CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH, BENGALURU

ORIGINAL APPLICATION NO.170/0139/2020

DATED THIS THE 2ND DAY OF MARCH, 2020

HON'BLE DR. K.B. SURESH, …MEMBER(J)
HON'BLE SHRI C.V.SANKAR …MEMBER(A)

Dr. Imtiaz Ahmed Khan,
Aged about 56 years
S/o late Abdul Hameed Khan
Working as Specialist Gr.I
Department of Ophthalmology
ESIC PGIMSR & Model Hospital,
Rajajinagar, Bengaluuru-560 010
Residing at No.4, 2nd Cross,
Nandidurga Extension, Benson Town,
Bengalore 560 046. ….Applicant

(By Advocate Shri M. Rajakumar)

Vs.

1. The Union of India,
Represented by its Secretary,
Department of Labour & Employment,
Ministry of Labour,
No.110, Shrama Shakti Bhavan.
Rafi Marg, New Delhi-110 001.

2.Employees State Insurance Corporation,
Represented by its Director General
Panchadeep Bhavan, CIG Marg,
New Delhi – 110 002

3. The Director,
Directorate of ESI Scheme
(Medical) Services,
Rajajinagar, II Block,
Bangalore 560 010 …..Respondents

(By Shri N. Amaresh, Counsel for the Respondents)

O R D E R (ORAL)

HON'BLE DR. K.B. SURESH, …MEMBER(J)

Heard. The matter seems to be covered by the order in OA.No.674/2019 dated 09.01.2019, which we quote:

"O R D E R (ORAL)
(HON'BLE DR. K.B. SURESH, MEMBER (J)

Apparently this case is covered by two different matters. One is Annexure-A1 Proceedings of Government of Karnataka and the Terms and Conditions, which we quote:

"Proceeding of Government Karnataka

Sub:- Absorption of Employees of Department of ESI Scheme (Medical) services, in E.S.I. Corporation working under deputation.

Read:- 1) G.O. No. LD 157 LSI 2001, dated: 31-03-2003.
2) Letter No. A-37(18)1/03-Med-IV dated 03-06-2005 From the Medical Commissioner, ESIC, New Delhi
3) Letter No. A-37(18)1/03-DM (HQ) dated: 20-12-2005 From the Medical Commissioner, ESIC, New Delhi
4) Notification No. 532-A-37(18)1/2006-07, dated: 19-10-2006, from the Medical Superintendent, E.S.I. Corporation Model Hospital, Rajajinagar, Bangalore.
5) Letter No. DEV/3/2003-04, date: 10-12-2007 from the Director, ESI Scheme (Medical) Services.
6) Letter No. DEV/3/2008-09, date: 27-01-2009 from the Director, E.S.I. Scheme (Medical) Services.

PREAMBLE:

The E.S.I. Hospital, Rajajinagar, Bangalore has been handed over along with staff, Building, furniture and equipment to E.S.I. Corporation vide G.O. No. LD 157 LSI 2001, dated: 31-03-2003 with a view to establish model Hospital, from 01-04-2003. The staff of the hospital was handed over on deputation for initial period of 3 years with option of absorption. The deputation period of the staff expired on 31-03-2006.

The Medical Commissioner, E.S.I. Corporation New Delhi in his letters read at (2) and (3) above has requested to absorb the staff working under deputation in the service of the E.S.I. Corporation. The Corporation has sent the Terms and Conditions of absorption.

In the notification read at (4) above the corporation has informed that the absorption will be effective from 01-01-2006.

The staff on deputation at ESIC was informed to exercise their option for absorption 179 Medical Officer/Employees working under deputation at ESIC as listed in the Annexure exercised their option for absorption. After

examination of the Terms and Conditions prescribed by the ESIC for absorption at Govt. level, it is decided to issue the following.

Government Order No. LD 395 LSI 2006, Bangalore,
Dated: 03-08-2009.

In the circumstances explained in the preamble sanction is accorded to absorb the services of 179 Medical Officers and other staff of the Employees State Insurance Scheme (Medical) Services, department in to the services of Employees State Insurance Corporation as per the list annexed with the following terms and Conditions.

