

Supreme Court of India

V. Kameshwari (Smt) vs Union Of India (Uoi) And Ors. on 12 January, 1993

Equivalent citations: JT 1993 (1) SC 108, (1993) IILLJ 992 SC, 1993 (1) SCALE 48, 1993 Supp (2) SCC 407, (1993) 2 UPLBEC 898

Bench: M Venkatachaliah, S Agrawal, A Anand

JUDGMENT

1. As per the office report, there is delay of 709 days in the filing of the special leave petition against the judgment and order dated September 19, 1988, passed by the Central Administrative Tribunal, Hyderabad Bench, hereinafter to as the Tribunal, in Review Petition No. 39 of 1987. An Application (LA. No. 1 of 1989) has been filed by the petitioner of seeking condonation of delay, which is supported by an affidavit filed by the petitioner. On April 23, 1990, the matter was adjourned and the petitioner was directed to file an affidavit from the learned Counsel who had appeared for her in the Tribunal on the question whether Tribunal's order was communicated to him and if so, when and if not communicated whether he had applied for grant of certified copy and if so, when and further, when the copy was delivered to him. The petitioner filed her own affidavit dated August 30, 1990 stating that her counsel had, despite her request, declined to file the affidavit but had given certain information with regard to the points, mentioned in the order dated April 23, 1990. After considering the material on record and hearing the petitioner, the delay was condoned ex-parte on November 5, 1990 and notice was issued in the special leave petition. Respondent No. 3 filed a counter and raised objection to the condonation of delay ex-parte. On September 23, 1991, the following order came to be made by a Bench of this Court:

Delay was condoned ex-parte by the order dated November 5, 1990 without notice to the respondent. It appears that proviso to Rule 10(1) of Order XVI of the Rules of this Court was not brought to the notice of the Bench. The condonation is being opposed by respondent No. 3. In these circumstances it is directed that the matter may be placed before a bench presided over by Hon'ble Mr. Justice M.N. Venkatachaliah for considering the question of condonation.

The petition for condonation of delay thereafter came up for consideration and the said petition has been considered by us afresh.

2. Respondent No. 3 opposed the condonation of delay and relied upon the objections filed in that behalf. After hearing learned Counsel for the parties at length and considering the entire material on record and the circumstances of the case, we are satisfied that the delay in the filing of the special leave petition was not wanton. We are satisfied with the explanation furnished by the petitioner as regards the cause of the delay, as projected in the affidavit and elaborated at the time of hearing. We, accordingly, allow I.A. No. 1 of 1989 and condone the delay in the filing of the special leave petition.

3. Having heard learned Counsel for the parties, we hereby grant special leave to appeal against 15 the order dated September 19, 1988, passed by the Tribunal, in Review Petition No. 39 of 1987 and proceed to dispose of the appeal.

4. This appeal relates to promotion to the Class III post of office clerk from the post of Lascar, a Class IV post in the Railway Establishment. Promotion from Class IV to Class III posts is governed by para 110 of the Railway Establishment Manual. Prior to September 1, 1982, Lascars were not eligible for such promotion but by order dated October 16, 1982 they were made eligible for promotion to the post of Junior Clerks with effect from September 1, 1982. Such promotion is made on the basis of a written test followed by viva voce for assessing suitability and candidates who obtain the qualifying percentage of marks in the written and oral tests are placed in the panel in the order of their seniority.

5. The appellant was recruited for the post of Lascar with effect from February 27, 1980, and was attached to the office of the Divisional Electrical Engineer, Traction Distribution, Vijayawada in South Central Railway. On July 30, 1982 a notification was issued by the Divisional Railway Manager, South Central Railway, Vijayawada Division, Vijayawada for filling up 19 vacancies for the post of Junior Clerks (Class III posts) by promotion of Class IV employees other than Lascars. Out of 19 vacancies five posts were reserved for employees belonging to Scheduled Castes, two for employees belonging to Scheduled Tribes and 12 posts were for employees belonging to other communities. Eleven persons - 2 belonging to Scheduled Castes and 9 belonging to other communities were selected for promotion. At that time the Lascars were not eligible for promotion to Class III posts of Junior Clerk. For the remaining eight vacancies it was decided that the same should be filled up by promotion from amongst Lascars. A notification dated March 21, 1983, was issued whereby applications were invited from Lascars who had completed three years service on February 28, 1983. Out of the said eight vacancies, three were reserved for candidates belonging to the Scheduled Castes, two for candidates belonging to the Scheduled Tribes and three for candidates belonging to other communities. A written test was held on June 12, 1983, and it was followed by viva voce on July 14, 1983. A panel of three selected candidates was published on August 27, 1983. v. Sarat Babu, Respondent No. 3 herein, was included in the said panel but the appellant was not included. It appears that the appellant was placed at Sl. No. 5 in the merit list and one Smt. K. Vijaya Kumari who was senior to the appellant was placed at Sl. No. 4. Both of them were not included in the panel because only three posts were available for candidates belonging to other communities according to the roster. On the basis of the said panel respondent No. 3 was promoted to the Class III post of Junior Clerk.

