

GENERAL MANAGER, NORTH WEST RAILWAY & ORS. A

v.

CHANDA DEVI

DECEMBER 12, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.] B

Railway Establishment Manual—Chapter XX rr. 2001, 2002, 2005—Casual labour—Attaining temporary status—Pensionary benefits (family pension)—Entitlement—Held: The employee was not entitled to benefit of pensionary benefits under the Pension Rules—There is distinction between casual labour having temporary status and a temporary employee—Moreover, the process for regularization had started after the death of the employee—Direction for not recovering any benefit, if already granted—Railway Services (Pension) Rules, 1993—Constitution of India, 1950—Article 142. C D

Husband of respondent No. 1 was appointed as a project casual labour. In a writ petition seeking regularization of similarly situated employees, a scheme for regularization was suggested and the same was accepted by the Court, making the scheme effective w.e.f. 1.1.1981. Railway Administration, in terms of the Scheme, issued an Office Order for considering the casual workers as temporary employees. Name of the husband of respondent No. 1 was specifically mentioned in the Order. By another Circular date of applicability of the Scheme was made effective from 11.3.1983. Thereafter, in 1983 husband of respondent No. 1 expired. Respondent No. 1 applied for compassionate appointment. It was rejected on the ground that as per Railway Rules, pension was not admissible to substitute temporary employees. She filed original application questioning the validity of the Rules. Central Administrative Tribunal allowed the same. Writ Petition filed thereagainst was dismissed by High Court. Hence the present appeal. E F G

Allowing the appeals, the Court

A HELD: 1. The provisions of Railway Services (Pension) Rules, 1993, made in view of the proviso appended to Article 309 of the Constitution of India cannot be said to have any application in the instant case. What was protected by conferring temporary status upon a casual employee was his service and by reason thereof the pension rules were
B not made applicable. A workman had not been and could not have been given a status to which he was not entitled to.

[Paras 10 and 27] [411-E, F; 419-D]

C 2. The Railway servants, if appointed on a regular basis, would enjoy a status having regard to the provisions contained in Article 309 of the Constitution of India. Recruitment Rules are applicable to the temporary and permanent government servants and they are governed by the Rules framed under the proviso appended to Article 309 of the Constitution of India. Their services are indisputably protected under
D Article 311(2) thereof. [Para 12] [411-G; 412-A]

Moti Ram Deka etc. v. General Manager, N.E.F. Railways, Maligaon, Pandu, etc. AIR (1964) SC 600 and *Khem Chand v. Union of India and Ors.*, AIR (1958) SC 300, relied on.

E 3. Chapter XX of Railway Establishment Manual provides for casual labour. The case of the employee in question was governed by Chapter XX of the Manual. Rule 2001 excludes the applicability thereof which govern the service conditions of permanent and temporary staff. [Paras 11 and 14] [411-F; 412-C]

F *Ram Kumar and Ors. v. Union of India and Ors.*, [1988] 1 SCC 306 and *Union of India and Ors. v. Rabia Bikaner and Ors.* [1997] 6 SCC 580, referred to.

G 4. The contrast between a casual labour having a temporary status and a temporary servant may immediately be noticed from the definition of a temporary railway servant contained in Rule 1501 occurring in Chapter XV of the Manual. High Court failed to notice that when casual labour has been excluded from the definition of permanent or temporary employee, he with temporary status could not have become so and there
H is no legal sanction therefor. It is for the legislature to put the employees

to an establishment in different categories. It may create a new category to confer certain benefits to a particular class of employees. Such a power can be exercised also by the Executive for making rules under the proviso appended to Article 309 of the Constitution of India. A

[Paras 20 and 26] [416-F, G; 418-H; 419-A, B]

Dakshin Railway Employees Union, Trivandrum Division v. General manager, Southern Railway and Ors., [1987] 1 SCC 677, referred to. B

5. In the Office Order dated 24.1.1989, the designation has been shown as T.S. Helper CSI (Construction) i.e. temporary status as per the CSI (Construction). However, wrongly it was said to be a pensionable post. Before the High Court, an additional affidavit was filed by the Railway Administration wherein *inter alia* it was stated that the screening tests were held long thereafter viz. some time in the year 1999. Only upon holding a screening test, the services of the employees concerned could be regularized; and as in the case of the employee in question he had expired in the year 1988, he had not and could not have undergone any screening test and that no pensionary benefit or benefit of family pension was admissible to him. [Para 21] [417-A, B, C] C D