Terms and Conditions

- *The employees who will be absorbed in ESIC should give Technical resignation to their State Government Service.*
- *The E.L at the credit of these employees will be encashed for a maximum of 240 days and remaining leave will lapse.*
- *The ESIC should consider the State service of these employees for pension purpose and the old pension scheme should be considered. The State Government shall transfer the pension contribution to ESIC.*
- *Regarding fixation of seniority, the ESIC should consider the Institutional Seniority.*
- *Even though the Medical Officer proposed for absorption are in Specialist Cadre in ESI (M) Services, they should be absorbed in ESIC Specialist Sub Cadre.*
- *If the employees proposed for absorption have taken H.P.A./H.B.A advances, M.C.A etc., such advances should be cleared before absorption or if the State desires, the ESIC may take action to deduct the remaining advance along with interest and remit the same to State from time to time.*

By order and in the name of the
Governor of Karnataka,
Sd/-
(Govindaswamy)
Desk Officer,
Labour Department
(ESIS (M) Servies)"

2. Applicant comes under this "Terms and Conditions". In a similar matter in OA No. 809-831/2013 we had considered the same issue and vide order dated 16.10.2015 disposed off the matter, which we quote:

"ORDER
HON'BLE SHRI RUDHRA GANGADHARAN .....MEMBER (A)

We have heard twenty three applications (from OA No. 809/2013 to OA No. 831/2013) as a batch since the cause of action and the reliefs prayed for are common. The applicants are all employees of the

Employees State Insurance Corporation Model Hospital (ESIC MH), Rajajinagar, Bengaluru, who are aggrieved by the decision of the ESIC Headquarters, New Delhi, to count their date of absorption in the ESIC with effect from 1.1.2006 rather than from 1.4.2003.

2. After filing the OA the applicants filed certain documents on 7.4.2015 as well as a written submission dated 15.9.2015. The substance of all these pleadings is summarized below. The applicants submit they were initially appointed in ESI Hospital, Rajajinagar, coming under the Director, Employees State Insurance Scheme, [ESIS (M)] of the Government of Karnataka (GOK). In line with a policy decision the GOK (4th respondent) issued an order dated 30.1.2003 (Annexure A1) to convert the said hospital into a Model Hospital to be transferred to the ESIC, New Delhi, together with all infrastructure, inventory and equipment, with effect from 1.4.2003. The said order stipulated that the staff currently working there "... are transferred to the ESIC on deputation basis for an initial period of 3 years with option of absorption. The terms and conditions of deputation will be intimated later." It was evidently anticipated that all formalities in respect of absorbing these personnel in the ESIC would be completed within the said period. The draft terms and conditions of absorption were communicated by the GOK to the Director, ESIS (M), in a letter dated 30.06.2005 (Annexure A2) with an instruction to obtain the views of the employees association. This letter states that the draft terms and conditions were part of a letter dated 3.6.2005 sent by the ESIC, New Delhi (Annexure A4). However the letter actually appended to Annexure A2 is dated 9.10.2003 and paragraph 3 of the said draft is different from the one appended to the letter dated 9.10.2003. In the written submission the applicants say that they did not accept the terms and conditions in the draft attached to the letter dated 9.10.2003 and that Annexure A4 was issued thereafter. Paragraphs 1 to 3 of the draft attached to Annexure A4 are reproduced below:

> *1) Option may be exercised by each employee for absorption in Corporation service or for repatriation to the State Govt. service. This option may be exercised by each employee who has a minimum of 2 years' service left in the lending Department as on 01.01.2006.*
>
> *2) Mere exercising of option for absorption in Corporation service shall not confer any right on any employee to claim absorption and the decision of the Corporation in the matter would be final based on consideration of due screening.*
>
> *3) An employee option for absorption has to resign from State Govt. service and <u>his absorption in Corporation service will take effect from the date of deputation in ESI Corporation or from the date he joins the duty in the ESI Corporation whichever is earlier</u> (emphasis added).*