6. The appellant moved the Tribunal under Section 19 of the Administrative Tribunals Act complaining that she should be promoted to the post of Office Clerk as on the date on which respondent No. 3 was promoted to the said post, the appellant being senior to respondent No. 3, she should have been out of the selection panel in his place. In this context, it may be stated that respondent No. 3 was initially appointed as casual labourer in 1958 and was given the status of temporary employee since 1982. He was adjusted as a substitute Lascar vide order dated September 20, 1978, and while he was working as a substitute Lascar he was regularised on the post of Khalasi in the scale of Rs. 196-232 (RS) with effect from February 22, 1981, by order dated September 16, 1987, allowing the application of the appellant and setting aside the appointment of Respondent No. 3 on the post of Junior Clerk, directed that the appellant be so promoted and appointed in the consequential vacancy provided that Smt. K. Vijaya Kumari, who was senior to the appellant, had left the Department/Wing prior to March 31, 1986. In the said order, the Tribunal found that

respondent No. 3 had been wrongly included in the panel on account of a mistake in reckoning his seniority at the time the panel was drawn up and that Smt. K. Vijaya Kumari and the appellant were senior to respondent No. 3.

7. Respondent No. 3 filed a Petition before the Tribunal for review of the order dated September 16, 1987. The said Review Petition was allowed by the Tribunal by order dated September 19, 1988 on the ground that under Rule 12 of the Central Administrative Tribunal Procedure Rules, 1985, it is required that the respondent shall be given one month's time for filing reply and that in the present case the original application was disposed of within one month. The Tribunal, on reconsidering the matter on merits, found that in view of para 2511 of the Railway Establishment Manual and according to the judgments of the High Court of Andhra Pradesh relating to reckoning of seniority of casual workers respondent No. 3 was entitled to count his service after attaining the temporary status, i.e., after six months service for the purpose of seniority. Before the Tribunal it was contended that para 2511 of the Railway Establishment Manual had been amended by order dated May 7, 1983, and that in view of the said amendment the service of the casual labourer prior to absorption in temporary/permanent regular post after the required selection/screening will not be counted for the purpose of seniority and the date of his regular appointment after screening/selection shall determine his seniority vis-a-vis other regular employees. The Tribunal held that one said amendment has not been made retrospectively and its application can only be prospective and that respondent No. 3 was, therefore, entitled to count his seniority from 1962. The Tribunal has also referred to the Circular dated December 12, 1978 whereby it was clarified that all continuous temporary service preceding permanent absorption in the regular cadre may be counted in reckoning the period of qualifying service. On that view, the Tribunal held that respondent No. 3 was rightly treated as senior to the appellant and there was no justification for setting aside the promotion of respondent No. 3 and promoting the appellant in his place. The Tribunal, therefore, dismissed the original application filed by the appellant. Feeling aggrieved by the said order of the Tribunal dated September 19, 1988 the appellant has filed this appeal.

8. Under para 110(a) of Chapter I of the Railway Establishment Manual a prescribed percentage of vacancies in the lowest grade of Class III posts of commercial clerks, Ticket Collectors, Train Clerks, Number Takers, Time Keepers, Fuel Checkers, Office Clerks, Accounts Clerks, Typists and Store Clerks etc. are required to be earmarked for promotion of railway servants in Class IV categories for whom no regular avenue of promotion exists. The said promotion is to be made in accordance with the requirements laid down therein. One such requirement is that the promotion should be made on the basis of selection and that there should be a written test to assess the educational attainments of candidates followed by interviews, where considered necessary. In Clause (4) of para 110(a)(i) it is provided that "all those who qualify in written and oral test, the qualifying percentage of marks being prescribed by the General Manager, should be arranged in the order of their seniority for promotion against the yearly vacancies available for them in Class III categories". Since both the appellant as well as respondent No. 3 had qualified in the written as well as oral test and only one of them could be included in the panel the question with regard to their inter se seniority assumes importance. The appellant claims to be senior to respondent No. 3 while the Tribunal has found that respondent No. 3 was senior to the appellant. It is not disputed that while the appellant was recruited for the post of Lascar on regular basis on February 27, 1980, respondent No. 3 was

regularised on the post of Khalasi, in the same scale as Lascar, (Rs. 196-232) with effect from February 22, 1981. Prior to his regularisation on the post of Khalasi respondent No. 3 had been working as a casual labourer from 1958 onwards and he had been given temporary status since 1962. Can the period of temporary service from 1962 till his regularisation on the post of Khalasi on February 22, 1981 be counted for the purpose of reckoning the seniority of respondent No. 3? The Tribunal has answered this question in the affirmative and has held that the said period of his service from 1962 to 1981 should be counted for reckoning the seniority of respondent No. 3 and in this context reliance has been placed on para 2511 of the Railway Establishment Manual. It has, however, been pointed out that para 2511(a) of the Railway Establishment Manual had been amended by order of the Railway Board dated May 7, 1983, i.e. before the preparation of the selection panel. As a result of the said amendment, para 2511(a) reads as under:

