

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 96 OF 2012

Friday, this the 28th day of June, 2013

CORAM:

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

K.B.Abdul Khader
(Retired Sr.Gate Keeper
Southern Railway, Ernakulam)
Residing at Pattathil House
Kanjiramattom P.O
Ernakulam District – 682 315 ... Applicant

(By Advocate Mr. M.P.Varkey)

versus

1. Union of India represented by the
General Manager
Southern Railway Headquarters Office,
Chennai – 600 003
2. The Senior Divisional Personnel Officer
Southern Railway, Trivandrum Division
Trivandrum - 14
3. The Senior Divisional Finance Manager
Southern Railway, Trivandrum Division
Trivandrum ... Respondents

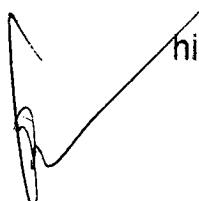
(By Advocate Mr.Sunil Jacob Jose, SCGSC)

The application having been heard on 27.06.2013, the Tribunal on 28.06.2013 delivered the following:

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The relief sought by the applicant in this O.A is to declare that he is entitled for gratuity for the casual labour service with interest for the period of casual labour service rendered by him upto the date preceding the date of his absorption under the Payment of Gratuity Act, 1972.



2 Brief facts of the case as stated by the applicant are that he retired from the Railway service as Sr.Gate Keeper on 28.2.2010. According to him he had rendered casual service for the period from 6.6.1966 to 20.4.1979. He was granted temporary status from 23.7.1978 and regularised as Gangman on 21.4.1979. He retired as Sr.Gate Keeper in the Pay Band 5200-20200 + Grade Pay Rs.2400 and granted the pensionary benefits vide PPO No.0604207815. To support his contention he produced copy of Casual Labour Service Card and copy of PPO. It is submitted that he is a member of Railway Pensioners Association and came to know about the issuance of Anxx.A7 by which he was entitled to be given an option to count his casual labour service to get pension and gratuity with interest from 1978 onwards with all consequential benefits such as MACPs and Special Allowance. All these benefits were not granted to him on his retirement. It is submitted that in view of the issuance of the above order he is eligible for payment of gratuity for the period of casual labour service upto the date preceding the date of absorption and as per Govt of India order, they are entitled to pension at 50% of their last emoluments and corresponding amount of commutation. He made representation to the 2nd respondent requesting to grant the benefits on 15.10.2010. Thereafter he approached the Pension Adalat 2011, Trivandrum Division by his representation dated 13.10.2011. In response to his request a communication, Anxx.A4 dated 7.12.2011 was received whereby it was informed that the casual labour card in original was not submitted and that there is an error in calculation while granting MACP to the applicant. Further by Anxx.A6 he was informed that on receipt of excess payment of pensionary benefits due to erroneous fixation of MACP benefit, the arrears has been adjusted against DA difference in DCRG and leave salary and a balance amount has to be deposited by the

applicant. His pension is reduced accordingly w.e.f 1.3.2010. He alleged that there was no over payment and the respondent did not communicate the details of the recovery.

3 Respondents in their reply statement admitted that Anxx.A7 was issued by the Railway Board and in Dec.2006 an order was issued by Minisry of Personnel, Public Grievances and Pension, New Delhi. It is submitted that at the time of his superannuation or thereafter he had not made any request for payment of Gratuity for the casual labour service. 50% of the casual labour service from 23.10.78 to 21.4.79 had been counted for pensionary benefits. They further stated that during the casual labour service claimed by the applicant he worked in a Project and not in Open Line. It is further submitted that at the time of superannuation he was drawing Rs.10220/- plus Grade Pay Rs.2400 in the Pay Band Rs.5200-20200 was not admissible to him, therefore, he was paid one stage higher by mistake which they sought to rectify by recovering it, by sending a letter dated 16.12.2011. It is further submitted that his pay was correctly refixed while detecting the error. As regards submission of original Casual Labour Card, it is stated that the applicant had never produced the same. Regarding Gratuity, it is submitted that due gratuity amount will be paid on receipt of the representation and casual labour card and other required documents.