3. In a letter dated 1.8.2005 (Annexure A5), the Karnataka Employees State Insurance Model Hospital Welfare Association conveyed its views in respect of the terms and conditions, and accepted paragraphs 1 and 3

while opining in respect of paragraph 2 that all employees interested in such absorption should be considered. In a letter dated 8.9.2008 (Annexure A11)the ESIC MH, Rajajinagar, directed the employees to submit their options by 19.9.2008 positively. Thereafter in an order dated 30.8.2009 (Annexure A12) the GOK accorded sanction for absorbing the services of 179 medical officers and other staff of the ESIC (M) Services Department into the ESIC and directed such employees to submit their technical resignation to the GOK. Since this order was silent on the date of absorption, the following query was raised in a letter dated 20.10.2009 by Secretary, Labour Department, GOK (Annexure A13):

..... In the ordinary course, the absorption would take effect from the date of the Govt. Order. Therefore, I am directed to request you to issue clarification as to whether the absorbed Medical officers/employees have been absorbed in the corporation with effect from 1/1/2006? If so, whether the technical resignation submitted by them can be accepted by the Govt. Of Karnataka with effect from 31/12/2005.

In response the Joint Director, ESIC Model MH, Rajajinagar, stated that the absorption would be effective from 1.1.2006 and the technical resignations tendered by the staff may be accepted with effect from 31.12.2005 AN (Annexure A14). The ESI Corporation would therefore bear the pay and allowances of the officers and staff absorbed from 1.1.2006.The formalities related to finalizing the absorption took more time than anticipated and there is substantial amount of correspondence between the State Government and its agency and the ESIC New Delhi on this matter.

5. The ESIC, New Delhi, then issued two orders dated 11.2.2010 (Annexure A15) and 7.7.2010 (Annexure A16) formally absorbing a total number of 57 personnel into the ESIC with effect from 1.1.2006. This date did not suit the applicants who submitted their representations to the second respondent (ESIC HQ). In an order dated 16.6.2011 (Annexure A7) the ESIC HQ constituted a cell to visit the respective hospitals and settle pending issues in respect of absorption as well as other matters. The cell was expected to complete its work by November, 2011. The applicants submit that they are not aware of what the committee has done so far. They have produced a copy of a letter dated 14/17.10.2013 from the ESIC in answer to an RTI query which states that "no report was submitted".

6. The employees association of the ESIC MH submitted representations (Annexure A19 and A20) pressing their case for absorption from 1.4.2003 onward. They submit that the staff of the Asramam Hospital, Kollam, Kerala, were absorbed into the ESIC with effect from the date of their deputation to the ESIC. The ESI Hospital, Rajajinagar, was handed over to the ESIC on 1.4.2003. The staff were placed on deputation to ESIC with effect from the very same date. The applicants had no option at that time but to go on deputation to ESIC. However the terms and conditions in the annexure to the ESIC's letter dated 3.6.2005 (Annexure A4) clearly state that the seniority of an employee absorbed in the Corporation will be determined either from the

date of deputation or from the date he joins duty in the ESIC, whichever is earlier. Hence there was a legitimate expectation that the date of absorption would count from 1.4.2003. In Annexure A20 the applicants have pointed out that in a letter no.A-37/18/1/2003-DM (Hqrs) dated 4.9.2006, the ESIC asked to obtain option for absorption to ESIC from those working on deputation with effect from 1.1.2006 subject to the terms and conditions of the letter dated 3.6.2005 (Annexure A4); this went against the condition laid down in paragraph 3 of the said terms and conditions. Hence ESIC's decision to enforce the date of absorption with effect from 1.1.2006 is unilateral and unjust. The designation of ESIC staff, their length of service and question of monetary benefits have been ignored by ESIC. The absorbed staff have been demoted to a junior cadre. The judgments of the Hon'ble Apex Court in (1998) 3 SCC 201 [paragraph 7 of K. Anjaiah and ors V/s. K.Chandraiah and ors] and (2000) 1 SCC 644 (paragraph 15 of Sub-Inspector Rooplal and another V/s. Lt. Governor through Chief Secretary, Delhi and others) have been cited in support of their claim.

