

**(1972) 06 CAL CK 0004**  
**In the Calcutta High Court**

Hirendra Nath Sen Gupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision :** 29-06-1972

**Acts Referred:**

**Citation :** (1972) 06 CAL CK 0004

**Hon'ble Judges :** Salil Kumar Datta, J

**Bench :** Single Bench

**Advocate :** S.N. Ganguly, for the Appellant; S.K. Roy Chowdhury, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Salil Kumar Datta, J.—Those to applications have been made in these Two Rules for interim order restraining the respondents from giving effect to the notification published in E.R. Gazette Nos. 19 and 20 dated 15.10.71 retiring the petitioners with effect from 1st of July, 1972.

2. The petitioner in C.R. 3047 (W) of 1972, according to his case entered into Railway service on 14.10.36 as unskilled Khalashi and held lien in a permanent post in a vacancy due to the retirement of a permanent incumbent. The petitioner was confined on 14.10.39 and at present is officiating as Chief Clerk in the office of the Divisional Superintendent, Easter Railway, Sealdah. The petitioner would attain 58 years of age on 1.1.72 and he has been asked to retire on the said date. The petitioner contends that he is a Ministerial Railway servant and is entitled to continue his service till he attains 60 years. On these allegations he has obtained this Rule calling upon the respondents to show cause why the Railway Administration should not rescind or withdraw the said notification directing him to retire on 1.7.72 and, further directing the respondents to allow him to continue in service till 1.7.74.

3. The petitioner in C. R. 3048 (W) of 1972 entered into Railway service on 20.7.37 and was confirmed on 1.4.38. He also claims to be a Ministerial servant

and will attain 58 years of age on 1.7.72 when he has also been asked to retire by the said notification. The petitioner contends that he is entitled to be in service till 60 years of his age. On such allegations he has obtained this Rule praying for similar reliefs as in the other Rule and both rules are to be heard analogously.

4. As already stated the present application are for interim orders restraining the respondents from giving effect to the orders of retirement of the petitioners. These applications have been opposed by the respondents who have filed affidavit-in-opposition to which again the petitioners have Affidavit-in-reply.

5. The relevant Rule of Retirement is 2046 of the Establishment Code, Volume II (as amended by advanced correction slip No. 233-RII) which is as follows:

2046 (FR 56). (a) Except as otherwise provided in this Rule every railway servant shall retire on the day he attains the age of fifty-eight years.

(i) A Ministerial railway servant who entered Government service on or before the 31st March, 1938 and held on that date -

(ii) a permanent post in a provisional substantive capacity under Clause (d) of Rule 2008 and continued to hold the same without interruption until he was confirmed in that post, shall be retained in service till the day he attains the age of sixty years.

6. The petitioners to avail themselves of the benefit of this Rule have to establish that the conditions of sub-clause (i) or (ii) of clause (b) of the Rule are fulfilled. It is their case that they were appointed in permanent vacancy before 31.3.38. The appointment in a permanent vacancy does not automatically mean that they held a lien or suspended lien on a permanent post. The lien under Clause 14 of Rule 2003 means the title of a Railway servant to hold substantially, either immediately, or, on the termination of a period of periods of absence, a permanent post including a tenure post, to which he has been appointed substantially. It is not the petitioners' case that they held such post on or before 31st March, 1938. Accordingly sub-clause (i) of clause (b) of Rule 2046 is not applicable to the petitioners.

7. It is now to be examined if sub-clause (ii) of clause (b) of the Rule is applicable to the petitioners. Under this sub-clause a Railway servant to be entitled to a service of 60 years must hold a permanent post in a provisional capacity under clause (d) of Rule 2008 on or before 31.3.31 and continue to hold the same until interruption till he is confirmed in that post. Clause (b) of Rule 2008 provides that if a Railway servant's lien on a post is suspended under clause (a) or (b) of the Rule, the post may be filled substantially and the Railway servant appointed in that position shall acquire a lien on it. Clause (a) of Rule 2008 contemplates suspension of lien of a Railway servant when he is appointed in substantive capacity to a tenure post or a post outside his cadre or provisionally to a post on which another Railway servant would hold a lien, had

his lien not been suspend under this Rule. Under clause (b) of this Rule a lien would be suspended if a Railway servant is deputed outside India or transferred to a foreign service or to a post in another cadre and is likely to be absent for not less that three years.

8. Mr. Ganguly has contended that at least sub clause (ii) of clause (b) of Rule 2046 applies to this case. In Civil Rule No. 3047(W) of 1972 the petitioner according to him held lien on the permanent post vacant due to retirement of a permanent incumbent. The retirement of a Railway servant, however, is not a suspension of a lien under the Rules on the post under clause (a) or (b) of Rule 2008. The petitioner in the other Rule has not stated as to how he had a lien on a permanent post on or before 31.3.38. For these reasons it is not possible to hold prima facie that the petitioners are entitled to benefit of sub clause (ii) of clause (b) of Rule 2046 as amended.

9. It would appear that the petitioners have also challenged the date of 31.3.38 given in clause (b) of Rule 2046 as arbitrary. These points may require some consideration at the time of hearing of the Rule. But prima facie it has not been established nor argued that this Rule is one without any purpose or import. For this reason it is not possible to hold on these applications that this Rule is arbitrary or of no legal validity. This point may be urged at the time of hearing of the Rule and accordingly it is obvious that the petitioners have not been able to make out a prima facie case for injunction.

10. Further, in the event the injunction is granted and the Rules fail, the balance of convenience will be against the Railway Administration as in such case if the injunction is granted, the petitioners will remain in service and will block the chain of promotions of other incumbents for the said posts creating serious prejudice to the Railway Administration as well as to the incumbents. On the other hand, if the Rules succeed, the petitioners would be adequately compensated, as in such case the Railway Administration will have to pay all their salaries as also allowance in accordance with law for the period of forced retirement.

11. For these reasons, these applications fail and are dismissed. There will be no order for costs.

12. The prayer for stay of operation of this order is refused.

13. Mr. Chowdhury, learned Advocate for the respondents, undertakes to the file his power on behalf of the respondents within four weeks and waives service of the Rules and grounds. Let affidavit-in-opposition in the main Rule be filed within four weeks and reply thereto within one week thereafter. Liberty is given to the parties to mention for fixing an early date of hearing. Mr. Ganguly will handover copies of the writ petitions to Mr. Roy Chowdhury in course of this week.