4 The applicants filed rejoinder reiterating the facts stated in the OA and further submitted that his pay fixation for MACPs is available vide par 7 of the Scheme and condition 4 of Anxx.A8 memorandum. The respondents have not explained as to why Rule 1313 (FR 22)(I)(a)(1) is not applicable for the 3rd MACP.

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5. The respondents filed additional reply and submitted that as regards the pay fixation is concerned, the applicant is eligible for the pay under Rule 1313(I)(a)(1) of IREC which is optional.

6. Counsel for the applicant submitted that the respondents have no authority to truncate the pension already fixed. Rectification of error in grant of 3rd MACP, fixing the pay at one stage above the stage of eligibility, cannot in any circumstance be viewed as a clerical error. As such, neither the pay can be reduced nor pension on the basis of down graded revision of pay. As regards the payment of gratuity of the services rendered prior to regularisation, the counsel again argued that the applicant is entitled for the same in accordance with Annexure A-7 order dated 30.06.2000. The applicant has not exercised any option. He is entitled to gratuity as claimed for in the prayer of the OA.

7. Counsel for respondents submitted that on account of an inadvertent mistake committed by the respondents, the applicant cannot be permitted to enjoy any unjust enrichment. And the Department should be permitted to rectify the mistake.

8. Arguments were heard and documents perused. As regards entitlement for payment of gratuity with interest, in accordance with the Railway Board's circular (Annex.A7) it is clear that where a retired employee is eligible to draw gratuity under the provisions of the Payment of Gratuity Act, 1972 for the period of casual labour service prior to regularization, the same shall be worked out on the basis of wages admissible on the date of temporary status service when option is exercised. The amount of gratuity

thus worked out shall carry interest at the simple rate for the period of delay i.e., for the period from the date of absorption upto the end of the month preceding the date on which the payment is made. The Railway Administration is to take steps suo moto to examine all the past cases on the basis of records available and to settle the claims accordingly. All the claimants were also to be suitably addressed on the basis of particulars available with the Railways, so that they or their legal heirs can claim the payment without delay. The Railway Administration is also required to extend all assistance to the retired as well as the serving Railway servants to exercise their option judiciously in order that the option exercised is advantageous to them. In this regard para 4 of the order in OA 358/08 (supra) is extracted below:

"4. Heard Shri.T.N.Sukumaran for the applicant and Shri.K.M.Anthru for the respondents. Admittedly, the aforesaid direction of the Railway Board has not been followed by the respondents' Railway in the case of the applicant. I, therefore, direct that the respondents shall comply with the directions of the Railway Board contained in the aforesaid Circular No. No.130/2000 dated 30.6.2000 (Annexure A-1) in the case of the applicant without any further delay. Since the applicant has already retired from service and he was a low paid employee, an official from the Welfare Department of the Railways shall be deputed to assist the Government servant to exercise his option judiciously as ordered by the Railway Board in their Circular. The benefits arising out of the said circular shall be made available to the applicant within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs."

In the above facts and circumstances of the case, the above decisions of this Tribunal in O.A.358/08 – T.Chellappan Vs. Union of India & Ors decided on 3.2.2009, O.A202/08 V. Augustin Vs. Union of India & Anr and OA 699/2010 are to be followed. Accordingly, it is declared that the applicant is entitled for payment of Gratuity with interest for the respective casual service period of the applicant in terms of Annexure A-7 circular of the Railway Board.

9. As regards revision of pay, bona fide, mistake has been committed by the respondents at the time of grant of 3rd MACP. The bona fide mistake can always be rectified as otherwise it will result on perenniel loss to the respondents and unintended benefit to the applicant. Power to reduce pension is no doubt restricted in that, save for clerical error, there cannot be any reduction. In the instant case, the mistake sought to be rectified is not with reference to the calculation of pension but with reference to the calculation of pay. As such, the respondents do enjoy that power to rectify that mistake. Reduction in pension is as a consequence of reduction in pay. As such, the bar stipulated in the pension rules, cannot in any way come to the rescue of the applicant. Hence, it is declared that respondents are entitled to rectify the mistake in working out the pay due to the applicant on grant of 3rd MACP.