7. Since the application was only filed on 5.8.2013 the applicants have filed an MA No.445/2013 for condoning the delay. They submit that the procedure for absorbing the applicants into the ESIC took several years. The actual orders of absorption were issued only in 2010 (Annexure A15 and A16). The employees objected to the date of absorption and in response the ESIC Headquarters constituted a cell on 16.6.2011 (Annexure A17) to go into and settle various pending issues including the date of absorption. The applicants claim that they made representations to this cell with no response. They have made a series of representations to the respondents as well.

8. In their reply statement the respondents point out that in their letter dated 9.10.2003 (Annexure A3) the ESIC had clearly stated that merely exercising the option for absorption in ESIC shall not confer any right to claim absorption, and that the decision of the Corporation in the matter would be final. As per paragraph 3 of the said terms of absorption, an employee opting for absorption had to resign from the state government and his absorption in ESIC would take effect from the date of absorption in ESI Corporation or from the date he joined duty in the ESI Corporation whichever is later (emphasis added). Since all the applicants resigned from the State Government with effect from 31.12.2005 they were absorbed with effect from 1.1.2006. The ESIC could not have absorbed such persons until they had actually resigned from the service of the GOK. The respondents claim that even after handing over the management of the hospital the GOK continued to maintain full control over the employees. They have produced a copy of the minutes of a meeting held on 21.10.2003 (Annexure R1) which they claim makes it clear that employees were still under the control of State Government. Moreover, the State Government continued to transfer the officials to various posts in the hospital; they have named five persons who were posted to the ESIC MH on various dates in 2004 and 2006.

9. The respondents submit that Annexure A4 dated 3.6.2005 encloses the draft terms and conditions of absorption of employees with effect from

1.1.2006 and that "this communication was issued in supersession of all the previous communications regarding absorption of employees in this Hospital" (emphasis added). The process of obtaining, examining and disposing of the options of the employees took time since the concerns of the employees also had to be addressed. There were instances of employees initially opting for absorption and thereafter seeking to be repatriated to the GOK. It was made clear vide Annexure A4 that resignation from the State Government services would be effective from 1.1.2006. The applicants were free either to accept or reject this condition. The respondents attribute the delay in finalizing the matter to the State Government.

10. The respondents submit that one Dr. Imtiaz Ahmed Khan who was absorbed into the ESIC with effect from 1.1.2006 submitted an application requesting absorption with effect from 1.1.2003 (Annexure R3). This was rejected in a communication dated 17.7.2012 (Annexure R4) which pointed out that the date of absorption had been finalized by the Board of Directors of ESIC in its 134th meeting in respect of ten different hospitals. The respondents have also submitted a copy of a letter dated 30.5.2013 from ESIC HQ to the Union Ministry of Labour and Employment denying that the date of absorption was decided by the ESIC in a unilateral manner. In its 134th meeting held on 21.12.2005 the ESIC decided to allow option to the State Govt. employees working on deputation in 12 hospitals including ESIC MH, Rajajinagar, to be absorbed in ESIC with effect from 01.01.2006. All the State Government employees while exercising their options knew very well that they will be absorbed in ESIC with effect from a specific date, namely, 1.1.2006. They have referred to the decision of the Guwahati Bench of this Tribunal in OA No.39 of 2008 on exactly the same issue which was decided in favour of ESIC. They clarify that the employees of the ESIC, Asramam, Kollam, were absorbed with effect from 1.1.2003 only because the retirement age in the Government of Kerala was then 55, whereas it was 58 or 60 in other States. If the policy to absorb all employees with effect from 1.1.2006 had been applied in the ESIC, Asramam, it would have been unfair, since most of the employees had less than two years service left for retirement as on 1.1.2006. The 134th meeting of the ESIC therefore took a conscious decision to fix 1.1.2003 as the date of absorption of the employees in respect of ESIC, Asaramam. The respondents also submit that when a similar matter was agitated before the Hon'ble High Court of Kerala, the latter decided in W.P.Nos.433, 546, 562 and 577 of 2013 to let the Ernakulam Bench of this Tribunal decide the said matter.

