Central Administrative Tribunal
Cuttack Bench, Cuttack

MA No. 520/2020 in
OA No. 214/2018
And batch cases

This the 17th day of March, 2021

Hon'ble Mr. Pradeep Kumar, Member (A)

1. **MA 520/2020 (in OA No. 214/2018)**

Narasingha Rout, aged about 55 years
S/o Sankar Rout at present working as a SMW Office of C.W.M./CRW/East Coast Railway/Mancheswar, Bhubaneswar, Dist. – Khurda, permanent resident of At /PO-Sovarampur, Dist.-Balasore.

2. **MA 885/2019 (in OA No. 407/2018)**

Lachhaman Parida, aged about 55 years
S/o Late Kandu Charan Parida, resident of Vill-Barimul, PO-Bari- Thengarh,
Via-Dhanmandal, Dist. – Jaipur, at present working as a Welder Grade-I under WPO/CRW/EcoR/MCS.

3. **MA 922/2019 (in OA No. 556/2018)**

Chitaranjan Hota, aged about 57 years, S/o Late Janardan Hota, at present working as Black Smith, Grade-I, resident At – Santol, PO-Golabandha, Via-Phulnakhara, Dist. – Cuttack – 754001.

4. **MA 53/2000 (in OA No. 378/2018)**

Sudhakar Sahoo, aged about 59 years, S/o Raj Kishore Sahoo, at present working Technician-III/CRW/East Coast Railway/Mancheswar, resident of At/PO-Gediapalli Patna, Dist. – Khurda.

5. **MA No. 1000/2019 (in OA No. 379/2018)**

Sailendra Kumar Sahoo, aged about 54 years, S/o Late Dashirathi Sahoo, at present working Painter-III/CRW/East Coast Railway/Mancheswar, resident of AT/PO-Qr. No. F-19/2-Type-Sec-C Railway Colony Mancheswar, East Coast Railway, BBSR, Dist. – Khurda.

6. **MA No. 884/2019 (in OA No. 261/2018)**

Ranjan Kumar Mishra, aged about 53 years, S/o Radhakrushna Mishra, at present working as a Fitter-I Office of C.W.M./CRW/East Coast Railway/Mancheswar, Bhubaneswar, Distt. Khurda, permanent resident of Vill./PO-Potisari, Via-Bhimada, PS-Badasahi, Dist.-Mayurbhanj.

7. **MA No. 924/2019 (in OA No. 337/2018)**

Dharanidhar Mallick, aged about 66 years, S/o Late Natabar Mallick, retired Black Smith, Grade-II, Office of CRW/Mancheswar, permanent residence of Vill-Kadampara, PO-Jhinkiria, Dist.-Cuttack.

8. **MA No. 54/2020 (in OA No. 349/2018)**

Aswini Kumar Khuntia, aged about 57 years, S/o Late Nrusingha Charan Khuntia, resident of Vill-Kotuan, PO-Arilo, Via-Somepur, Dist. – Cuttack, at present working as a SMW Grade-I under WPO/CRW/ECoR/MCS.

9. **MA 847/2019 (in OA No. 219/2018)**

Santosh Kumar Swain, aged about 54 years, at present working as a SMW Office of C.W.M./CRS/East Coast Railway/Mancheswar, Bhubaneswar, Dist.-Khurda,

permanent resident of Vill-Talapada, PO-Bantala, Via-Dhanmandal, Dist.-Jaipur.

....Applicants

(By Advocate: Sh. N.R.Routray)

Versus

1. Union of India, through the General Manager, East Coast Railway, E.Co.R. Sadan, Chandrasekharpur, Bhubaneswar, Dist. – Khurda.

