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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O. A. No. 72 of 2011
Cuttack the 9th day of January, 2014

Laxman @ Laxman Mandia ..... Applicant
Versus
Union of India & Ors. ..... Respondents

FOR INSTRUCTION

1. Whether it be referred to reporters or not? ✓
2. Whether it be circulated to PB,CAT,New Delhi for circulation to all the Benches or not? ✓

(R.C.MISRA)
Member(Admn.)

(A.K.PATNAIK)
Member (Judl.)

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CORAM
THE HON'BLE MR. A.K. PATNAIK, MEMBER (J)
THE HON'BLE MR.R.C.MISRA, MEMBER (ADMN.)

.....

Laxman @ Laxman Mandia aged about 67 years, S/o. Late Kubera Mandia, permanent resident of Vill: Chainpur, PO. Motari, PS. Delang.

...Applicant

(Advocates: M/s.R.K.Samantsinghar, A.K.Mallick,S.K.Ray,D.Paikray)

VERSUS

Union of India Represented through –

1. General Manager, East Coast Railway, Rail Vihar, AT/PO/PS-Chandrasekharpur, Bhubaneswar, Dist. Khurda.

2. The Divisional Railway Manager, East Coast Railway, Khurda Road Division, At/Po/Ps.Jatni, Dist. Khurda.

3. The Senior Divisional Personnel Officer, East Coast Railway, Khurda Road Division, At/Po/Ps.Jatni, Dist. Khurda.

.....Respondents

(Advocate:Mr.R.N.Pal)

O R D E R

A.K. PATNAIK, MEMBER (JUDL.)

The case of the Applicant, in nut shell, is that in the year 1963 to 1964 he had worked in the Railway on casual basis

for a period of 373 days. Thereafter, as a retrenched casual employee, he was re engaged in the Railway on 2.8.1986 and conferred with temporary status entitling him CPC scale of pay w.e.f. 01.08.1987 and he was allowed to work continuously against regular establishment post w.e.f. 10.05.1990 and while working as Senior Trackman, on reaching the age of superannuation, he retired from service w.e.f. 31.01.2003. He having been denied the pension and other pensionary benefits, on the ground of non-qualifying service, had earlier approached this Tribunal in OA No. 115 of 2006 which was disposed of on 11th November, 2008 and in pursuance of the said order of this Tribunal, Respondents considered the case of the applicant but rejected the claim of the applicant for sanction of pension as he did not possess minimum 10 years qualifying service so as to entitle him pension and intimated the said fact to the applicant vide letter dated 08.12.2008. Being dis-satisfied with the reasoning assigned in support of rejecting his prayer for pension, the applicant has approached this Tribunal in the second round of litigation with the following reliefs:

"In the facts and circumstances stated above, the Hon'ble Court may kindly admit the original application and on hearing both the sides pass necessary orders by directing the respondents to take into consideration, the temporary status service of the applicant starting from 01.08.1987 to 10.05.1990 into consideration and pass appropriate orders granting pension and gratuity to the applicant and if necessary the Hon'ble Court may kindly quash the Annexure-A/2 in the interest of justice and further direct the Respondents to calculate the temporary status service of the applicant at par with the other similar situated persons who are getting the pension in view of the order of this Hon'ble Court as well as Hon'ble High Court of Orissa and further direct to pay interest as delay is attributable to the Respondents."

2. Respondents filed their counter stating therein that the applicant was engaged as Casual Gangman on daily rate basis in different broken period's upto 01.5.1990. Considering his past engagement from time to time, the competent authority conferred temporary status, on CPC scale, to the Applicant w.e.f. 10.5.1990. After attaining temporary status, the Applicant was posted as Jr. Gangman on 2.5.1996 on regular basis against permanent post, confirmed w.e.f. 02.5.1997, promoted to the post of Sr. Gangman in scale of Rs.2650-4000/- w.e.f. 12.7.2002 and retired from service w.e.f. 31.1.2003. Rule 31 of the Railway Services (Pension) Rules, 1993 provides that "in respect of Rly Servant in