11. A separate statement of objections has been filed on behalf of respondents 3 and 4 who are the Director, Directorate of ESIC Scheme, and the State of Karnataka, Department of Labour, respectively. The third and fourth respondents submit that the ESIC has been lenient enough to absorb the applicants with effect from 1.1.2006 in a case of retrospective absorption, even though the process of absorption concluded only in 2010. The mere fact that the applicants were on deputation from 1.4.2003 onward does not entitle them to be absorbed from that particular date. There was also no provision to absorb them prior to 31.5.2005 unless they resigned from the posts held by them in the State Government. Hence the

question of legitimate expectations being disappointed does not arise. However, the pay scales were also not the same. The decisions quoted by the applicants are not relevant to the present case.

12. In their written submission the respondents have stressed that the employees could have entered the service of the ESIC only after they ceased to be employees of the GOK. Their technical resignations took effect only from 31.12.2005; hence they could not have become regular employees of ESIC until 1.1.2006. The preamble to Annexure A12 dated 3.8.2009 had also indicated that the absorption would take effect from 1.1.2006. This order had not been challenged. The process of absorption had been finalized only after considerable correspondence, and the applicants were well aware of developments that took place before the orders of absorption were finally issued. The date of absorption, 1.1.2006, applies uniformly to various hospitals all over India and any change now would create administrative problems in respect of the all-India seniority of absorbed employees and disturb a settled matter. It would also impact the provisional seniority list of employees published on 16.11.2012 with effect from 31.3.2012 (Annexure R8 of additional reply statement).The date of absorption was decided after considerable deliberation and consultation, certainly not in an arbitrary manner. The respondents have submitted a copy of Resolution No.142 dated 22.2.2008 in which the draft terms and conditions of absorption were amended. The significant changes relevant to the present matter were:

> *1. Date of absorption as 01/01/2006 in the existing document has been deleted as the date of absorption in the case of Madhya Pradesh would be the date decided between the State Government and the ESI Corporation.*
> *2. The words, "whichever is earlier" appearing at the end of existing clause-3 have been deleted and only one date of absorption has been provided in the new draft.*

Accordingly the second point of the draft in Annexure A4 was amended as follows:

> *2. Mere exercising of option for absorption in Corporation service shall not confer any right on any employee to claim absorption and the decision of the Corporation in the matter would be final based on consideration of the screening.*

The respondents claim that consequently clause 3 of Annexure A4 was modified by a circular issued by the ESIC (Resolution No. 142 dated 22.2.2008). The applicants therefore could not seek absorption with effect from 1.4.2003.

13. Referring to the batch of cases heard in the Ernakulam Bench of this Tribunal the respondents say that in the said matter an order was inadvertently issued by the ESIC HQ, (vide enclosure to Applicant's Memo dated 7.4.2015) showing the date of absorption as 1.1.2003. But no such orders were issued in the case of applicants in the present case. An

inadvertent order cannot be cited as a precedent and cannot be construed to replace another well considered decision.

14. The respondents have referred to the judgment in WP (O) No.3464/07 in the Hon'ble High Court of Guwahati wherein the issue regarding absorption of employees of the ESIC hospital Beltola, Guwahati, was closed in the following manner:

In view of the fact that the Writ Petitioner has already taken a decision to absorb Respondents with effect from 01.01.2006, the grievance of the Writ Petitioner in our view is only marginal and did not call for adjudication in this Writ Petition. The Writ Petition is therefore dismissed at the admission stage.

15. The applicants have sought condonation of the delay in filing the OA which they say is about 2 years and 6 months. The applicants were placed on deputation with the ESIC as far back as on 1.4.2003. The process of regularizing their services in ESIC took its own time. The applicants represented against the orders dated Annexure A15 and A16. They also made representation to the committee set up in Annexure A17 to resolve various pending issue including the question of absorption. The applicants submit that they are not aware of what the committee has done so far and that their representations have received no response. They submit that the delay is not intentional and that they have a good case on merit.