2. Chief Workshop Manager, Carriage Repair Workshop, East Coast Railway, Mancheswar, Bhubaneswar, Dist. – Khurda-751017.

3. Workshop Personnel Officer, Carriage Repair Workshop, E.Co.Rly., Mancheswar, Bhubaneswar, Dist. – Khurda-751017.

.... Respondents

(By Advocate: Sh. S.K.Ojha, Sh. M.B.K.Rao, Sh. B.B.Patnaik, Sh. A.K.Patnaik, Sh. C.R.Mohanty and Sh. T.Rath)

ORDER

Hon'ble Mr. Pradeep Kumar, Member (A):

There are 9 different MAs in each of 9 OAs, wherein the MAs have been referred to the undersigned for decision as there has been a difference of opinion between Hon'ble Member (A) and Hon'ble Member (J) at

Cuttack Bench. All these OAs and MAs are almost similar. The salient details of one of the OA No.214/2018 are narrated herein to appreciate the issue involved.

2. The applicant in OA No.214/2018 was directly recruited and appointed as a skilled artisan in scale of Rs.950-1500 on 29.03.1988. As per the relevant instructions, the applicant was to undergo in-service training for a period of six months and on successful completion of the same, the applicant was to be posted on the regular post carrying this pay scale. It appears that there were instructions that during the said period of training, certain stipend is to be paid and regular pay scale is to be granted only on appointment to the regular post. In the instant case, the applicant claims to have completed his in-service training successfully within the specified six months time and having been successful in the test, he was granted regular appointment belatedly vide orders dated 01.04.1997 as Skilled Grade-III in the said pay scale.

3. The respondents implemented a financial upgradation scheme known as Assured Career Progression (ACP) promulgated by DoPT vide OM dated 09.08.1999, under which someone who has not been promoted for a period of 12 years, was to be granted the pay scale of the next higher post in the departmental hierarchy. The Scheme also envisaged a second financial upgradation on completion of 24 years of service under similar conditions.

The applicant was granted this first ACP by counting 12 years from the date he was regularised on 01.04.1997. The applicant preferred this OA praying that this 12 years time is required to be counted from the date he was initially appointed, i.e., w.e.f. 29.03.1988. Since this was not agreed, he preferred OA No.174/2018, wherein directions were passed on 04.04.2018 to the respondents to pass a reasoned and speaking order. Applicant's request for grant of 1st

ACP w.e.f. March, 2000 was rejected vide orders dated 03.04.2018. Hence this OA No.214/2018 was filed.

4. The applicant brings out that on the same issue, an OA No.192/2010 was allowed earlier vide judgment dated 22.03.2012. The respondents challenged this decision before Hon'ble High Court of Orissa in WP(C) No.12425/2012 which was dismissed vide judgment dated 06.02.2013. Thereafter, it was challenged before Hon'ble Apex Court in SLP (CC) No.11040/2013 which was also dismissed on 02.08.2013.

The applicant has also pleaded that subsequently, certain other similarly placed employees of CRW/Mancheswar filed OAs before Cuttack Bench for same benefit. Relying on order in OA No.192/2010, all these OAs were also allowed. These orders were challenged before Hon'ble High Court of Odisha in WP(C) No.16565/2010 and others. All these writs were dismissed on 01.05.2017.

One another OA No.924/2013 for same grievance was also allowed by Tribunal on 07.04.2016. This was challenged before Hon'ble High Court of Odisha in WP(C) No.19250/2016 which was dismissed on 08.03.2017. Thereafter, this was assailed by filing SLP No.26668/2017 which was also dismissed on 15.09.2017. The review petition No.2/2018 was also dismissed by Hon'ble Apex Court on 17.01.2018.

With this background, the applicant pleads that the decision in OA No.192/2010 was in *rem* and as such the applicant also need to be granted the same benefit.

5. Once the instant OA was filed and notices were issued, the respondents submitted their counter reply wherein a plea was also taken that the OA is severely barred by limitation as the first ACP benefit was granted around one decade back and neither the applicant has preferred an MA seeking condonation of delay nor adequate reasons have been brought out for grant of this condonation.