6. Recruitment of Government Employees must be made strictly in terms of the statutory rules. Entitlements of the employees being governed by statute or statutory rules, the question of attribution of any malice by the High Court was clearly erroneous. *Mala fide* cannot be attributed to a legislation. It is only its validity, that can be challenged. In these cases, validity of the Rules were not under challenge. E

[Paras 25 and 28] [419-E; 418-G] F

7. In absence of any statutory rules framed, executive instructions can be issued in relation to the matter governed by the constitutional provisions. The Railway Manual was an amalgam of various Circulars issued from time to time. Such executive instructions or rules framed would be statutory in nature. [Para 24] [418-F] G

Khem Chand v. Union of India and Ors., AIR (1958) SC, 300 relied on. H

A **8. However, in exercise of jurisdiction under Article 142 of the Constitution of India it is directed that in the event the respondent No.1 herein have been given any benefit including the benefit of family pension, the same shall not be recovered. [Para 29] [419-F]**

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5833 of 2007.

From the Judgment and Order dated 25.04.2005 of the High Court of Rajasthan at Jaipur Bench at Jaipur in WP No. 5317 of 2004.

C WITH
C.A. No. 5839 of 2007

Paramjit Singh Patwaha, Amanpreet Singh Rahi, Saket Singh, Varuna Bhandari Gugnani, R.C. Kathi and B. Krishna Prasad for the Appellants.

D P.K. Sharma, Gaurav Nagar, S.K. Mishra and Debasis Misra for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

E 1. Interpretation of some of the provisions of the Indian Railway Establishment Manual (hereinafter referred to as "the Manual") is in question in these appeals which arise out of judgments of the Rajasthan High Court, Jaipur Bench at Jaipur dated 25.4.2005 in DB Civil W.P. No. 5317 of 2004 and dated 25.4.2005 in D.B. Civil WP No. 5316 of 2004 affirming orders dated 12.4.2004 in O.A. No. 536/2003 and order dated 7.4.2003 in O.A. No. 233/2003 respectively.

2. The fact of the matter is as under :

G Smt. Santosh, Respondent No. 1, in Civil Appeal arising out of SLP (C) No. 23737 of 2005, is widow of one Ram Niwas who was appointed as a project casual labour on 8.11.1979. The case of regularisation of the similarly situated employees came up for consideration before this Court in *Inder Pal Yadav and Ors. v. Union of India and Ors.*, [1985] 2 SCC 648. During hearing of the said matter from time to time, the Court

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inter alia suggested for framing of a scheme of regularisation; pursuant A
where to and in furtherance whereof, proposals were placed before this
Court by the Railway Administration of Union of India from time to time.
A Scheme was eventually produced before this Court; clause 5.1 whereof
reads thus :

“5.1. As a result of such deliberations, the Ministry of Railways B
have now decided in principle that casual labour employed on
projects (also known as ‘project casual labour’) may be
treated as temporary on completion of 360 days of continuous
employment. The Ministry have decided further as under: C

(a) These orders will cover :

(i) Casual labour on projects who are in service as on January
1, 1984 ; and

(ii) Casual labour on projects who, though not in service on D
January 1, 1984, had been in service on Railways earlier and
had already completed the above prescribed period (360
days) of continuous employment or will complete the said
prescribed period of continuous employment on re-
engagement in future. (A detailed letter regarding this group E
follows.)

(b) The decision should be implemented in phases according
to the schedule given below :”

The said Scheme was accepted by this Court subject to the F
modification that clause 5.1(a) (i), the date from which the Scheme was
made effective was from January, 1981.

3. The Railway Administration in terms of the said scheme during G
pendency of the said Writ petition issued an Office Order; the relevant
portion whereof reads as under:-

“1. Under instruction given in the above referred letter of Head
Office those Casual Workers who have completed 3 years on
01.01.1984 but less than 5 years and who have worked for more
than 1095 days have been ordered to be considered as Temporary H

A employees from 01.01.1985.

2. Those casual workers who have worked for 360 days on 31.12.83 but less than 3 years have been ordered to be considered as temporary employees from 01.01.1986. Therefore, the following casual workers are eligible to be considered as temporary employees but they will be appointed only after their selection by the selection committee.”