10. If the pay is revised down word, the same might result in difference in pension and the Department may pay the reduced pension. In so far as excess amount already paid, the same cannot be recovered. This is on the basis of the decision of the Apex Court in the case of **Col.(Retd.) B.J.Akkara Vs. the Government of India and others** which is an exception carved out from the general law as laid down by the Apex Court in the case of **Chandi Prasad Uniyal & others Vs. State of Uttarakhand & others.**

11. In Akkara's case supra the Apex Court has held as under:-

.....Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to

recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

12. In the case of **Chandi Prasad Uniyal** in para 17 the Apex Court has held as under:

"17. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case (supra) and in Col.B.J.Akkara (retd.) case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered."

13. In view of the above, the OA is **allowed** to the following extent :-

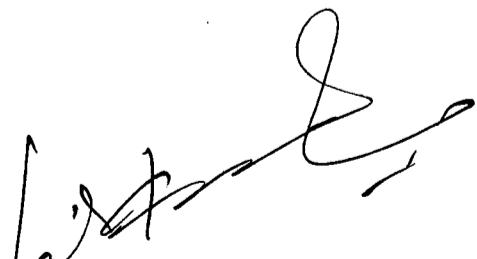
(a) The applicant is entitled to gratuity with prescribed rate of interest as per rules for the period of casual services rendered by him prior to his regularization.

(b) The respondents may recalculate the pay of the applicant by rectifying the mistake committed by them while granting 3rd MACP and may refix the pay as well as pension. But they shall not recover any excess money paid to the applicant due to wrong fixation of pay.

(c) Necessary orders revising the PPO be issued forthwith and the concerned authority be informed accordingly without delay so that the applicant is granted and paid only the correct pension from the month of July, 2013.

14. No cost.

Dated, the 28th June, 2013.



Dr. K.B.S. RAJAN
JUDICIAL MEMBER

CENTRAL ADMINISTRATIVE TRIBUNAL
 ERNAKULAM BENCH
O.A.No.96/2012

Dated this the ^{26th} day of July, 2012

CORAM :

HON'BLE Mrs.K.NOORJEHAN, ADMINISTRATIVE MEMBER

K.B.Abdul Khader, S/o Bava (Retd. Sr.Gate Keeper)
 Southern Railway, Ernakulam), R/o Pattathil House
 Kanjiramattom P.O, Ernakulam - 682315.

...Applicants

(By Advocate Mr.M.P.Varkey)

Vs

- 1 Union of India represented by the General Manager,
 Southern Railway, Headquarters Office, Chennai - 3.
- 2 Sr.Divisional Personnel Officer, Southern Railway,
 Trivandrum Division, Trivandrum-695014.
- 3 The Sr.Divisional Finance Manager, Sourthern Railway
 Trivandrum Division, Trivandrum.

Respondents

(By Advocate Mr.Sunil Jacob Jose)

This application having been heard on 13th July 2012, the Tribunal delivered the following :-

ORDER

HON'BLE Mrs.K.NOORJEHAN, ADMINISTRATIVE MEMBER

The relief sought by the applicant in this O.A is to declare that he is entitled for gratuity for the casual labour service with interest for the period of casual labour service rendered by him upto the date preceding the date of his absorption under the Payment of Gratuity Act, 1972.

2 Brief facts of the case as stated by the applicant are that he retired from the Railway service as Sr.Gate Keeper on 28.2.2010. According to him he had rendered casual service for the period from 6.6.1966 to 20.4.1979.