6. Thereafter, the applicant preferred MA No.520/2020 seeking condonation of delay. This was heard by the Tribunal wherein Hon'ble Member (A) has held as under:

> "9. In view of the above discussions and taking into consideration the fact that the pleadings have been completed in these OAs, we are of the view that it is not possible to dispose of these MAs for condoning delay at this stage without considering the matter on merit.
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> 10. List the OAs on 11.11.2020 for hearing on merit. It is clarified that the written submissions and citations filed by learned counsels after hearing on MAs will be taken into consideration while considering the OAs on merit....."

7. Hon'ble Member (J), however, did not agree and instead held as under:

> "4. ..... Such a claim has been made after a gap of about 18 years. No satisfactory ground has been made in the application to the satisfaction of this Tribunal that there is any sufficient cause for condonation of delay. It is also pertinent to mention here that initially the applicant did not prefer to file any such application for condonation of delay but filed the same after counter affidavit was filed in this case. The applicant has not shown to the satisfaction of this Tribunal at this stage that there is any judgment in REM which will show that the present case is also covered by the said decision, in order to grant the financial benefit in favour of the applicant. Besides that, even if any such decision would have been given then the applicant should be treated as fence sitter. They having not approached this Tribunal in reasonable time and having approached this Tribunal after a

> gap of 18 years for claiming the financial upgradation in question with effect from the year 2000, this Tribunal is not satisfied that this is a good case in which sufficient ground has been made out to condone the delay. In case such a stale claim is allowed to be entertained by this Tribunal after lapse of about 18 years, floodgates of litigation will open up and the same may cause huge financial burden to the respondent department. The delay and laches on the part of the applicant in not approaching this Tribunal expeditiously for seeking the relief in question cannot be overlooked.
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> xxx xxx xxx
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> 7. Accordingly, this MA & other similar MA's filed in other cases have to be dismissed. Hence ordered, the MA's are dismissed being barred by limitation having not been filed within period of limitation as prescribed under rule 21 (?) of this Administrative Tribunal Act but in the circumstances without any cost."

8. Since there is a difference of opinion, the matter pertaining to MA was referred to Hon'ble Chairman of this Tribunal, who had nominated the undersigned to hear and resolve the issue. This nomination was notified by Deputy Registrar (JA) vide letter dated 08.01.2021. The specific issues framed by the Hon'ble Member (A) and Member (J), which need resolution, are reproduced as under:

> "(i) Whether order dated 26.02.2020 passed in MA No.1040/2019 in OA No.202/2019 is applicable to the present OAs or the order dated

17.3.2020 passed in MA No.872/2015 [assed om OA No.596/2015 is applicable.

(ii) Whether it can be concluded at this stage that none of the judgments relied on by the applicants in support of their claim is the judgment in REM which will show that the present OAs are covered by the said judgment.

(iii) Whether it can be concluded at this stage that the applicants have failed to advance sufficient cause for condoning delay in the MAs or further hearing on the claims in the OAs on merit is necessary before reaching such conclusion."

9. In regard to the question of delay, the matter was heard through Video Conferencing on 02.02.2021, 04.02.2021 and 08.02.2021. The applicants were represented by Sh. N.R. Routray and respondents were represented by Sh. S.K.Ojha, Sh. M.B.K.Rao, Sh. B.B.Patnaik, Sh. A.K.Patnaik, Sh. C.R.Mohanty and Shri T.Rath.

9.1 In addition to the judgments relied upon, the applicant also brought out that another OA No. 763/2014 on the same grievance was allowed on 14.11.2017. This was challenged in WP(C) No. 6963/2018 before Hon'ble High Court where CAT judgment was upheld vide orders dated 03.01.2019. It

was challenged before Hon'ble Apex Court in SLP No. 28896/2019 and SLP No. 32999/2014. A common judgment was passed on 22.10.2019 and CAT order was also upheld. Delay was condoned by Apex Court.

Applicant also relied upon :

(i) Judgment dated 03.03.2011 in Krishna Chand Verma Vs. UOI by Hon'ble High Court of Himachal Pradesh, CWP-5683/2010.

