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O.A.No.41 of 2011  
Cuttack this the 2<sup>nd</sup> day of February 2015

Khetramohan Nayak...Applicant

-VERSUS-

Union of India & Ors...Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not? *yes*
2. Whether it be referred to CAT, PB, New Delhi for being circulated to various Benches of the Tribunal or not? *yes*

*R.C. Misra*  
(R.C.MISRA)  
MEMBER(A)

*A.K. Patnaik*  
(A.K.PATNAIK)  
MEMBER(O)

CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH, CUTTACK

O.A.No.41 of 2011

Cuttack this the 2<sup>nd</sup> day of February, 2015

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HON'BLE SHRI A.K.PATNAIK, MEMBER(J)

HON'BLE SHRI R.C.MISRA, MEMBER(A)

Khetramohan Nayak

Aged about 54 years

S/o. Somnath Nayak

At present working as a Technician Grade-III(SMW)

C.No.880 under Senior Section Engineer(W/S)-POH,CRW

Mancheswar

Dist-Khurda

...Applicant

By the Advocate(s)-M/s.N.R.Routray

S.Mishra

T.K.Choudhury

-VERSUS-

Union of India represented through

1. The General Manager  
East Coast Railway  
Rail Vihar, Chandrasekharpur  
Bhubaneswar  
Dist-Khurda

2. Chief Workshop Manager  
Carriage Repair Workshop  
East Coast railway  
Mancheswsar  
Bhubaneswar  
Dist-Khurda

3. Workshop Personnel Officer  
Carriage Repair Workshop  
East Coast Railway  
Mancheswar  
Bhubaneswar  
Dist-Khurda

...Respondents

By the Advocate(s)-Mr.D.K.Behera



ORDERR.G.MISR, MEMBER(A)

This Original Application is an off shoot of O.A.No.436 of 2010 which was disposed of by this Tribunal at the stage of admission vide order dated 19.8.2010 directing Respondent No.2 to consider the representation of the applicant as at Annexure-A/7 and pass <sup>R</sup>a reasoned order within a stipulated time frame. In the above background, the Respondents have disposed of the representation vide communication dated 29.10.2010(A/8) wherein his request ~~s~~ for grant of 1<sup>st</sup> financial upgradation under the Assured Career Progression Scheme(ACPS) with effect from 4.4.2000 has been rejected. In the circumstances, the applicant in the present O.A. has sought for the following relief.

- i) To quash the order of rejection dated 29.10.010 under Annexure-A/8.
- ii) To direct the Respondents to grant 1<sup>st</sup> financial upgradation w.e.f. 4.4.2000 and pay the differential arrear salary from 4.4.2000 to 13.1.2004 by refixing his pay in the scale of Rs.4000-6000/-.

2. The sequence of events as revealed from the O.A. are that initially applicant was appointed as Skilled Artisan(SMW) under the Respondent No.2 with effect from 4.4.1988. On completion of successful training, he was absorbed against the working post in the scale of Rs.950-1500/- with usual <sup>is L</sup>

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allowances vide order dated 14.1.1992. While working as such, based on the recommendations of 5<sup>th</sup> Central Pay Commission, Assured Career Progression (in short ACP) Scheme came into effect vide A/3 dated 01.12.1999 to deal with the problem of genuine stagnation and hardships faced by the employees due to lack of adequate promotional avenues. The Scheme provided that 1<sup>st</sup> financial upgradation shall be allowed after 12 years regular service and the 2<sup>nd</sup> financial upgradation after 12 years regular service from the date of 1<sup>st</sup> financial upgradation subject to fulfillment of the prescribed conditions provided that no promotions during the aforesaid periods have ~~not~~<sup>l</sup> been availed of by an employee. Accordingly, vide Office Order dated 6.5.2004(A/5), applicant was granted financial upgradation to the next higher grade in scale Rs.4000-6000/- with effect from 14.1.2004. While the matter stood thus, applicant submitted a representation dated 2.3.2009 to the Respondents claiming the 1<sup>st</sup> ACP to be ante-dated to 4.4.2000 and having received, no response, he moved this Tribunal in O.A.No.436/2010 and as stated above, this Tribunal disposed of the said O.A. on 19.8.2010 at the stage of admission itself. Pursuant to the direction of this Tribunal, the Respondents considered the matter and rejected the claim of the applicant. Hence, this Original Application.