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4. In the said Office Order, the name of said Ram Niwas was shown at Serial No. 15 which reads as under:-

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“S. No.	Name	Date of Birth	Date of first appointment	Total Service days on 31.12.83	Date for being considered Temporary employees
*	***	***	***	***	***
15.	Ramniwas Singh Syotaaj Singh	07.03.56	08.11.79	707	01.01.86”

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5. By reason of another circular letter, the date 1.1.1984 was changed to 11.3.1983. Ram Niwas expired on 29.12.1988. By an order dated 24.1.1989, the application of Respondent no. 1 herein to give appointment to her on compassionate ground was rejected stating:

F “It is regretted and informed that Shri Ram Niwas S/o Shyotaj Singh under CSI (C) Jaipur expired on 29.12.88.

The particular of the employee is as under. The employee was not expired while on injured on duty.

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The settlement of employee is being done shortly.”

H His wife filed an application for grant of family pension. The said application was rejected by an Order dated 23.4.2003 stating :

“Ref: Your Application Letter dated 5.3.2005

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Your application for grant of family pension has been examined and found that as per Railway Rules, Pension is not admissible to substitute temporary employees.

For information please.

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Sd/-
Sr. D.P.O.
Jaipur”

6. Original application came to be filed by the first respondent before the Central Administrative Tribunal questioning the validity of the said Rule. The same was allowed by a Judgment and Order dated 7.4.2004 relying on or on the basis of a decision of a co-ordinate Bench of the Tribunal at Ahmedabad Bench in *Smt. Vallam Badia v. Union of India*, (2003) 2 SLJ CAT 271 which was affirmed by a Division Bench of the Gujarat High Court in *Union of India v. Shanti Devi, Ramawat Jakri & Ors.* [Special Leave Appeal No.12456/03 etc. decided on 21.7.2003]. The Writ Petition filed thereagainst by the appellant was dismissed by a Bench of the Rajasthan High Court holding :

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“The controversy with regard to the matter being covered in favour of the petitioner or the respondent widow of Ram Niwas by virtue of judgments either referred before the Tribunal or before this Court in the context of findings given with regard to the status of Ram Niwas, lose all its significance. The said controversy would have been relevant only if it was proved that the status of Ram Niwas was that of a casual labour with temporary status. Surely, if such was a finding given by us, we would have discussed the matter threadbare on the basis of judgment in *Union of India and Ors v. Rabia Bikaner and Ors* (supra) and the judgment reported in 1988(1) SCC 306 and the order of review passed by the Supreme Court in the matter of *Ram Kumar and Ors v. Union of India and Ors.*, (1996) 1 All India Services Law Journal Vol. IV 116. We may, however, mention that the counsel defending widow of Ram Niwas vehemently contends that the judgment rendered by the Supreme Court in *UOI v. Rabia Bikaner* (supra) cannot

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A possibly be applied as the same is based upon judgment in *Ram Kumar* (supra) which has been reviewed in view of the introduction of policy of pension to temporary employees by the Railway itself.”

B 7. Mr. Paramjit Singh Patwalia, learned senior counsel appearing on behalf of the appellant would draw our attention to different provisions of the Indian Railway Establishment Manual, the relevant provisions whereof would be noticed hereinafter, and contend that the Tribunal and consequently, the High Court committed a serious error in passing the
 C impugned judgment insofar as they failed to take into consideration the distinctive feature of a workman with a status of temporary employee and one as casual labour with a temporary status. It was urged that the High Court as also the Tribunal committed a serious error insofar as they failed to take into consideration the decisions of this Court in *Ram Kumar and*
 D *Ors. v. Union of India and Ors.*, [1988] 1 SCC 306 as also its review order reported in *Ram Kumar v. Union of India and Ors.* (1996) (1) SLJ 116 and *Union of India and Ors. v. Rabia Bikaner and Ors.*, [1997] 6 SCC 580 in their proper prospective. It was further submitted that the
 E view taken by the Tribunal and the High Court is wholly unsustainable inasmuch as the word “pensionable” occurring in the letter dated 24.1.1989 was an apparent mistake which in terms of the provisions of the Manual should have been ignored. Even the Circular letter issued by the Western Railway on the basis whereof the workman was given a temporary status is of no value.

F 8. Mr. P.K. Sharma, learned counsel appearing on behalf of the respondent, on the other hand, submitted that the case of the respondent is governed by Railway Services (Pension) Rules - 1993. It was urged that both in the scheme for appointment as also the letter dated 24.1.1989, the Railway Administration having accepted that the Shri Ram Niwas
 G husband of the first respondent was a temporary employee, it is impermissible for the appellant now to change its stand.