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He was granted temporary status from 23.7.1978 and regularised as Gangman on 21.4.1979. He retired as Sr.Gate Keeper in the Pay Band 5200-20200 + Grade Pay Rs.2400 and granted the pensionary benefits vide PPO No.0604207815. To support his contention he produced copy of Casual Labour Service Card and copy of PPO. It is submitted that he is a member of Railway Pensioners Association and came to know about the issuance of Anxx.A7 by which he was entitled to be given an option to count his casual labour service to get pension and gratuity with interest from 1978 onwards with all consequential benefits such as MACPs and Special Allowance. All these benefits were not granted to him on his retirement. It is submitted that in view of the issuance of the above order he is eligible for payment of gratuity for the period of casual labour service upto the date preceding the date of absorption and as per Govt of India order, they are entitled to pension at 50% of their last emoluments and corresponding amount of commutation. He made representation to the 2nd respondent requesting to grant the benefits on 15.10.2010. Thereafter he approached the Pension Adalat 2011, Trivandrum Division by his representation dated 13.10.2011. In response to his request a communication, Anxx.A4 dated 7.12.2011 was received whereby it was informed that the casual labour card in original was not submitted and that there is an error in calculation while granting MACP to the applicant. Further by Anxx.A6 he was informed that on receipt of excess payment of pensionary benefits due to erroneous fixation of MACP benefit, the arrears has been adjusted against DA difference in DCRG and leave salary and a balance amount has to be deposited by the applicant. His pension is reduced accordingly w.e.f 1.3.2010. He alleged that there was no over payment and the respondent did not communicate the details of the recovery.

3 Respondents in their reply statement admitted that Anxx.A7 was issued by the Railway Board and in Dec.2006 an order was issued by Minisry of Personnel, Public Grievances and Pension, New Delhi. It is submitted that

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at the time of his superannuation or thereafter he had not made any request for payment of Gratuity for the casual labour service. 50% of the casual labour service from 23.10.78 to 21.4.79 had been counted for pensionary benefits. They further stated that during the casual labour service claimed by the applicant he worked in a Project and not in Open Line. It is further submitted that at the time of superannuation he was drawing Rs.10220/- plus Grade Pay Rs.2400 in the Pay Band Rs.5200-20200 was not admissible to him, therefore, he was paid one stage higher by mistake which they sought to rectify by recovering it, by sending a letter dated 16.12.2011. It is further submitted that his pay was correctly refixed while detecting the error. As regards submission of original Casual Labour Card, it is stated that the applicant had never produced the same. Regarding Gratuity, it is submitted that due gratuity amount will be paid on receipt of the representation and casual labour card and other required documents.

4 The applicants filed rejoinder reiterating the facts stated in the OA and further submitted that his pay fixation for MACPs is available vide para 7 of the Scheme and condition 4 of Annx.A8 memorandum. The respondents have not explained as to why Rule 1313 (FR 22)(I)(a)(1) is not applicable for the 3rd MACP.

5 The respondents filed additional reply and submitted that as regards the pay fixation is concerned, the applicant is eligible for the pay under Rule 1313(I)(a)(1) of IREC which is optional.

6 During the course of final hearing the counsel for the applicant referred to the order of this Tribunal in OA 1082/2010 wherein similar cases are dealt with and allowed. Therefore, the counsel for the applicants averred that the present OA is squarely covered by the orders referred supra.

6 I have heard counsel for the parties and perused the records and gone through the orders of this Tribunal.

7 The counsel for the respondents has not disputed the authenticity of

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orders of the Govt and Railway Board. Regarding the date of entry of the applicants as casual labour, this issue is settled in view of the order passed by the Tribunal in OA 202/08. The relevant paras 4,5&6 are extracted below:

"4 Respondents in their reply statement submitted that the applicant has not produced or annexed any proof for his claim that he has worked as a casual labourer from 10.4.1972 to 22.10.1978 the period for which he has claimed gratuity under the Payment of Gratuity Act, 1972 and he has also not produced his Date of Birth certificate from the civil authorities.