3. In the counter reply, Respondent-Railways, at the outset, have raised an objection regarding the maintainability of this



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O.A. on the ground of limitation. Relying on the decision of the Hon'ble Supreme Court in U.P.Jal Nigam & Anr. Dar.Jaswant Singh reported in (2007) 1 SCC (L&S) 500 and in Bhakra Beas Management Board Drs.Krishna Kumar Vij & Anr. (2010) 2 SCC (L&S) 694, Respondents have repudiated the claim of the applicant to extend the similar benefits on the ground <sup>of P</sup> the O.A. being barred by limitation. It has been submitted that the applicant was appointed as trainee with stipendiary pay and he was regularized against working post w.e.f. 14.1.1992. The period from 4.4.1988 to 13.1.1992 was treated as trainee. Therefore, as per extant rule regular service of 12 years from 14.1.1992 was taken into account for granting 1<sup>st</sup> financial upgradation under the ACP Scheme with effect from 14.1.2004. In the fitness of things, we would like to quote hereunder the relevant points as mentioned by them while rejecting the claim of the applicant vide A/8.

"In this regard it is mentioned that you were appointed as trainee Skilled Artisan in scale Rs.950-1500 / PB with GP 1900 (Vth PC) on 04.04.88 and regularized against working post w.e.f. 14.01.92. In term of para 4(Annexure) of Estt.Srl.No.288/99, 1<sup>st</sup> financial upgradation was granted to scale 4000-600/- w.e.f. 14.01.92 <sup>2004</sup> after completion of 12 years regular service from date of regularization, i.e., 14.01.92, under ACP scheme vide this office order dtd. 06.05.2004. As per extant rule the period from 04.04.88 to 14.01.92 was not treated as regular service and the same was not taken into account as qualifying service from 1<sup>st</sup> financial upgradation under ACP 1999.

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Secondly the Railway Board's clarification dtd. 31.03.2004 (EBE No.69/2004) as mentioned by you in your representation says regarding extension of the scope of the ACP scheme to the staff appointed as casual labour. In the said letter Railway Board has decided to count 50% of temporary status of casual labour service on absorption as regular employment for granting financial upgradation in the ACP Scheme. It means 50% of the period between temporary status and regularization in case of casual labour shall be taken into account while computing the qualifying service for granting financial upgradation of such nature staff. But in your case it is not applicable as you were not appointed initially as casual labour.

As regards granting financial upgradation under MACPS in terms of railway Board's letter EBE NBo.101/2009, it is to say that as per para-9 of said letter the regular service shall be counted for the purpose of granting financial upgradation under MACPS. Accordingly you will be eligible for 2<sup>nd</sup> financial upgradation 14.01.2012 under MACPS on completion of 20 years regular service from 14.01.92.

Therefore, as per rule you have been granted 1<sup>st</sup> financial upgradation under ACP Scheme w.e.f. 14.01.2004 and 2<sup>nd</sup> financial upgradation will be granted on completion of 20 yrs. Service from 14.01.92, i.e. on 14.01.2012. The question of payment of differential arrears as mentioned by you does not arise".

4. Applicant has filed a rejoinder to the counter more or less urging the same points as in the O.A.
5. We have heard the learned counsel for both the sides and perused the materials on record. We have also gone through the written notes of submission filed by the applicant. In the



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written notes of submission, applicant has mentioned that in similar matter in O.A.No.192/2010, this Tribunal had granted similar relief as claimed by the applicant herein. The order dated 22.03.2012 of this Hon'ble Tribunal in O.A.No.192/2010 having been appealed of by the Respondent-Railways in W.P. ( C ) No.12425/2012, the Hon'ble High Court of Orissa dismissed the said Writ Petition. Thereafter, the Respondent-Railways carried the matter to the Hon'ble Supreme Court in SLP No.11040/2013, which too was dismissed vide order dated 2.8.2013. According to applicant, the this matter being covered by the decision of this Tribunal in O.A.No.192/10, similar order <sup>passed</sup> should be allowing the O.A..