service on or after 22.8.1968, half of the service paid from contingencies shall be taken into account for calculating the pensionary benefits on absorption in regular employment". In note 2 of the said Rule 31 it has been provided that 'the expression absorption in regular employment means absorption against a regular post'. Railway Board issued instruction Vide letter No. E (NG)/II/78/C1/12 dated 14.10.1980/Estt. Srl. No. 239/80 provides that only half of the service from the date of attaining temporary status to the date of regularization can be counted as qualifying service for pension. On attaining temporary status, the applicant got CPC scale of pay and earned increments. The employees who worked after attaining the temporary status are not treated as regular employee without being regularized against permanent post. A Railway employee is entitled to pension if he/she has possessed minimum qualifying service of ten years or possessed qualifying period of service of 9 years and 9 months so as to be rounded upto 10 years in order to be eligible for pension. Otherwise in case of an Rly servant retiring in accordance with the rules before completing the qualifying service of 10 years the

amount of service gratuity shall be calculated @ ½ month's emoluments for every completed six monthly period of service in lieu of pension. As the applicant did not possess the qualifying service, as per the Rules he was sanctioned and paid DCRG and service gratuity. The breakup of service taken for calculating the qualifying service, as stated in the counter is as under:

Sl.No.	Particulars	Year	Month	Day
1	50% of the casual service actually rendered during the period from 10.5.90 to 01.5.96 = 5 year, 11 month and 2/2 days taken it account for pensionary benefits	02	11	25 ½
2	100% of the regular service rendered from 02.5.1996 to 31.1.2003	06	08	29
3	Total period of service taken into account for pensionary benefits	09	08	24 ½
4	Less no of qualifying service during the regular service period for 02.4.1996 to 31.1.1993	Nil	Nil	Nil
5	Net qualifying service period to be taken for the purpose of computing pensionary benefits	09	08	24 ½

It has further been stated by the Respondents that with reference to the order dated 11th November, 2008 in OA No. 115 of 2006 of this Tribunal, the entire service records of the Applicant was verified and it was found that even by invoking the provision of relaxation provided in Sub Rule 3 of Rule 69 of the Pension Rules, the Applicant is not entitled to minimum pension as he still

lacks of 6 and ½ days of service to be eligible minimum pension. Accordingly, by placing reliance on some of the orders of this Tribunal and Hon'ble High Court of Orissa, it has been sated by the Respondents that there being no injustice in the decision making process of the matter, this OA is liable to be dismissed.

3. The Applicant filed rejoinder in which by placing reliance on certain documents obtained by him under RTI Act, 2005 it has been stated that prior to 1986 the applicant had rendered 373 days' work in the railway on casual basis. Thereafter, he had rendered 83 days casual work in the year 1986, 119 days in the year 1987, 105 days in the year 1988, 119 days in the year 1989 and 227 days in the year 1990. It has been stated that an employee is entitled to annual increment after completion of one year regular service. As the applicant was granted annual increment, it is presumed that the applicant service has been counted for all purpose w.e.f. 10.5.1990. Further contention of the Applicant is that Rule 20 of the Railway Services (Pension) Rule, 1993 makes it abundantly clear that the commencement of qualifying service starts from the date he/she takes charge of the

post to which he/she is first appointed either substantively or an officiating/temporary capacity and according to the applicant he was conferred temporary status w.e.f. 1.8.1987 entitling him the benefits as have been granted to other regularly selected and appointed employees working in the railway and it has been admitted by the respondents that the qualifying service of the applicant has been taken from 10.5.1990 and, therefore in both the events the qualifying service of the applicant cannot be less than 12 years. Accordingly, applicant has prayed for the relief claimed in this OA.

4. Mr. R.K.Samantasinghar, Learned Counsel for the Applicant, at the outset submitted that the applicant after rendering many years of dedicated service for the Department, after his retirement due to inaction of the Respondents in paying him the pension and other pensionary benefits which is his ~~solace~~ sole means for sustenance when he is crippled thriving for sustenance of rest part of his life. Mr.Samantasinghar's contention is that earlier the applicant approached this Tribunal in OA No. 115/2006 seeking direction to the Respondents to sanction the superannuation

pension and other pensionary benefits along with arrear pension with interest as the applicant had completed more than ten years of qualifying service. The Respondents filed their reply stating therein that the applicant is not entitled to pension and pensionary benefits as he had not acquired the ten years qualifying service as required under the Rules. The said OA was disposed of by this Tribunal on 11th November, 2008 in which after taking into consideration the reply of the Respondents it has been held that if the period from 1.8.1987 to 10.05.1990 is taken into consideration, no doubt the applicant is entitled for pension as he will be getting pensionable service and accordingly, direction was issued to the Respondents to consider the claim of the applicant and pass appropriate orders thereon as early as possible at any rate within 60 days from date of receipt of a copy of this order. But the Respondents, without taking into consideration the specific observation made in the earlier order, rejected the claim of the applicant denying the applicant his livelihood. In referring to the submissions made by the Respondents in their counter, it has been contended by Mr.Samantasinghar that it is the stand of the