5 I have heard counsel for the parties. Counsel for the respondents has not disputed the authenticity of Annexure A-1 letter. There is also no dispute that he was granted temporary status with effect from 23.10.1978. Therefore, there is no merit in the submissions of the respondents at this belated stage that the applicant has not produced any documentary proof regarding his casual labour service from 10.4.1972 to 22.10.1978. Further, the respondents thereby have produced a copy of Office Order No.107/79/WP dated 11.6.1979 (Annexure R-1) showing that the applicant who was a project casual labourer of TVC-ERS conversion project was granted temporary status and revised scale of pay at Rs.196/- p.m in scale of Rs.196-232 with effect from 23.10.1978.

6 In the above facts and circumstances of the case, I declare that the applicant is entitled for payment of Gratuity with interest for the period from 10.4.1972 to 22.10.1978 in terms of Annexure A-5 circular of the Railway Board."

8 In Accordance with the Railway Board's circular (Annex.A7) it is clear that where a retired employee is eligible to draw gratuity under the provisions of the Payment of Gratuity Act, 1972 for the period of casual labour service prior to regularisation, the same shall be worked out on the basis of wages admissible on the date of temporary status service when option is exercised. The amount of gratuity thus worked out shall carry interest at the simple rate for the period of delay i.e., for the period from the date of absorption upto the end of the month preceding the date on

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which the payment is made. The Railway Administration is to take steps *suo moto* to examine all the past cases on the basis of records available and to settle the claims accordingly. All the claimants were also to be suitably addressed on the basis of particulars available with the Railways, so that they or their legal heirs can claim the payment without delay. The Railway Administration is also required to extend all assistance to the retired as well as the serving Railway servants to exercise their option judiciously in order that the option exercised is advantageous to them. In this regard para 4 of the order in OA 358/08 (supra) is extracted below:

"4. Heard Shri.T.N.Sukumaran for the applicant and Shri.K.M.Anthru for the respondents. Admittedly, the aforesaid direction of the Railway Board has not been followed by the respondents' Railway in the case of the applicant. I, therefore, direct that the respondents shall comply with the directions of the Railway Board contained in the aforesaid Circular No. No.130/2000 dated 30.6.2000 (Annexure A-1) in the case of the applicant without any further delay. Since the applicant has already retired from service and he was a low paid employee, an official from the Welfare Department of the Railways shall be deputed to assist the Government servant to exercise his option judiciously as ordered by the Railway Board in their Circular. The benefits arising out of the said circular shall be made available to the applicant within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs."

9 In the above facts and circumstances of the case, I follow the above decisions of this Tribunal in O.A.358/08 - T.Chellappan Vs. Union of India & Ors decided on 3.2.2009, O.A202/08 V. Augustin Vs. Union of India & Anr and OA 699/2010 and declare that the applicant is entitled for payment of Gratuity with interest for the respective casual service period of the applicant in terms of Annexure A-7 circular of the Railway Board. Regarding grant of 3rd MACPS is concerned, the respondents submitted in their additional reply that fixation of pay under Rule 1313(I)(a)(1) of IREC is optional. The applicant is directed submit his option for fixation of his pay under Rule 1313(I)(a)(1) of IREC within a week from the date of receipt of a

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copy of this order. The 2nd respondent is directed to accept the option and issue appropriate orders in this regard and fix pay advantageous to the applicant. The respondents shall comply with the directions of the Railway Board contained in the aforesaid circular without any further delay. The applicant should be given the opportunity to exercise his option, in a way which is advantageous to him as enjoined in the Annx.A7 circular. The benefits arising out of the said circular shall be made available to the applicant within a period of three months from the date of receipt of a copy of this order with interest @ 8% per annum for the period of delay from the date preceding the date of absorption upto the date on which payment is made. No costs.