H 9. We, before embarking upon the rival contentions of the learned counsel for both the parties, intend to place on record that the provisions of the Railway Services (Pension) Rules have no application in the instant

case. The said Pension Rules came into force from 2.12.1993. Rule 2 of the Rules provides for application thereof only in respect of the following category of candidates :

“2. *Application* – Save as otherwise expressly provided in these rules, these rules shall apply to the following railway servants, namely :-

- (1) any Group ‘D’ railway servant whose service was pensionable before the introduction of Pension System for Railway Servants on the 16th day of November, 1957;
- (2) any non-pensionable railway servants who was in service on the 16th day of November, 1957 and who elected to be governed by these rules,
- (3) any non-pensionable railway servant who was in service on the 1st day of January, 1986 and did not opt to be governed by the State Railway Provident Fund (Contributory) Rules; and
- (4) any person entering a railway service on or after the 16th November, 1957, except a person who is appointed on contract or re-employed after superannuation or whose terms of appointment specifically provide to the contrary.”

10. A bare perusal of the aforementioned provisions would clearly go to show that the statutory rules for grant of pension made in view of the proviso appended to Article 309 of the Constitution of India cannot be said to have any application in the instant case.

11. The Manual was made for the purpose of simplification of various circular letters issued by the competent authority from time to time. It is divided in separate chapters. Chapter XIX provides for ‘apprentices’, Chapter XX provides for ‘casual labour’.

12. Indisputably, the Railway servants, if appointed on a regular basis, would enjoy a status having regard to the provisions contained in Article 309 of the Constitution of India. Recruitment Rules are applicable to the temporary and permanent government servants and they are

A governed by the Rules framed under the proviso appended to Article 309 of the Constitution of India. Their services are indisputably protected under Article 311(2) thereof. [See *Moti Ram Deka etc. v. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, AIR (1964) SC 600]

B 13. In *Khem Chand v. Union of India and Ors.*, AIR (1958) SC 300, this Court traced the history of Article 309 and 310 of the Constitution of India as also the provisions of Indian Railway Service Establishment Code which governs the Railway servants. It was noticed that the said Rules have originally been framed under Section 96-B (2) of the Government of India Act, 1915.

C 14. Indisputably, the case of the Ram Niwas was governed by Chapter XX of the Rules. Rule 2001 excludes the applicability thereof which govern the service conditions of permanent and temporary staff stating;

D “2001. (i) Definition of Casual Labour – Casual Labour refers to labour whose employment is intermittent, sporadic or extends over short periods or continued from one work to another. Labour of this kind is normally recruited from the nearest available source. They are not ordinarily liable to transfer. The conditions applicable to permanent and temporary staff do not apply to casual labour.”

E 15. Rule 2002 lays down the rights and privileges admissible to casual labour stating;

F “2002. *Entitlements and privileges admissible to Casual Labour* - Casual Labour are not eligible for any entitlements and privileges other than those statutorily admissible under the various Acts, such as, Minimum Wage Act, Workmen’s Compensation Act, etc. or those specifically sanctioned by the Railway Board from time to time.”

G 16. Rule 2005 clearly lays down the entitlement and privileges admissible to casual labour who are treated to be temporary i.e. given temporary status in the following terms;

H 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 provision 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.

- (b) Such casual labour who acquire temporary status, will not, however, be brought on to the permanent or regular establishment or treated as in regular employment on Railways until and unless they are selected through regular Selection Board for Group D Posts in the manner laid down from time to time. Subject to such orders as the Railway Board may issue from time to time, and subject to such exceptions and conditions like appointment on compassionate ground, quotas for handicapped and ex-servicemen etc. as may be specified

A in these orders they will have a prior claim over others to recruitment on a regular basis and they will be considered for regular employment without having to go through employment exchanges. Such of them who join as Casual labour before attaining the age of 28 years should be allowed relaxation of the maximum age limit prescribed for Group D posts to the extent of their total service which may be either continuous or in broken periods.

B (c) No temporary posts shall be created to accommodate such casual labour, who acquire temporary status, for the conferment of attendant benefits like regular scale of pay, increment etc. After absorption in regular employment, half of the service rendered after attaining temporary status by such persons before regular absorption against a regular/temporary/permanent post, will qualify for pensionary benefits, subject to the conditions prescribed in Railway Board's letter No. E(NG)II/78/CL/12 dated 14-10-80. (Letter No. E(NG)II/85/CL/6 dated 28-11-86 in the case of Project casual labour).