Respondents that though C.P.C. (Central Pay Commission) scale has been granted to the applicant from 01.08.1987, the Applicant acquired the Temporary status on 10.05.1990 whereas in paragraph-4 at page-14 of the impugned order & in paragraph-3 at page-7 of the counter, it has been stated that as per the entry in the service book, C.P.C. scale was granted to the applicant from 01.08.1987. The above stand/contention of the Respondents is highly ridiculous and does not base on law as in Estt. Srl. No. 129/84, it has been clarified that where a casual labour is discharged from service after 2.10.80, on completion of work or due to non-availability of further productive work and employed later when work is available, the previous spell of service as casual labour is reckoned as continuous with the subsequent spell of service in the manner clarified in the Ministry letter of 2nd April 1981 (Annexure-A/6). In other words it is the contention of Mr.Samantasinghar that in view of the Railway Board Circular, the applicant being a temporary status holder was granted C.P.C scale of pay. Further by relying on the Service records obtained under RTI Act and enclosed to the rejoinder, has contended that

admittedly, in terms of Railway Board circular vide 129/84, after completion of 120 days of service temporary status and CPC scale was granted to the applicant w.e.f. 01.08.87 and thereafter the service sheet of the applicant was opened in which the first appointment of the applicant was shown as 01.08.1987. In so far as the decisions relied on in the counter, Mr. Samantasinghar's contention is that the said decision is based on Railway Board circular No. 239/80 regarding calculation of period of service of casual labour after attainment of temporary status towards pensionary benefits. However, in the present case the Respondents did not accept the date of temporary status of the applicant w.e.f. 1.8.87 even though this Tribunal clarified in the earlier judgment. The Respondents wrongly interpreted the date of temporary status of the applicant as 10.05.90 instead of 01.08.87 without any basis and accordingly calculated the period from 10.05.90 till retirement towards pension which is highly illegal, unconstitutional and arbitrary. It has been contended that undisputedly, the applicant was conferred with temporary status w.e.f. 01.08.1987 and thereafter, C.P.C. scale was granted to him and while working as

such, he was regularly absorbed w.e.f. 10.05.90 as Sr. Trackman and finally retired from service on 31.01.2003. The Accounts Department of the Railway Administration have calculated the total qualifying service, by misusing the non-qualifying service for the purpose of pension and pensionary benefits from 10.05.90 to 31.01.2003 which is 12 years 8 months and 12 days. The Respondents have neither calculated nor added the temporary status period of service from the date of temporary status i.e. 01.08.1987 to the date of regularization i.e. 10.05.90 keeping in mind the Estt. Srl. No. 239/80. In this regard, Mr. Samantasinghar's contention is that it is the well settled principle of law that no one should question to his/her own admission. The Respondents without taking all the above material facts and law into consideration have denied the pension and other pensionary benefits to the applicant which is highly unjust, arbitrary and mala fied exercise of power and, therefore, the Applicant is entitled to the relief claimed in this OA.

On the other hand, the primary objection of Mr. R.N.Pal, Learned Panel Counsel appearing for the Respondents is

that in paragraph 3 of the OA the applicant has stated that this OA is within the period of limitation provided in section 21 of the A.T. Act, 1985 and on the other hand the applicant has filed a Misc. Application No. 167 of 2011 seeking to condone the delay under section 5 of the Limitation Act instead of Section 21 of the A.T. Act, 1985. Hence, Mr.Pal has contended that due to delay and laches this OA is liable to be dismissed.

As regards the merit of the matter, Mr.Pal's contention is that the question that arises in this OA for decision is as to whether (i) a casual labourer with temporary status being engaged in different spells on daily rate basis with breaks is to be counted for grant of Pension ? (ii) Whether by ignoring the Railway Board's Circular vide Letter No. E(NG)II/78/CL/12 dt. 14.10.1980 circulated under Estt. Srl. No. 239/80 vide Annexure-R/2 to Counter is entitled for calculation of 100% casual service as qualifying service?, (iii) Whether after the decision of the Hon'ble High Court of Orissa dated 04.9.2010 rendered in 4 W.P (C) No. 2136 of 2002 (Union of India vs. Sachi Prusty and others), W. P. No. 6474 of 2002 (Union of India and Another vs. Jogi Swain and