6. We have also gone through the order dated 22.3.2012 of this Tribunal in O.A.No.192/2010. In the O.A. cited supra, applicant had initially joined as Trainee Artisan in the trade of Motor Mechanic on 29.3.1988 with stipendiary pay of Rs.950/- per month, which, however, by virtue of order dated 3.9.9<sup>1991</sup>, he was allowed the scale of Rs.950-1500/- from the date of the order. Therefore, the point in issue before the Tribunal was whether the applicant's service from 1988 to 1991 could be taken into account for the purpose of grant of ACP.

7. Upon verification of the service sheet, the Tribunal found that the applicant had been granted annual increment with effect from 29.3.1988 in terms of Estt.Srl.No.109/92 and his pay was accordingly re-fixed. Estt.Sr.No.109/92 states that the




  
*Railway have decided that the period of training will be treated as duty for the purpose of grant of increment to those railway servants, who have undergone such training on or before 1.1.1986. The said Estt.Srl. stipulates that the benefit of counting the period of pay will be admissible on notional basis from 1.1.1986 and <sup>an</sup> actual basis from 1.10.90.*
  
 Based on the above, the Tribunal came to the conclusion that since the period from 1988 onwards has been treated as duty and pay has been re-fixed allowing annual increments though on notional basis, there cannot be any <sup>(sic) p.</sup> 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 and accordingly, directed the Respondents to count the period of service of the applicant from 29.3.1988 for the purpose of grant of ACP and allow the applicant financial benefits and ACP, if he fulfills the other conditions required for grant of financial upgradation under the ACP.

8. The above decision of this Tribunal was the subject matter of challenge in W.P. ( C ) No.12425/12 before the Hon'ble High Court of Orissa. The Hon'ble High Court of Orissa vide order dated 6.2.2013 dismissed the said Writ Petition in the following terms:

"The petitioner-Railways in this writ petition has assailed the order dated 22<sup>nd</sup> March, 2012 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.192 of 2010.

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The opposite party filed the aforesaid Original Application claiming the benefits under the ACP Scheme. Learned Tribunal on perusal of the said Scheme and on considering the materials available on record as well as the submissions made before it, applying the Establishment Sl.No.109 of 1992 issued by the Railways for calculating increment, found that the opposite party is entitled to the benefits under the ACP Scheme and issued directions in that regard. Mr.Mishra, learned counsel appearing for the petitioners submits that the learned Tribunal could not have applied the said Establishment Sl.No.109 of 1992 while considering the case of the opposite party with regard to grant of ACP and further submits that the ACP Scheme specifically provides in paragraph 4 that the first financial upgradation under the ACP Scheme shall be allowed after 12 years of regular service. Basing on the said clause Mr.Mishra submits that the opposite party was under training and the training period cannot be calculated as regular service for the purpose of getting the benefits under the ACP Scheme. On perusal of clause 5.2 of the ACP Scheme, we find that 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. It is needless to say that the employees on being appointed as direct recruits were sent for training. Therefore, the period for which the opposite party was under training has to be calculated for the purpose of grant of ACP. We find no error to have been committed by the learned Tribunal in passing the impugned order. The writ petition, therefore, being devoid of merit, is dismissed".



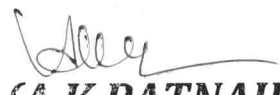
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9. The above order of the Hon'ble High Court of Orissa on being appealed of in SLP No.11040/13 is said to have been dismissed by the Hon'ble Supreme Court.

10. We are convinced that the facts of the present O.A. are quite similar to the facts in O.A.No.192/10 as already decided by this Tribunal, confirmed by the Hon'ble High Court, against which SLP has been dismissed by the Hon'ble Apex Court. Since in our considered view, the point in issue is no longer res integra, we do not feel <sup>o</sup> inclined to take a divergent view from the view already taken by this Tribunal. In the circumstances, we quash the impugned communication dated 29.10.2010(A/8) and direct the Respondent-Railways, subject to fulfillment of other conditions, to take into account the period from 4.4.1988 to 13.1.2992 as regular service for the purpose of grant of 1<sup>st</sup> ACP in favour of the applicant from 4.4.2000.

10. As regards the point of limitation as urged by the Respondents, we would like to note that since the claim of ACP is purely personal to the employee concerned and by the denial of such benefit, the applicant is losing financial benefits every day, limitation would not strictly apply to this case.

In the result, the O.A. is allowed as above. No costs.

  
(R.C.MISRA)  
MEMBER(A)

  
(A.K.PATNAIK)  
MEMBER(J)