(ii) AIR 1966 SC 1942 B.N. Nagraj vs. State of Mysore and others

(iii) Amrit Lal Giri Vs. Collector of Central Excise

(iv) K.C. Sharma Vs. UOI, 1997 Vol VI SCC 721

(v) Hon'ble High Court of Orissa judgment dated 01.05.2017 in WP (C) No.6963/2018.

Applicant also pleaded that in terms of Hon'ble Apex Court judgment in **Tukaram Kana Joshi Vs. Maharashtra Industrial Corpn,** 2013 (1) SCC 353, it was held that there can be no hard and fast rule about limitation and substantive justice is more important.

9.2 The respondents pleaded that instant case is highly time barred. The decision in OA No.192/2010 was delivered on 22.03.2012. Thereafter the challenge before Hon'ble Apex Court was also decided on 02.08.2013. However, the applicant did nothing to claim his right or relief and raised the challenge in OA No. 174/2018 only followed by OA No. 214/2018, i.e. after five years. The applicant has also not brought out any reason for such delays in filing OA No. 214/2018 as well as in MA No.520/2020 even though a specific objection of limitation was raised. Therefore, this is a case of someone being not only a fence sitter but also of waiver by acquiescence. There is thus no merit in MA seeking condonation of delay.

It was also pleaded that the judgment in OA No.192/2010 being in rem, is also not borne out of facts.

Further, Hon'ble Apex Court in **D.C.S. Negi Vs. UOI** 2019 (1) SCC (L & S) 321, have laid down that question of limitation needs to be decided first

beforehand. It was also brought out that the five judgments relied upon by applicant (Para 9.1 supra) are in different context. And once Apex Court has defined the parameters in **State of UP Vs. A.K. Srivastava**, it is para 22 (2) of the judgment thereof, which is attracted in instant case.

The respondents also relied upon following :

(i) Chennai Metropolitan Water Supply & Sewerage Board Vs. T.T. Murali Babu by Hon'ble Apex Court, wherein it was held that delay and laches should not be brushed aside.

(ii) Biswaraj & Anr. Vs. Spl. Land Acquisition Officer wherein it was held that limitation has to apply with all its rigours.

(iii) State of Uttaranchal Vs. Shiv Charan Singh Bhandari 2013 (12) SCC 179

(iv) UOI Vs. N.K. Sarkar 2010 Vol. II SCC 59.

It was finally pleaded that instant case is highly time barred and MA needs to be dismissed.

10. ACP Scheme was promulgated vide DoPT OM dated 09.08.1999, which envisaged two financial upgradations on completion of 12 years and 24 years of service, if someone was not promoted in the meanwhile whereas he/she was fit otherwise. The relevant clause as contained in para 3.2 in this circular and at para 5.2 at Annexure-II thereof, reads as under:

> "3.2 'Regular Service' for the purpose of the ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of relevant Recruitment/Service Rules.
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> xxx xxx xxx
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> 5.2 Residency periods (regular service) for grant of benefits under the ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit."

This scheme was adopted and implemented by respondents. It was pleaded that in accordance with ACP scheme, it is service in regular post that only can be counted towards stagnation.

11. It is noted that while OA No.192/2010 was under adjudication, the respondents had pleaded to decide it in terms of an earlier judgment in another OA

No.190/2010 on the same grievance, wherein reliance was placed on an establishment Serial no.109/92 dated 22.06.1992 issued by respondents. It is noted that this Serial is a clarification of an earlier establishment Serial no.45/1991 dated 07.03.1991. In this background, following orders were passed in OA No.190/2010:

> "5. In this OA, the dispute is in regard to counting the period of service from the date of initial engagement of the applicant as Trainee Artisan till completion of his training period i.e. 02.09.1991 followed by regular absorption. The applicant joined as Trainee Artisan w.e.f. 5.4.1988 and as it appears as per the order of this Tribunal dated 15.10.1990 he was regularised in the existing skilled Artisan Gr.III post vide order under Annexure-A/2 dated 3.9.1991 with immediate effect in the existing skilled artisans Gr.III with usual allowances. Hence it has been contended by learned counsel for the applicant as the applicant was regularized and granted all benefits with effect from the date when he joined as trainee artisan non counting said period of service is not sustainable in the eyes of law.....
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> 6. None of the parties have produced the copy of the order dated 15.10.1990 of this Tribunal. However it is the specific case of the applicant that the applicant has been allowed all the service benefits except counting the period for the purpose of grant of the ACP benefits. If it is so, then non counting the said period for the purpose of counting the ACP benefit is not sustainable. But in absence of any concrete material in this regard, we are unable to take any positive view on the same. But we find that the order of rejection under Annexure-A/8 is without answering the specific points raised by the Applicant in this regard in his representation under Annexure-A/7.