another), W.P. No. 3136 of 2002 (Union of India and Another vs. Sachi Prusty and others), W.P. No. 5266 of 2002 (Union of India and Another vs. Baidhar Samal and others) there remains anything in this case to allow the prayer of the applicant (iv) Whether by ignoring the statutory Rule-69 (b) of Railway Services (Pension) Rules 1993, the applicant is entitled for pension ? and (v) Whether ignoring para-205 of Railway Establishment Manual, Volume-II, the Applicant is entitled for Pension ?. According to Mr.Pal, the Applicant is not entitled to the relief claimed in this OA as the applicant did not have ten years qualifying service for pension as provided in Rule -69 of Rly. Services (Pension) Rule' 93. All the dues to which the applicant was entitled to as per the Rules, except pension, were sanctioned and paid to him soon after his retirement on reaching the superannuation. It has been reiterated that the applicant was initially engaged on casual basis under the Section Engineer (P.Way) Khurda Road. On 01.8.1987, he was granted the CPC scale of Rs. 775-1,025/- and on completion of 120 days of continuous service as casual labour he was conferred with temporary status on 01.8.1987. Previously he had worked only 119

days in 1987, 105 days in 1988, 119 days in 1989 and 227 days in 1990 and worked continuously only w.e.f 10.5.1990 with temporary status followed by regularization on 02.5.1996. As per Rules 50% of temporary service is to be counted from the date of temporary status till regularization and 100% per cent from the date of regularization till retirement. After his retirement in order to sanction pension, 50% of casual service from 10.5.1990 to 01.5.1996 and 100% regular service from 02.5.1996 to till retirement i.e. 31.01.2003 were taken together and was found that the applicant is having only 9 years, 8 months and 24 ½ days of qualifying service as against ten years qualifying service for sanction of pension. In this connection, Mr. Pal, drew our attention to the specific observation of the Hon'ble High Court of Orissa in common judgment dated 04.9.2010 in W.P.(C) No. 2136 of 2002 (Union of India vs. Sachi Prusty and others), W. P. No. 6474 of 2002 (Union of India and Another vs. Jogi Swain and another), W.P. No. 3136 of 2002 (Union of India and Another vs. Sachi Prusty and others), W.P. No. 5266 of 2002 (Union of India and

Another vs. Baidhar Samal and others) in which it has been held as under:

> ".....The Indian Railway Establishment Manual has made a distinction between "temporary status" and "temporary employment". The casual labour who are treated temporarily after expiry of 6 months of continuous employment, were only entitled to the rights and privileges admissible to temporary Railway service. But, such temporary status did not entitle to the casual labour to the benefit of period the service rendered after attaining temporary status being treated as qualifying service for the purpose of retrial benefits, the service after absorption in regular, temporary/permanent Post after requisite selection, can be only taken into consideration. At this stage, it is profitable to refer the Para- 2005 of Indian Railway Establishment Manual, Volume-II which stipulates that :-
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> > "2005. Entitlements and privileges admissible to casual labour who are treated as temporary (i.e. given temporary status) after completion of 120 days or 360 days of continuous employment (as the case may be) (a) Casual Labour treated as temporary, are entitled to the rights and benefits admissible to temporary Railway Servants as laid down in Chapter-XXIII of this Manual. The rights and privileges admissible to such labour also include the benefit of D & A Rules. However, their service prior to absorption in temporary/permanent/regular cadre after the required selection/screening, will not count for the purpose of seniority and the date of their regular appointment after screening/selection, shall determine their seniority vis-à-vis other regular/temporary employees. This is however, subject to the provision that if the seniority of certain individual employees has

> already been determined in any other manner, either in pursuance of judicial decisions or otherwise, the seniority so determined shall not be altered. Casual labour including Project casual Labour shall be eligible to count only half the period of service rendered by them after attaining temporary status on completion of prescribed days of continuous employment and before regular absorption, as qualifying service for the purpose of pensionary benefits. This benefit will be admissible only after their absorption in regular employment. Such casual labours, which have attained temporary status, will also be entitled to carry forward the leave at their credit to new post on absorption in regular service. Daily rated casual labour will not be entitled to these benefits.