(Dated 26th July 2012)


K.NOORJEHAN
ADMINISTRATIVE MEMBER

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CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

R.A. NO. 46 OF 2012 IN O.A. NO. 96 OF 2012

Tuesday, this the 28th day of May, 2013

CORAM:

HON'BLE Mrs. K. NOORJEHAN, ADMINISTRATIVE MEMBER

K.B. Abdul Khader,
S/o. Bava, Retired Sr. Gate Keeper,
Southern Railway, Ernakulam.
Residing at Pattathil House,
Kanjiramattom (P.O),
Ernakulam – 682 316.

- Review Applicant

(By Advocate Mr. M.P. Varkey)

Versus

1. Union of India represented by
General Manager,
Southern Railway, Chennai – 600 003.
2. Senior Divisional Personnel Officer,
Southern Railway,
Trivandrum Division,
Thiruvananthapuram – 695 014.
3. Senior Divisional Finance Manager,
Southern Railway,
Trivandrum Division,
Thiruvananthapuram – 695 014.

- Respondents

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

The Review Application having been heard 24.05.2013, the Tribunal on 28.05.2013 delivered the following:

ORDER

HON'BLE Mrs. K. NOORJEHAN, ADMINISTRATIVE MEMBER

The applicant has filed Review Application No. 46/2012 in Original Application No. 96/2012 pointing out certain error apparent on the face of the records. He stated that the respondents were directed to grant him an opportunity to exercise an option for payment of gratuity for his casual labour service while he specifically averred in para 5(a) and 8(1) of the O.A that he did not want to exercise option. Similarly, he had exercised his option for fixation of pay for grant of 3rd MACP and hence, there was no need for a further direction to the respondents to permit him to given an option. In the O.A, he has stated that vide

Annexure A-4 impugned order, the respondents informed him that 3rd MACP was fixed one stage above the permissible one, and hence, the fixation already allowed is being revised. Also, he was intimated vide Annexure A-6 that his pension will be reduced with effect from 01.03.2010 based on re-fixation of pay and Grade Pay under 3rd MACP and the over payment will be adjusted against the arrears due to him. The Tribunal has stayed Annexure A-6 order on 10.02.2012. Yet, the respondents had not refunded the withheld amount of arrears to him and no direction was given in the order of the Tribunal to the respondents to do so. It was also averred that as per Rule 90 of the Railway Services (Pension) Rules, 1993, there is statutory ban on revision of pension, to the disadvantage of the pensioner.

2. The respondents filed an affidavit and stated that the applicant superannuated on 28.02.2010 and the Pension Payment Order, effective from 01.03.2010 was issued. As the mistake in re-fixation of pay was detected after the issuance of the Pension Payment Order, Annexure A-6 was issued on 18.01.2012 to intimate him about the re-fixation of pay consequent on grant of 3rd MACP. The respondents extracted the relevant Rule 90 (1) of the Railway Services (Pension) Rules, 1993 to show that the re-fixation of pension, on detection of a clerical error can be done, if it is detected within a period of two years from the date of sanction of pension. Since Annexure A-6 was issued on 18.01.2012, it was within the period of two years from the period of sanction of pension.

3. The counsel for the applicant cited the order of C.A.T Jabalpur Bench in the case of **Union of India v. Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court and Another** reported in (1996) 33 Administrative Tribunals Cases 531, wherein it was held that a clerical error is a mistake which occurs in copying and when the basic document on the basis of which an entry has been made is found incorrect, it suggests that the correctness of the entry is open to doubt. He, therefore, argues that the fixation of pay on grant of 3rd MACP



was a conscious act and it cannot be treated as a clerical error after the lapse of 22 months. Hence, the PPO is not liable to be reviewed and changed as per the provision of Rule 90 of Railway Services (Pension) Rules, 1993. Hence, the respondents cannot alter the Pension Payment Order and thus reduce the pension which has put the applicant in a disadvantage.

4. Heard the counsel for the parties and perused the documents.
5. As the counsel has made out a **prima facie** case, the **Review Application is allowed**. The order in O.A. No. 96/2012 is recalled. List the O.A on 13.06.2013.

(Dated 28th May, 2013)


K. NOORJEHAN
ADMINISTRATIVE MEMBER

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