Hence we are constrained to quash the said order of rejection under Annexure-A/8 and the same is accordingly quashed and the Respondents are hereby directed to reconsider the representation of the applicant at Annexure-A/7 and pass a reasoned order within a period of 60 (sixty) days from the date of receipt of copy of this order."

12. The Tribunal gave following directions on 22.03.2012 in OA No.192/2010:

"4. We have heard learned counsel for both sides and perused the materials placed on record. Grant of financial up gradation under ACP being a recurring cause of action, we do not find any justification of the stand of the Respondents that this OA is liable to be dismissed being hit by the law of limitation. Hence the said plea is hereby over ruled.

xxx xxx xxx

6. .....During the course of hearing, Learned standing Counsel for the Respondents produced before us the service sheet of the applicant. On perusal of this document it reveals that increment has been granted to the applicant on Annual basis w.e.f. 29.03.1988 in terms of Establishment Srl. No. 109/92 and his pay was accordingly refixed. We have perused the Estt. Srl. No. 109/92 where under the Railway have decided that the period of training will be treated as duty for the purpose of grant of increments to those railway servants who have undergone such training on or after 01-01-1986. It has further been provided therein (Estt.Srl.No.109/92) that the benefit of counting the period for pay will be admissible on notional basis from 1.1.1986 and on actual basis from 01-10-1990. In view of the above the contention of the Respondents that the period spent by the applicant a Trainee Artisan and hence is not reckonable for the purpose of ACP cannot be accepted. Since the period from 1988 onwards has been treated as duty and pay has been refixed allowing annul

> increments though on notional basis, there cannot be any ambiguity on the issue that the said period of service cannot be taken into account for the purpose of reckonable service for grant of ACP.
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> 7. As far as the contention of the Respondents' counsel that this case being covered by the order of this Tribunal in OA No. 190/10, can be disposed of by leaving the matter to the authorities to examine the case of the applicant, as directed in the aforesaid OA, we do not find justifiable reason to do so because in the earlier OA, we had no occasion to peruse the Estt. Sl. No. 109/92 and the service sheet of the said applicant while passing order in OA No. 190/10.
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> 8. In view of the discussions made above, the order of rejection at Annexure-A/7 cannot be held to be justified and the same is accordingly quashed. The Respondents are hereby directed to count the period of service of the applicant from 29.03.1988 for the purpose of grant of ACP and allow the applicant financial benefits under ACP if he fulfils the other conditions required for grant of financial up-gradation under ACP. Respondents are further directed to complete the entire exercise within a period of 90 days from the date of receipt of copy of this order."

The background and establishment serial numbers 45/1991 and 109/92 are brought out in para 15 below.

13. It is this direction in OA No.192/2010, (Para 12 supra), which has been pleaded by the applicant to be a direction in *rem* and thus attracting para 22 (1) of **State of U.P. vs. Arvind Kumar Srivastava and**

others, (2015) 1 SCC (L&S) 191, as decided by Hon'ble Apex Court and the applicant pleads that even though MA No.520/2020 seeking condonation of delay has been filed since this objection was raised by respondents, but the question of delay in the instant case, is not relevant and his OA no.214/2018 needs to be decided in terms of para 22 (1) of the said judgment by Hon'ble Apex Court.

As against this, the respondents have pleaded that the applicant's case is clearly barred by limitation as he had been a fence sitter and the judgment in OA No.192/2010 cannot be said to be in *rem* as there is no such direction there. Accordingly, his case needs to be covered under para 22 (2) of the said judgment by the Hon'ble Apex Court.