and accordingly it was contended that such casual labourer who acquires temporary status, will not however, be brought on to the permanent or regular establishment or treated as a regular employee in Railway until and unless they are selected through regular Selection Board for Group-D post in a manner as laid down from time-to-time- subject to such orders as Railway Board may issue from time-to-time and subject to such exceptions and conditions like appointment on compassionate ground, quota for handicapped and ex-service man etc. as may be specified on these orders, they will have a prior claim over others for recruitment on a regular basis and they will be considered for regular employment

without having to go through Employment Exchanges. Such of them who join as casual labourer before attaining the age of 28 years, should be allowed relaxation of the maximum age limit prescribed for Group-D posts to the extent of their total service which may be either continuous or in broken periods. No temporary posts shall be created to accommodate such casual labourer who acquire temporary status for the conferment of benefits like regular Scale of Pay, increment etc. After absorption in regular employment, half of the service rendered after attaining temporary status by such persons before regular absorption against a regular/temporary/permanent post, will qualify for pensionary benefits subject to the conditions prescribed in Railway Board's Letter No. E (NG)II/78/CL/12 dt. 14.10.1980. (Letter No. E(NG)II/85/CL/6 dated 28.11.1986 in the case of Project Casual Labourer. Casual labourer who have acquired temporary status and have put in 3 years continuous service, should be treated at par with temporary Railway Servants for the purpose of Festival Advance/Flood Advance on the same conditions as are applicable to temporary Railway servants for grant of such advance provided

they furnish 2 sureties from permanent Railway employees. Casual labourer engaged on works, who attain temporary status on completion of 120 days continuous employment on the same type of work, should be treated as temporary employees for the purpose of Hospital Leave in terms of Rule- 554-R-1 (1985 Edition). A casual labourer who has attained temporary status and has been paid regular Scale of Pay, when re-engaged, after having been discharged earlier on completion of work or for non-availability of further production work, may be started on the pay last drawn by him. (This shall be effective from 02.10.1980). When the relevant clause in the Indian Railway Establishment Manual provides for the procedure for reckoning the qualifying period of service for the purpose of pensionary benefits, no person can claim any right on the basis that de hors the statutory rule nor can there be any estoppel. Further, in such cases, there cannot be any consideration on the ground of hardship. If the rule do not provide for grant of pensionary benefits, pension cannot be granted who has not completed 10 years of qualifying service because Rule-31 of the Railway Services (Pension) Rules' 1993 clearly stipulates

that in respect of a Railway servant in service on or after 22.8.1968, half the service paid from contingencies shall be taken into account for calculating pensionary namely the service paid from contingencies, has been continuous and followed by absorption in regular employment without any break. Note (1) the provisions of this rule shall also apply to casual labour paid from contingencies. Further Mr. Pal drew our attention to the decision of the Hon'ble High Court of Punjab and Harayana dated 09.3.2010 rendered in C.W.P.No. 16046 of 2009 (Union of India and others vs. Brij Lal Order) in which it has been held that any such direction for counting the whole service paid from contingency would be in violation of Rule -31 of the Rules. In stating so, Mr. Pal reiterated that as the period of qualifying service (50% of casual service from 10.5.1990 till regularization and 100% service from regularization w.e.f. 02.5.1996 till retirement on 31.3.2003) of the applicant comes to 9 years, 8 months 24 ½ days which is less than minimum qualifying service of 10 years, as per the Estt. Srl.No. 239/80 dated 31.10.1980 the applicant's case was considered but the same was rejected and intimated to him. Accordingly, Mr. Pal submitted that

there being no injustice caused to the applicant in the decision making process, this OA being devoid of any merit is liable to be dismissed.

5. We have considered the rival submissions of the parties and perused the records and the Estt. Srl. Nos. and decisions relied on by the respective parties. We find that earlier the applicant approached this Tribunal in OA No. 115 of 2006 praying for a direction to the Respondents to sanction and pay him the pension and pensionary benefits. The Respondents contested the matter by filing counter. The Tribunal after considering the materials placed in the said OA and after hearing the respective counsel at length disposed of the said OA on 11th November, 2008 and in compliance of the said order, the Respondents considered the case for sanction/grant of pension and pensionary benefits but rejected the same in order dated 8.12.2008 which is impugned in this OA. Relevant portion of the order of this Tribunal dated 11th November, 2008 is extracted herein below:

> "3. In the light of the rival contentions raised by the parties it has to be decided as to whether the applicant is entitled for the relief claimed in the OA or not?. At the first place, it has to be noted that

Annexure-A/1 and the letter alleged to have been sent by the authority, produced at page 12 of the OA are not owned by the Respondents. However, in the counter these documents are not denied to have been issued by the authorities of the Railways. In Annexure-A/1, it is specifically stated by the Section Engineer (P>Way), East Coast Railways, Khurda Road that the applicant has been assigned CPC scale on 1.8.1987. In the same manner, in letter produced at page 12 of the OA it is stated that temporary status (CPC) has been assigned to the Applicant on 1.8.1987.