16. The learned counsel for the respondents has cited the judgment of the Hon'ble Apex Court in Union of India and Others Vs. M.K.Sarkar [(2010) 2 SCC 59], on the question of delay and laches in filing the OA. The reply statement of the 3rd and 4th respondents submits that the cause of action arose as far back as on 11.2.2010 and 7.7.2010 when the abosorption was ordered. The applicant failed to approach the Tribunal at that time. They have also quoted the following judgment of the Hon'ble Apex Court in M.P. Palaniswamy v. A. Krishnan, [(2009) 6 SCC 428]:

> *30. It cannot be forgotten that this regularization was all along accepted by the present appellants. Once they chose to accept the regularization which was conditional, then it would have to be borne in mind that they have accepted the conditions also. It cannot be countenanced that only the favourable part of the GOMs was accepted by them and the unfavourable part was rejected. If they had to do it, they had to challenge the GOMs immediately. They did not do it, instead they waited almost for six years. When for the first time, they came out with an Original Application vide OA No.3617 of 1994. Again, when the matters were decided in the Writ Petition Nos. 2911 and 3041 of 1998 on 24.3.1998 and the seniority prayed for on the basis of initial appointment was refused to them, they kept quiet, only to raise the same demand again in 2003 when the Panel was prepared.*

17. We have studied the judgments of the Hon'ble Apex Court in a number of other cases where the context and the question of "sufficient cause" have figured. In the case of Collector, Land Acquisition Anantnag and another Vs. Mst.Katiji and others the Hon'ble Supreme Court held that:

3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

> *1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
>
> *4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
>
> *5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*
>
> *6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal……...

18. In N. Balakrishnan Vs. M. Krishnamurthy the Hon'ble Supreme Court held:

Condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. in every case of delay there can be some

lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice

19. In State of Bihar and Others Vs. Kameshwar Prasad Singh and another the Hon'ble Supreme Court held:

F. Constitution of India-Art.136 – Delay/Laches – Delay in filing appeal before Supreme Court – Condonation of – Liberal approach preferable – Sufficiency of cause – Where dismissing the appeal on technical ground of delay would, instead of advancing interests of justice, result in failure of justice inasmuch as by virtue of the impuned judgments of the High Court not only seniority and promotion of the parties before the Court be affected but those of several other incumbents also be affected, held Court would be inclined to condone the delay – Words and Phrases – "sufficient cause"

18. Order on MA No.445/2013: We are guided by the wisdom of the Hon'ble Apex Court in the cases cited in paragraphs 17 to 19 above. We have therefore looked at the context in which the delay occurred as well the question of sufficient cause. We do not think the delay is due to any mala fides. We believe we would not be doing justice if we were to dismiss the OA simply because it has been filed late. We feel that the present issue is serious enough to warrant consideration of the MA. We feel that it will be in the interest of justice to decide this OA on merits. Accordingly the delay is condoned and the MA is allowed.

19. Having so condoned the delay in filing this application we now come to the main issue agitated by the applicants. We have carefully studied the pleadings of the both parties and considered the arguments of the learned counsel for both sides. We note that the respondents themselves sought the acceptance by the applicants of paragraph 3 of the draft terms and conditions appended to Annexure A4. This paragraph makes it clear that absorption in the service of the Corporation will take effect from the date of deputation or from the date of joining duty in the ESIC whichever is earlier. The Karnataka Employees State Insurance Corporation Model Hospital Welfare Association accepted this condition in its letter dated 1.8.2005 (Annexure A5). The respondents have informed us that this condition was subsequently amended in a circular adopted by ESIC (Resolution No.142 dated 22.2.2008); the words "whichever is earlier" were deleted, and only one date for absorption was provided in the new draft. This amendment took place almost three years after Annexure A4 was presented to the applicants for consideration. There is nothing to indicate that the subsequent resolution No.142 was ever the subject matter of discussion between the employees of the hospital and the management of the ESIC. There is nothing to indicate that this was the subject of discussion between

the employees of hospital and Government of Karnataka either. It appears that the ESIC shifted goal posts without keeping the applicants in the picture. This was nothing short of arbitrary. The applicants therefore could be pardoned for being under the impression that they would be regularized in the service of Corporation on 1.4.2003, the date from which they were deputation to the ESIC. The respondents argue that the applicants could not have been absorbed into the ESIC until they had formally quit the GOK; we agree. The point is that since the orders of absorption are dated 11.2.2010 (Annexure A15) and 7.7.2010 (Annexure A16) and take affect from 1.1.2006, the respondents cannot argue that the date of absorption cannot be further backdated.