The observations made by the Hon'ble Apex Court in **State of U.P. vs. Arvind Kumar Srivastava** in para 22 (1 to 3) thereof, referred by rival parties, in this OA, read as follows:

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:

(1) Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

(2) However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

(3) However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma &Ors. v. Union of India (supra). On the other hand, if the judgment of the Court was in personam holding

> that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

14. With this background, the position as it emerges is as follows:

14.1 The respondent department recruits skilled artisan on fresh direct recruitment basis to the pay scale of Rs.950-1500 in technical streams as well as other staff in the same pay scale for non-technical stream also. The staff in technical stream have training (either in a training school and/or in-service training) for longer duration (in the instant case, there is in-service training for six months) which an employee must successfully complete before being assigned duty on a regular post. The staff in non-technical stream either do not have training or such training period is comparatively much smaller.

14.2 All of the staff (Tech as well as non-Tech stream) were paid some kind of stipend during training and pay scale was granted only on being assigned a regular post.

14.3 The period spent on such training, prior to being put on a regular post, was not being counted as eligible service for further promotion or for financial upgradation (e.g. under ACP scheme introduced on 09.08.1999, Ref. para 10 supra).

14.4 Thus, the staff of technical stream were having a permanent set back, vis-à-vis their batchmates in non-technical stream, throughout their service in respect of their promotion as well as financial upgradation due to comparatively longer duration of training.

15. This issue of permanent set back, was raised in the joint staff council meeting by the staff side. After considering the same, certain directives were issued by the DoPT vide their OM No.16/16/89-Estt. (Pay-I)

dated 22.10.1990 to address the issue. This reads as under:

> "The undersigned is directed to say that under FR-26 only duty in a post on time scale counts for increments in that time scale. As per FR 9 (6) (a) (i) the services as a probationer or apprentice is treated as duty provided that service as such is followed by confirmation. As such, the training period during which a Government servant is not remunerated in the scale of pay attached to the post cannot be treated as duty.
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> 2. The Staff-side in the National Council (JCM) have raised a demand that the training period should be counted for the purpose of drawing increments as otherwise the concerned staff, particularly the non-gazetted in the technical Departments. Where the training period is a long one is put to perpetual disadvantage vis-a-vis the staff in non-technical jobs who are recruited along with technical staff in the same scale of pay.
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> 3. The matter has been considered in the National Council (JCM) and it has been decided that in case where a person has been selected for regular appointment and before formally taking over charge of the post for which selected person is required to undergo training, training period undergone by such a Govt servant whether on remuneration of stipend for otherwise may be treated as duty for the purpose of drawing increments.
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> 4. These orders take effect from the 1st of the month in which this OM is issued.
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> xxx xxx xxx"

This, in turn, was adopted by Ministry of Railways also and issued vide RBE No.25/91 dated 04.02.1991. The respondents circulated it further vide establishment Serial no.45/1991 dated 07.03.1991. Subsequently, a clarification was issued by Ministry of Railways vide RBE No.89/92 dated 02.06.1992. This, in turn, was also circulated by respondents vide establishment Serial no.109/92 dated 22.06.1992. This reads as under:

> "Please refer to Board's letter of even number dated 4.2.91 and subsequent clarifications thereto dated 8.8.91, addressed to South Central Railway and circulated to all the Railways under Board's letter dated 15.11.91 on the above subject wherein it was clarified that Govt. of India's orders regarding counting of training period for the purpose of increments are effective from 1.10.1990 and the training period before 1.10.1990 will, therefore, not count for the purpose of increments. This matter has since been considered in the National Council/JCM and it has been decided with the approval of the President that the benefit of treatment of such training as duly for the purpose of increments may be allowed in the case of those railway servants also who had undergone such training on after 1.1.1986. However, in such cases, the benefit of counting period for pay will be admissible on notional basis from 1.1.1986 and on actual basis from 1.10.1990.
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> xxx xxx xxx"

These two establishment serial nos. are referred earlier in para 11 & 12 above.