C (d) Casual labour who have acquired temporary status and have put in three years continuous service should be treated at par with temporary railway servants for purpose of festival advance/Flood Advance on the same conditions as are applicable to temporary railway servants for grant of such advance provided they furnish two sureties from permanent railway employees.

D (e) Casual labour engaged on works, who attain temporary status on completion of 120 days continuous employment on the same type of work, should be treated as temporary employees for the purpose of hospital leave in terms of Rule 554-R-I (1985 Edition).

E A casual labour who has attained temporary status and has been paid regular scale of pay, when re-engaged, after having been discharged earlier on completion of work or for non-availability of further productive work, may be started on the pay last drawn

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by him. (This shall be effective from 2nd October, 1980).

17. The aforementioned Rule 2005 replaced an earlier Rule being Rule 251 occurring in Chapter XXV of the previous publication which has *inter alia* been noticed by this Court in *Ram Kumar and Ors. v. Union of India and Ors.*, [1988] 1 SCC 306. Ranganath Misra, J. speaking for a Division Bench noticing the different entitlements of an employee who has acquired temporary status as noticed in *Inderpal Yadav's* case held;

“12. It is the stand of the learned Additional Solicitor General that no pensionary benefits are admissible even to temporary railway servants and, therefore, that retiral advantage is not available to casual labour acquiring temporary status. We have been shown the different provisions in the Railway Establishment Manual as also the different orders and directions issued by the Administration. We agree with the learned Additional Solicitor General that retiral benefit of pension is not admissible to either category of employees.”

18. A clarification was, however, subsequently made in *Ram Kumar and Ors. v. Union of India and Ors.*, [1988] 1 SCC 306, stating;

“The only other question to be seen is with regard to entitlement to pension. It appears that the Board on the basis of the Fourth Pay Commission report has provided for pension at the time of superannuation even to those who are temporary employees. In paragraph 12 of our order on the basis of material then placed before us, we had taken the view that temporary employees were not entitled to pension on superannuation. We direct the Railway Board to consider the claim of temporary employees who are before us for pension at the time of superannuation or otherwise in view of the fact that the Board has taken its own decision differently. Obviously appropriate material had not been placed before this Court when the submission of Mr. Ramaswamy for Railway administration was accepted in the order. The decision is beneficial to the employees and we direct that the Board's decision

A may be implemented.”

19. *Ram Kumar* (supra) was followed by this Court in *Union of India and Ors. v. Rabia Bikaner and Ors.*, [1997] 6 SCC 580 stating:

B “4. It is contended by the learned counsel for the respondent-widows that under para 2511 – “Rights and Privileges admissible to the casual labourers who are treated as temporary after completion of six months’ continuous service” – of the Railway Establishment Manual, they are entitled to family pension. We find it difficult to give acceptance to the contention. It is seen that every
C casual labourer employed in the railway administration for six months is entitled to temporary status. Thereafter, they will be empanelled. After empanelment, they are required to be screened by the competent authority and as and when vacancies for temporary posts in the regular establishment are available, they
D should be appointed in the order of merit after screening. On their appointment, they are also required to put in minimum service of one year in the temporary post. In view of the above position, if any of those employees who had put in the required minimum service of one year, that too after the appointment to the temporary
E post, died while in service, his widow would be eligible to pension under the Family Pension Scheme, 1964. In all these cases, though some of them have been screened, yet appointments were not given since the temporary posts obviously were not available or in some cases they were not even eligible for screening because the
F posts become available after the death. Under these circumstances, the respondent-widows are not eligible for the family pension benefits.”

G 20. The contrast between a casual labour having a temporary status and a temporary servant may immediately be noticed from the definition of a temporary railway servant contained in Rule 1501 occurring in Chapter XV of the Manual.

“1501 (i) Temporary Railway Servants

H Definition – A “temporary railway servant” means a railway servant

without a lien on a permanent post on a Railway or any other administration or office under the Railway Board. The term does not include "casual labour", including 'casual labour with temporary status', a "contract" or "part time" employee or an "apprentice".

21. We have noticed hereinbefore that in the Office Order dated 24.1.1989, the designation has been shown as T.S. Helper CSI (Construction) i.e. temporary status as per the CSI (Construction). However, wrongly it was said to be a pensionable post. Before the High Court, an additional affidavit was filed by the Railway Administration wherein *inter alia* it was stated that the screening tests were held long thereafter viz. some time in the year 1999. Only upon holding a screening test, the services of the employees concerned could be regularized; and as in the case of Ram Niwas, he had expired in the year 1988, he had not and could not have undergone any screening test and that no pensionary benefit or benefit of family pension was admissible to him.