4. After perusing Annexure-A/1 and A/2 we find that there is force in the contention of the applicant and hence it is a matter to be looked into by the Respondents. Though the definite stand of the Respondents is that the applicant is not having required qualifying period for allowing pension but if the period from 1.8.1987 to 10.5.1990 is taken into consideration no doubt the applicant is entitled for pension as he will be getting pensionable service. In the above circumstances, we allow this Original Application and direct the Respondents to consider the claim of the applicant and pass appropriate orders thereon as early as possible at any rate within 60 days from the date of receipt of a copy of this order."

As it appears, in compliance of the aforesaid direction of this Tribunal in the earlier OA, Respondents considered/reconsidered the case of the Applicant but rejected the claim of the applicant for sanction of pension/pensionary benefits in his favour vide letter dated 8.12.2008, the relevant portion of which are quoted herein below:

"3. Your engagement as casual labour on daily rate wages as revealed from the service record are furnished below:

Sl.No.	Year	No of days worked
01	Prior to 1986	373 days
02	1986	83 days
03	1987	119 days
04	1988	105 days
05	1989	119 days
06	1990	227 days

Your engagements during the said years were not continuous, but in broken spells and you were not engaged for 120 days continuously at a stretch as casual labour on daily rate wages. As per statutory provisions, one has to complete 120 days at a stretch without any break as casual labour on daily rate basis and then only one will be eligible for grant of temporary status.

4. As per the entry in the service book, it reveals that CPC scale has been granted to you from 1.8.1987. But however, you have not continuously worked as temporary status casual labour till regularization. Only in 1987 you could work for 119 days and subsequently also in broken spells. The engagement as casual labour after attaining temporary status with broken periods cannot be considered for the purpose of qualifying service in terms of Estt. Srl.No. 239/80.

5. It is pertinent to mention here that you have been engaged as casual labour with temporary status from 10.5.1990 continuously without any interruption upto the date of regularization. The Estt. Srl.No. 239/80 issued in the subject matter for counting the period of service of casual labour after their attainment of temporary status, on completion of 120 days continuous service as qualifying service for pensionary benefits on absorption as regular Rly employees. Inter alia, the Estt. Srl.No. 239/80 speaks about temporary status on completion of 120 days of continuously service. But in

your case it is observed from the Service Record that upto 1989 you have not been engaged continuously for 120 days. Only in the year 1990 you have worked for 227 days and, therefore you have been granted with temporary status on 10.5.1990. The service record also indicates that you have continued in service after getting CPC scale from 10.5.1990 followed by regularization from 02.05.1996 and finally you have attained superannuation from service w.e.f. 31.1.2003.

6. The Annexure-A/1 issued by S.E. (P.Way) KUR is not in conformity with the statutory rule circulated under Estt. Srl.No. 239/80. As stated in the aforesaid paras one has to work continuously for 120 days as casual labour then only one will get temporary status from the date given above and also as could be revealed from Annexure-A/1 to the OA that you have never worked at a stretch 120 days continuously as casual labour on daily rate wages. You have been engaged continuously for 120 days as casual labour in the year 1990 and thereby you have got temporary status from 10.5.1990 and worked continuously as such till regularization on 02.5.1996 and retired from service on 31.1.2003. Before your retirement from service you service record has been reviewed by the Finance Department as per rule taking into account your date of appointment from 10.5.1990.

7. Accordingly, the qualifying service has been calculated by taking 50% of casual service from the date of attaining temporary status i.e. from 10.5.1990 to the date of regularization and 100% qualifying service from 02.5.1996 i.e. date of regularization to the date of retirement i.e. 31.1.2003. Thus it comes to 09 years, 08 months and 24 ½ days.

8. That in accordance with Rule-69 of Railway Services Pension Rule, 1993 (RSPR'93), one has to possess minimum 10 Years qualifying service for granting minimum pension. But, you didn't possess minimum 10 Years qualifying service. As such, you

have not granted with minimum pension as a result of which you have been paid with Gratuity & Service Gratuity in lieu of pension. The receipt of Gratuity & Service Gratuity in lieu of Pension has not been disputed by you in OA."