16. From the foregoing, it becomes clear that in case the staff had undergone training after 01.01.1986 and completed it successfully within the time period allocated, pay fixation in regular pay scale, was to be granted on notional basis from 01.01.1986 and on actual basis from 01.10.1990 onwards. Arrears, wherever due, were also to be paid on this basis.

17. As brought out above, it is apparent that OA No.192/2010 was decided in the background that the training ought to have been completed successfully in the time limit specified, i.e., there should be no delay or failure in completing the training or in respect of regular posting of an employee, attributable to him/her.

It needs to be emphasized here that this aspect is inherent in the decision in OA No.192/2010, which relied on establishment Serial No.109/92, which in

turn was a clarification on another establishment Serial no.45/91.

18. In view of the foregoing, the decision in OA No.192/2010 was in facts and circumstances of that case and it cannot be said to be in *rem*, as there is no such direction to this effect in OA No.192/2010. Further, if there has been any delay attributable to an employee, in regard to training or regular posting, this judgment is not even applicable.

19. In regard to the question of delay in raising a claim or benefit of a decision and whether one has been a fence sitter, it is necessary to bring out the background of the Hon'ble Apex Court judgment in **State of U.P. vs. A.K.Srivastava** (supra) which is relied upon by the opposite parties in this case.

In this connection, it is relevant to bring out the point at issue under adjudication of Hon'ble Apex Court in **State of U.P. v. A.K. Srivastava** (supra),

which has been relied upon by applicant as well as the respondents. Relevant issue under adjudication and the conclusion arrived at in the observations recorded in para 22 (1 to 3), as recorded in this judgment, is reproduced below:

> "It was sometime in the year 1986 that the Chief Medical Officer, Varanasi, had advertised certain posts of Homeopathic Compounder and Ward Boys in various newspapers. Respondents herein applied for the said post and participated in the selection process. After the interviews, they were kept in the waiting list. Those who were in the select list were offered the appointments. Some of those candidates who were higher in merit and were offered the appointments did not join. For this reason, candidates in the waiting list were issued appointment letters by the then Chief Medical Officer. These included the respondents herein as well. However, before the respondents could join their duties, new Chief Medical Officer assumed the charge and blocked their joining. Thereafter, vide order dated June 22, 1987 he even cancelled the said appointments made by his predecessor for these Class-III and Class-IV posts i.e. Homeopathic Compounder and Ward Boys.
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> The respondents filed the suit in the Court of City Munsif, Varanasi challenging the aforesaid orders dated June 22, 1987 cancelling their appointments by the new Chief Medical Officer. This suit was registered as Suit No. 695/1987. It appears that this suit could not be taken to its logical conclusion as same was dismissed for non-prosecution because of non appearance of the advocate of the respondents. The respondents herein did not take any further steps in the said suit either by filing application for restoration of the suit or challenging the said order in appeal. In fact, there was a complete quietus on the part of these respondents.

It so happened that a few other candidates who were also affected by the same orders dated June 22, 1987, whereby their appointments were cancelled, approached the Tribunal challenging the legality, validity and proprietary of the said order on several grounds. One of the grounds taken was that before cancellation of their appointments, no show-cause notice was given to them. The Tribunal decided the case filed by them in their favour vide judgment dated August 16, 1991 holding the impugned order dated June 22, 1987 as illegal and void and quashed the same. Against the order of the Tribunal, the State filed the writ petition in the High Court. This writ petition was dismissed on August 27, 1992 thereby confirming the order passed by the Tribunal. The Special Leave Petition filed by the State met the same fate as that was also dismissed by this Court on August 12, 1994. In this manner, the Tribunal's order dated August 16, 1991 attained finality and the persons who had approached the Tribunal got the appointments.

