the OA, which has not been condoned by the Tribunal.

21. The period of limitation within which claim petitions can be filed before the Tribunal is indicated in Section 21 of the Act. The contingencies contemplated by Section 21 are not applicable to the present case. The suit, admittedly, was filed within time. It is another matter that it was filed in a court which had no jurisdiction and, therefore, the Tribunal, while allowing the appeal filed against the decree passed by the trial court, directed the plaint to be returned to the appellant for presentation before the appropriate Bench of the Tribunal. Some delay had occurred in the refiling of the plaint before the Tribunal and as pointed out by the Tribunal itself, the delay was only of one-and-a-half months, although at one place the Tribunal observed that there was a delay of about eight months. The period of eight months has been calculated by the Tribunal from the date on which an order was passed at Allahabad for the return of the plaint. The limitation would not run from the date of the order, but would run from the date on which the plaint was returned and made available to the appellant, if the appellant was not at fault. Two dates have been mentioned on which the plaint was returned; in the application for condonation of delay, the date mentioned is 20-8-1988, but in the affidavit filed in support of that application, the date of receipt of the plaint is mentioned as 20-10-1988. Since the OA was filed before the Tribunal on 12-12-1988, there was a delay of either three-and-a-half months or one-and-a-half months, but not a delay of eight months as observed by the Tribunal. The Tribunal had itself observed in an earlier part of its judgment that there was a delay of one-and-a-half months only.

22. Be that as it may, the fact remains that the litigative process was started by the appellant in 1980 when he filed the suit, though in a wrong court, within limitation. Now at this late stage, it will be too much for a poor employee of the status of the appellant to be driven out of the court on the ground of limitation, namely, that his OA was beyond time by one-and-a-half months or three-and-a-half months. Whatever be the delay in filing the OA before the Tribunal, the same is hereby condoned and the order of the Tribunal to that effect shall be treated to have been set aside.

23. For the reasons stated above, the appeal is allowed and the judgment and order dated 28-11-1995 passed by the Tribunal is set aside with the direction that the appellant shall be put back on duty on the post of Fitter with all consequential benefits. There will be no order as to costs.