Estt. SRL.No. 129/84 dated 13.7.1984 relied on by the Applicant in support of counting the qualifying service reads as under:

"Estt. Srl.No. 129/84 Dated: 13.7.1984

A copy of Railway Board's letter No. E (NG) II -80/CL/25 dated 14.5.1984 is published for information, guidance and necessary action.

Board's earlier letters of even number dates 21.10.80, 2.4.81 & 8.9.83 as referred to therein were circulated under this office Estt. Srl.No. 240/80, 83/81 and 210/83 respectively.

14.5.1984 from the Dy. Director, Establishment (N)/New Delhi to the General Managers, All Indian Railways and others.

Casual Labour-Grant of temporary status/monthly rates of wages to.

Attention of the Railways is invited to this Ministry's letter of even number dated 21.10.80 as amended by the letter dated 8.9.83 and the clarification issued in their letter dated 2.4.81.

2. The two recognized Federation have been pointing out the need to clarify to the Railways the application of these orders to the service rendered as casual labour before 2.10.80.

3. During the discussions in the PNM Meeting with the AIRF on the 6th, 7th February, 1984, the Federation stated that the aforesaid instructions were being interpreted on certain Railways to mean that only

the continuous service put in after 2.10.80 would be reckoned for determining eligibility for being treated as temporary on the open line and for monthly rates of wages on Projects.

4. It was agreed that the position would be clarified to the Railways. The position is accordingly clarified in the succeeding paragraphs.

5. Prior to 2.10.80 if a casual labourer was discharged due to completion of work or for non-availability of further productive work, it was treated as constituting an interruption for purpose of reckoning continuous employment. After 2.10.80, termination of service on account of completion of work due to on availability of productive work does not constitute such interruption of continuous employment. In other words, where a casual labourer is discharged from service after 2.10.80 on completion of work or due to non-availability of further productive work and employed later when work is available, the previous spell of service in the manner clarified in this Ministry's letter of 2nd April, 1981.

6. To illustrate further, if a casual labourer in the open line was in the employ of the Railways on 2nd October, 1980 and if he had put in 90 days of continuous employment as on that date but was discharged, say on 12.10.80, due to completion of work or for non-availability of further productive work, on reengagement on availability of fresh work, he need put in only the balance period of about 20 continuous days to complete the period of 120 days of continuous employment to be eligible for being treated as temporary with the attendant benefits. This clarification may be noted by all Railways for information and guidance."

6. We have gone through the decisions relied on by the Respondents and find that those cases are different/distinct to the

present case inasmuch in this case the applicant had earlier approached this Tribunal in OA No.115 of 2006 which was disposed of on 11th November, 2008 with observation, based on the uncontroverted documents filed as Annexure-A/1 & A/2, that if the period from 1.8.1987 to 10.5.1990 is taken into consideration no doubt the applicant is entitled for pension as he will be getting pensionable service which was not the case relied on by the Respondents. The Respondents, in other words admitted in the order of rejection that the applicant was allowed the Central Pay Commission Scale with effect from 1.8.1987 but have submitted that Annexure-A/1 issued by S.E. (P.Way) KUR is not in conformity with the statutory rule circulated under Estt. Srl.No. 239/80. It is not the case of the Respondents that the order at Annexure-A/1 is based on which the direction was issued by this Tribunal in earlier OA which is stated to be not in confirmity with the rule has been withdrawn/modified/rescinded to. Merely stating that the said order was not inconformity with the rules cannot, if so facto, absolve the liability to consider the case of the applicant in the light of the direction issued by this Tribunal in the earlier OA.

Even otherwise also, we find that the date of conferment of temporary status was/is not in order. According to the Respondents, prior to 1986 the applicant had rendered 373 days of casual service, 83 days in 1986, 119 days in 1987, 105 days in 1988 and 119 days in 1989. Estt. Srl.No. 129/84 dated: 13.7.1984 provides as under:

> "5. Prior to 2.10.80 if a casual labourer was discharged due to completion of work or for non-availability of further productive work, it was treated as constituting an interruption for purpose of reckoning continuous employment. After 2.10.80, termination of service on account of completion of work due to on availability of productive work does not constitute such interruption of continuous employment. In other words, where a casual labourer is discharged from service after 2.10.80 on completion of work or due to non-availability of further productive work and employed later when work is available, the previous spell of service as casual labour is reckoned as continuous with the subsequent spell of service in the manner clarified in this Ministry's letter of 2nd April, 1981.
>
> 6. To illustrate further, if a casual labourer in the open line was in the employ of the Railways on 2nd October, 1980 and if he had put in 90 days of continuous employment as on that date but was discharged, say on 12.10.80, due to completion of work or for non-availability of further productive work, on reengagement on availability of fresh work, he need put in only the balance period of about 20 continuous days to complete the period of 120 days of continuous employment to be eligible for being treated as

temporary with the attendant benefits. This clarification may be noted by all Railways for information and guidance."