22. The decision of the Gujarat High Court relied upon by the Tribunal as also the Division Bench, in our opinion, may not be correct. It was held therein that as temporary servant also is entitled to pension on his attaining the age of superannuation, the purported amendment in the Railway Manual to the effect that they would enjoy the status of temporary employee is bad in law.

23. The Gujarat High Court in *Rukhiben Rupabhai* (supra), no doubt on analyzing the scheme filed before this Court, opined :

"32. This change has been made by Railways after the Apex Court decision in *Inder Pal Yadav* case (supra). The original definition 'temporary railway servant' is clear, but in the above quoted definition in Clause (1501), Railways have included the 'casual labour with temporary status', thereby, taking them out from the category of "temporary railway servant". How and why this change has been made, what procedures were adopted for making the change, there is no whisper, although, this change has grievously affected the casual labour becoming temporary on completion of 360 days continuous employment, and committed breach of the Apex Court's decisions in *Inder Pal Yadav* case (supra) followed

A by *Dakshin Railway Employees* case (supra), making casual labour 'temporary railway servant'. Since there exists only four categories, namely, (1) permanent, (2) temporary (3) casual labour and (4) substitutes, casual labour, under the original scheme approved in cases referred to hereinbefore, becomes 'temporary railway servant', after completion of 360 days' continuous employment, therefore, he cannot be made 'casual labour with temporary status' by subsequent gerrymending by the Railways by its Circular dated 11th September 1986, which was not brought to the notice of the Apex Court in *Dakshin Railway Employees* case (supra). Therefore, this Circular has no legal sanction, against the Apex Court decisions in *Inder Pal Yadav* case (supra), contrary to original scheme and as such, hit by Articles 14, 16, 21, 41/42 of the Constitution of India.”;

D but evidently the provisions of the Railway manual were not considered in their proper perspective.

E What has been considered therein was that the Railway Manual should be given effect to as it governs the terms and conditions of service of the employees working under the Railway Administration. A scheme when engrafted in a rule must be read in the context in which the same was done. This Court while accepting the scheme, nowhere suggested that the amendments made in the Railway Manual would be of no effect. Even otherwise the same could not have been done.

F 24. In absence of any statutory rules framed, executive instructions can be issued in relation to the matter governed by the constitutional provisions. In *Khem Chand* (supra), this Court had noticed the relevant constitutional provisions and opined that the Railway Manual was an amalgam of various circulars issued from time to time. Such executive instructions or rules framed would be statutory in nature.

G 25. *Mala fide* cannot be attributed to a legislation. It is only its validity, that can be challenged. In these cases, validity of the Rules were not under challenge.

H 26. The Gujarat High Court in our opinion therefore, committed a

fundamental error in opining otherwise. It failed to notice that when casual labour has been excluded from the definition of permanent or temporary employee, he with temporary status could not have become so and there is no legal sanction therefor. It is for the legislature to put the employees to an establishment in different categories. It may create a new category to confer certain benefits to a particular class of employees. Such a power can be exercised also by the Executive for making rules under the proviso appended to Article 309 of the Constitution of India. *Dakshin Railway Employees Union, Trivandrum Division v. General manager, Souther Railway and Ors.*, [1987] 1 SCC 677 whereupon reliance has been placed by the Gujarat High Court in *Rukhiben Rupabhai* (supra) does not lead to the said conclusion as was sought to be inferred by it. The question therein was as to whether any direction was to be issued to include the petitioners therein in the scheme for absorption as formulated pursuant to the directions of the Court.

27. What was protected by conferring temporary status upon a casual employee was his service and by reason thereof the pension rules were not made applicable. A workman had not been and could not have been given a status to which he was not entitled to.

28. Recruitment of Government Employees must be made strictly in terms of the statutory rules. Entitlements of the employees being governed by statute or statutory rules, the question of attribution of any malice in our opinion by the Gujarat High Court was clearly erroneous.

29. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. We, however, in exercise of our jurisdiction under Article 142 of the Constitution of India direct that in the event the respondent No.1 herein have been given any benefit including the benefit of family pension, the same shall not be recovered. These appeals are allowed with the aforesaid observations and directions. In the facts and circumstances of this case, there shall, however, be no order as to costs.