20. The respondents claim that a considered decision was taken in respect of the employees of the Model Hospital at Asramam, Kollam, since the age of retirement for employees of the Government of Kerala was only 55 years. However we see that in subsequent cases the ESIC proceeded to absorb the employees of other hospitals in Kerala that were transferred to ESIC with effect from subsequent dates. We have seen the order of the Ernakulam Bench of this Tribunal in OA No.1175/2013 filed by the employees of the ESIC MH, Udyogamandal, Kerala. The latter were aggrieved because an Absorption Order dated 25.5.2011 which absorbed them with effect from 2.11.2009 was withdrawn by the ESIC, New Delhi; in subsequent orders their date of absorption was changed to 4.3.2011. The respondents in the said OA submitted that the order dated 25.2.2011 was issued by an incompetent authority and therefore had to be withdrawn. After careful consideration the Ernakulam Bench of this Tribunal accepted the prayer of the applicants and ordered on 26.2.2015 that "The applicants will stand absorbed to the ESIC with effect from 2.11.2009 and 3enjoy all consequential benefits."

21. The respondents in the present OA submit that the Absorption Order dated 25.5.2011 in the case of the employees of the ESIC MH, Udyogamandal, was inadvertently issued; however no such mistake has been made in the case of employees of the ESIC MH, Rajajinagar. A striking feature in that case as well as the present one is the fact that the ESIC made certain commitments and then backed out from the same.

22. It is worth noting here that the Hon'ble Guwahati High Court did not go into the merits of the case in respect of date of absorption of employees in WP (C) No. 3464/2007. Instead the Court dismissed the case at the admission stage, noting that the very same subject matter was being heard by the Guwahati Bench of this Tribunal of OA No. 39/2008. In turn the Guwahati Bench of this Tribunal disposed of OA No. 39/2008. "[at admission stage] with direction to the Respondents to treat the copy of present Original Application as a joint representation [of the Applicants] addressed to the Respondents and consider the same/the grievances of the Applicants [as noted in para 1 above] and pass necessary consequential orders expeditiously, preferably within 120 days from the date of receipt of a copy of this order". The ESIC then issued an order giving 1.1.2006 as the date from which the applicants in the said OA stood absorbed to the service of the Corporation. We do not know whether this decision was challenged thereafter. In any case the said cases by

themselves do not substantiate the stand taken by the respondents in the present matter.

23. After carefully considering all relevant matters we conclude that it was not correct to go back on the condition prescribed in paragraph 3 of the draft terms and conditions (Annexure A4 dated 3.6.2005) circulated for acceptance by the respondents by resorting to a much-later circular (Resolution No. 142 dated 22.2.2008). We therefore set aside the office orders dated 11.2.2010 and 7.7.2010 (Annexure A15 and A16) in respect of the applicants alone. The applicants in all the OAs considered herein will stand absorbed to the ESIC with effect from 1.4.2003 and enjoy all consequential benefits. The OA is accordingly disposed of. No costs."

3. The matter is fully covered by our earlier judgments which had gone up to the Hon'ble High Court and the Hon'ble High Court having upheld the order it had gone to the Hon'ble Supreme Court also, and the Hon'ble Supreme Court also after having upheld the matter, the matter has now become concretized.

4. This OA is also allowed on the same terms. Benefits to be extended to the applicant within two months next. No order as to costs."

2. As the same seems to be in compliance with this matter also, this also is allowed to the same extent. The benefits to be made available as stated in the earlier OA. No costs.

(DR. K.B. SURESH)
MEMBER(J)

(C.V.SANKAR)
MEMBER(A)

vmr

Annexures referred to by the Applicants in OA No.139/2020

Annexure-A1: Copy of the deputation list.

Annexure-A2: Copy of order dated 09.01.2020

Annexure-A3: Copy of the representation dated11.9.2018

Annexure-A4: Copy of reply dated 3.10.2018

Annexure-A5: Copy of the representation dated 11.12.2019

….