7. In view of the above the date of conferment of temporary status needs to be antedated as per the rulings of the Railway Board quoted above which fact has not been taken into consideration by the Respondents while denying the applicant his pension. As it appears, after putting long years' of service, the applicant has been deprived of getting his pension only for shortfall of **FIVE AND HALF DAYS SERVICE.**

8. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 in the following words:

"The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalized? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service? What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it

thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition. The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".

9. As regards the point of limitation advanced by the Respondents we do not find any substance on the same as we find that this is a matter of sanction and payment of pension and pensionary benefits which comes within the meaning of recurring cause of action. It is also not the case of the Respondents that in case the relief sought in this OA is allowed the interest of a third party would be affected adversely but he is not a party in this OA. Law is well settled that delay and laches is a matter within the

discretion of the Court and such discretion must be exercised fairly and justly so as to promote justice and not to defeat it and if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Further, law is well settled that in the event that the claim made by the applicant is legally sustainable then the delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. The Court should not harm innocent parties if their rights have in fact emerged by delay on the part of the Applicant. In this connection relevant portion of the decision of the Hon'ble Apex Court rendered in the case of **Tukaram Kana Joshi and Others –Vrs- M.I.D.C. and Ors**, reported in **AIR 2013 SC 565** being relevant is reproduced herein below:

> "10. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and

laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another fact. **The Court is required to exercise judicial discretion**. The said discretion is dependent on facts and circumstances of the case. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. **There can be mitigating factors, continuity of cause of action, etc**. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. **Thus analyzed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.**

11. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it, that there can never be a case where the Courts cannot interfere in the matter, after the passage of a certain length of time. There may be a case where the **demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay.** Ultimately, it would be a matter within the discretion of the Court and **such discretion must be exercised fairly and justly so as to promote justice and not to defeat it**. The validity of the party's defence must be tried upon priciples substantially equitable(Vide P.S.Sadasivaswamy v State of T.N., AIR 1974 SC 2271; State of MP & Ors V. Nandlal Jaiswal & Ors, AIR 1987 SC 251; and Tridip Kumar Dingal & Ors V. State of West Bengal & Ors, (2009) 1 SCC 768=AIR 2008 SC (Suppl.) 824).

12. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in the injustice being done because of a non-deliberate delay. The Court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners (Vide: Durga Prasad V.Chief Controller of Imports and Exports & Ors, AIR 1970 SC 769; Collector, Land Acquisition Anantnag & Anr v. Mst.Katiji & Ors, AIR 1987 SC 1353; Dehri Rohtas Light Railway Company Ltd v. District Board Bhojpur & Ors, AIR 1993 SC 802=(1992 AIR SCW 3181; Dayal lSingh & Ors v. Unoin of India & Ors, AIR 2003 SC 1140=(2003 AIR SCW 685); and Shankara Coop Housing Society Ltd. V.M.Prabhakar & Ors, AIR 2011 SC 2161=(2011 AIR SCW 3033)."

10. In the case of **H.D.Vora v. Stat eof Maharashtra & Ors**, reported in **AIR 1984 SC 866**, the Hon'ble Supreme Court of India condoned 30 years delay in approaching the court where it found violation of substantive legal rights of the applicant.

11. In view of the discussions made above the prayer made in MA No. 59 of 2012 is allowed. The order dated 08.12.2008

denying the applicant pension is hereby quashed and the matter is remitted back to the Senior Divisional Personnel Officer, East Coast Railway, Khurda Road Division, Khurda/Respondent No.2 to reconsider the case of the applicant for sanction of pension and pensionary dues by ante-dating his date of conferment of temporary status in terms of Estt. Srl.No. 129/84 dated 13.7.1984 and pass appropriate order within a period of 60(sixty) days from the date of receipt of copy of this order.

12. In the result, with the aforesaid observation and direction this OA stands allowed to the extent stated above. There shall be no order as to costs.

(R.C.MISRA)
Member(Admn.)

(A.K.PATNAIK)
Member (Judl.)