Casual labour treated as temporary are entitled to all the rights and benefits admissible to temporary railway servants as laid down in Chap XXIII of the IREM the rights and privileges admissible to such labour also include the benefit of Disciplinary and Appeal Rules. However, their service prior to- absorption in temporary/permanent regular cadre after the required selection/screening will not count for purpose of seniority and the date of their regular appointment after screening/selection shall determine their seniority vis-a-vis other regular employees. This is, however, subject to the proviso that if the seniority of certain individual employees has already been determined in any other manner either in pursuance of judicial decision or otherwise the seniority so determined shall not be altered. Casual labour shall be eligible to count only half the period of service rendered by them after attaining temporary status on completion of 120 days continuous employment and before regular absorption as qualifying service for the purpose of pensionary benefits. Such casual labour who have attained temporary status will also be allowed to carry forward the leave at their credit to the new post on absorption in regular service. Daily rated casual labour or labour employed on projects will not be entitled to these benefits.

9. The Tribunal was of the view that the amended provision was not applicable to the present case since the amendment had not been made retrospectively and its application could only be prospective. The Tribunal, in our opinion, was in error in taking that view. Under the amended provision of para 2511 (a) the seniority of casual labour treated as temporary who were subsequently absorbed in temporary/permanent cadre is to be reckoned on the basis of the date of their regular appointment after screening/selection and their service prior to absorption in temporary/permanent regular cadre after the required selection selection/screening would not count for the purpose of seniority. The only exception, that has been made is in respect of the employees whose seniority had already been determined in any other manner either by any judicial decision or otherwise and it is provided that the seniority so determined shall not be altered. It is not the case of respondent No. 3 that his seniority on the post of Khalasi or Lascar had been determined in pursuance of judicial decision or otherwise prior to May 7, 1983. The seniority of respondent No. 3 has, therefore, to be determined in accordance with the provision contained in para 2511 (a) as amended on May 7, 1983. If the principle for determination of seniority as contained in the said provision is applied the period of temporary service of respondent No. 3 from 1962 till his regular absorption on the post of Khalasi on February 22, 1981 has got to be excluded and his seniority in the regular cadre of Khalasi can be reckoned only from February 22, 1981, the

date of his regular absorption on the said post. If the seniority of Respondent No. 3 is thus reckoned the appellant would be senior to respondent No. 3 and respondent No. 3 could not be placed in the panel in preference to the appellant.

10. As noticed earlier one Smt. K. Vijaya Kumari, who was senior to the appellant, was placed above her (at Sl. No. 4) in the order of merit and by virtue of seniority she would be entitled to be placed in the panel in the place of respondent No. 3. It, however, appears that Smt. Vijaya Kumari had opted for avenue as Khalasi on TRS pool and by order dated December 18, 1984, she was posted as Khalasi Helper in higher scale Rs. 210-290 with effect from April 1, 1981. From the additional affidavit dated February 7, 1992 filed on behalf of respondent Nos. 1 and 2, it appears that Smt. Vijaya Kumari has been promoted to Class III post with effect from January 2, 1990, and when she was asked about her interest to coming back she expressed her unwillingness to come to the post of Junior Clerk and has declined to stake her claim for the said post. Since Smt. Vijaya Kumari has declined to stake her claim for the post of Junior Clerk the appellant is the senior most person in the order of merit and is entitled to be promoted to the post of Junior Clerk in place of respondent No. 3 who was wrongly promoted to the said post. The appellant shall be treated to have been promoted to the post of junior clerk with effect from the date on which respondent No. 3 was promoted to the said post and her pay and seniority on that post shall be fixed on that basis. We find that the appellant moved the Tribunal on August 17, 1987, nearly four years after the promotion of respondent No. 3 on the post of junior clerk, and furthermore she moved this Court for special leave to appeal nearly two years after the passing of the impugned order by the Tribunal. Keeping in view the aforesaid circumstances, it is directed that from the date of this order, the appellant shall be entitled to receive her emoluments on the basis of her pay fixed as a consequence of her promotion to the post of Junior Clerk and, by way of arrears, she shall be paid one-fourth of the amount of difference between the emoluments the appellant would have been entitled to draw as a consequence of her promotion as junior clerk as per directions of this Court and the emoluments that were actually drawn by her during this period.

11. Respondent No. 3 has been working as Clerk ever since his promotion in 1983. After the said promotion selections were held for the subsequent vacancies but since he had already been promoted he did not opt for such selections. If respondent No. 3 reverted from the post of Clerk on the ground that his name was wrongly included in the panel and he was wrongly promoted on that basis, the result would be that respondent No. 3 would be made to suffer even though he was not at fault. Keeping in view the facts and circumstances, we consider it appropriate in the interest of justice to direct that while the appellant may be promoted as Office Clerk with effect from the date respondent No. 3 was promoted to the said post, the said promotion of the appellant will, however, not result in the reversion of respondent No. 3 from the post of Office Clerk on which he was promoted and which post he has been holding since 1983.

12. The Order dated September 19, 1988 passed by the Tribunal is set aside and the appeal is allowed as directed above. No order as to costs.