The respondents herein waited all this while, that is till the dismissal of the Special Leave Petition in the year 1994. It is only thereafter, in the year 1995, the respondents filed the writ petition for giving appointments to them as well on the strength of the judgment of the Tribunal given in the case of other persons, claiming parity. This writ petition was rejected vide order dated June 06, 1995 by the Chief Medical Officer. Against this rejection the respondents approached the Tribunal by filing Claim Petition No. 96/1996. As mentioned above, the said petition was allowed by the Tribunal on the ground that they were in the same position in which the other successful candidates were given relief and as such these respondents were also be entitled to the same relief. The High Court has affirmed the order of the Tribunal.

The moot question which requires determination is as to whether in the given case, approach of the Tribunal and the High Court was correct in extending the benefit of earlier judgment of the Tribunal, which had attained finality as it was affirmed till the Supreme Court. Whereas the appellants contend that the respondents herein did not approach the Court in time and were fence-

sitters and, therefore, not entitled to the benefit of the said judgment by approaching the judicial forum belatedly.

xxx xxx xxx"

Thereafter, the Hon'ble Apex Court gave the directions contained in para 22 (1 to 3) of the judgment (already reproduced in para 13 supra). This was followed by directions in the said case as under:

"Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above.

For all the foregoing reasons, we allow the appeal and set aside the order of the High Court as well as that of the Tribunal. There shall, however, be no order as to costs."

The plea put forth by State that applicants were fence sitters and their case is barred by limitation, was therefore, upheld by Hon'ble Apex Court.

20. In instant case, the applicant had not raised any claim or redressal even after decision by Hon'ble Apex Court on 02.08.2013. The first OA No. 174/2018 was filed in 2018 only. Despite specific plea of limitation being raised, no reasons are brought out even now for inaction all these years.

The judgment relied upon in OA No. 192/2010, is said to be in rem and thus attracting para 22 (1) of Hon'ble Apex Court judgment in **State of UP Vs. A.K. Srivastava** (Para 13 and 19 supra). However, neither is there any such direction in OA No. 192/2010 nor relief was granted to candidates in **State of U.P. Vs. A.K.Srivastava**. Further, the background of decision in OA No. 192/2010 was establishment serial 109/92 which in turn was a clarification on earlier 45/91 (Para 17 supra). Thus the decision in OA No. 192/2010 and

other OAs are in facts and circumstances of those cases where challenge to denial by respondents was raised by those petitioners well in time without much delay.

In instant case, the request to seek redressal of the grievance by way of challenge to denial is belated and no reasons are brought out to condone the delay despite specific objection being raised. In these circumstances, the delay cannot be condoned.

21. The issues referred to undersigned are accordingly answered as under:

(i) The applicability of a particular case being covered under para 22 (1) or 22 (2) as observed by Hon'ble Apex Court in **State of U.P. vs. Arvind Kumar Srivastava** (para 13 & 19 supra) will depend on facts and circumstances of each case as explained in (ii) and (iii) below.

(ii) The applicability of judgment in OA No.192/2010 in similar cases is contingent upon two aspects namely (a) there being no delay attributable to an employee in

completing successfully the training vis-a-vis the time specified and in respect of being assigned on a regular post, and (b) as to whether the case is not barred by limitation, if challenge is belated. The judgment in OA No.192/2012 is, therefore, not in *rem*. The circumstances of each case need to be examined based on facts in each case.

(iii) The observations made by Tribunal in para (4) of the judgment in OA no.192/2010 (para 12 supra), cannot be quoted out of context for all cases. The applicants need to show some proactiveness in claiming their rights. They cannot sleep over them and raise belated claims as such claims can unsettle the status holding fort since long. This aspect has become amply clear in the judgment in **State of U.P. vs. A.K. Srivastava** by Hon'ble Apex Court (para 19 supra) where fence sitters were denied relief.

The applicant had not agitated for similar benefit, as in OA No.192/2010 which became final in 2013, in time. He raised the claim in 2018 only and has failed

to give reasons to condone delay despite specific objection being raised. The MA No.520/2020 seeking this condonation, thus, does not succeed and is accordingly dismissed.

22. The issue is answered accordingly.

(Pradeep Kumar)
Member (A)

/sunita/