CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 802/94

Transfer Application No.

Date of Decision 13-12-96

R.N.Bari — Petitioner/s

Shri H.A.Sawant — Advocate for the Petitioners

Versus

Union of India & Ors. — Respondent/s

Shri S.C.Dhawan — Advocate for the Respondents

CORAM :

Hon'ble Shri. P.P.Srivastava, Member (A)

Hon'ble Shri.

(1) To be referred to the Reporter or not ? X

(2) Whether it needs to be circulated to other Benches of the Tribunal ? X

(P.P.SRIVASTAVA)

MEMBER (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

OA.NO. 802/94

this the 13th day of December 1996

CORAM: Hon'ble Shri P.P.Srivastava, Member (A)

Raghunath Nathoo Bari
C/o Shri H.A.Sawant,
DBA, 6/44, Unnat Nagar No.1,
M.G.Road, Goregaon (W),
Bombay-400 062.

By Advocate Shri H.A.Sawant ... Applicant

V/S.

1. Union of India
through the General Manager,
Central Railway Headquarters
Office, Bombay V.T.,Bombay.

2. The Chief Security Commissioner,
Central Railway Headquarters Office,
Bombay V.T., Bombay.

3. The Secretary, Ministry of Railways,
Railway Board, Rail Bhavan, New Delhi.

By Advocate Shri S.C.Dhawan
C.G.S.C. ... Respondents

ORDER

(Per: Shri P.P.Srivastava, Member (A)

The applicant was working in the R.P.F. Department of Central Railway. He unfortunately met with an accident on 13.8.1975 and sustained a grievous injury on his left hand. He was, therefore, treated in the hospital as 'Injured on duty' (IOD) from 13.8.1975 to 20.4.1977. Thereafter, the applicant was found unfit to carryout his duties in his original post but was found fit for category B-I where he was not to use his left hand which was injured

.. 2/-

due to grievous injury. Thus, the applicant was found fit for alternative job in Category B-I. The applicant was, therefore, granted whatever leave was due to him and ultimately was granted six months extra-ordinary leave from 15.5.1977 to 14.11.1977 within which period altetnative job was to be found. Since the department could not find any suitable job for the applicant, the applicant's services were terminated by order dated 15.11.1977.

2. The applicant, however, was offered an alternative job as a Peon in the F.A. & C.A.O. office. However, the applicant could not be engaged as his services ~~have~~ had already been terminated on 15.11.1977. The applicant could have been absorbed only if a special permission was obtained for relaxing the rules. According to the respondents the special permission was obtained from the Railway Board only in the year 1986, i.e. after about 9 years. The applicant was thereafter offered a job and after serving the new department, he retired in the year 1993. In this OA. the applicant has sought relief that the period between 15.11.1977 to 1.9.1986 should be counted for qualifying service.

3. The learned counsel for the applicant has argued that the question of less payment of pension is a continuing cause of action and the

.. 3/-

question of limitation would not apply and that the relief can be granted from the appropriate date after the OA. has been filed.

4. The learned counsel for the respondents has argued that the matter pertains to the year 1986 and is hopelessly barred by limitation. If the applicant had any grievance for the period from 15.11.1977 to 1.9.1986, he should have approached well in time and the case of the applicant cannot be entertained as it suffers from latches and is hopelessly barred by the law of limitation.

5. The learned counsel for the respondents has also argued that the question of permitting extra-ordinary leave to be counted for the purpose of qualifying service has not been provided in the rules and on this count also the applicant is not entitled to count the service from 1977 to 1986 for the purpose of qualifying service.

6. Although this is a case wherein the applicant has sufferred because of the criminal negligent resulting in the delay for about 9 years in the case of the applicant being offered a job, but the law of limitation is squarely against the applicant and cannot be over-looked in this case as the cause of action arose during 1977 to 1986.

.. 4/-

This cannot be treated as continuing cause of action.

7. The application, therefore, fails on the point of limitation. The OA. is dismissed with no order as to the costs.

(P.P.SRIVASTAVA)
MEMBER (A)

mrj.

CENTRAL ADMINISTRATIVE TRIBUNAL,
BOMBAY BENCH, MUMBAI,

Date of decision : 24/4/2015

Original Application No.802/1994

Raghunath Nathoo Bari - **Applicant.**
(By Advocate Shri S.N.Pillai)

Versus

Union of India & Anr. - **Respondents.**
(By Advocate Shri R.R.Shetty)

Coram:

HON'BLE SHRI A.J.ROHEE, MEMBER (J)
HON'BLE MS.B.BHAMATHI, MEMBER (A)

(a) To be referred to the Reporters or not?
(b) Library.
(c) To be uploaded or not?

(Ms.B.BHAMATHI)

MEMBER (A)

B.

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH.

ORIGINAL APPLICATION No. 802 OF 1994

Friday, this the 24th day of April, 2015

CORAM: HON'BLE SHRI ARVIND JAYRAM ROHEE, MEMBER (J),
HON'BLE MS. B.BHAMATHI, MEMBER (A).

Raghunath Nathoo Bari,
At Post Utkheda,
Taluka : Raver, Distt. Jalgaon,
Maharashtra State.
C/o. Shri H.A.Sawant, L.L.M.,
DBA, 6/44, Unnat Nagar No.1,
M.G.Road, Goregaon (W),
Mumbai-400062. ... **Applicant**
(By Advocate Shri S.N.Pillai)

VERSUS

1. Union of India
Through The General Manager,
Headquarters Office,
Bombay V.T.,
Bombay-400001.
2. The Chief Security
Commissioner,
Central Railway,
Headquarters Office,
Bombay V.T.,
Bombay-400001.
3. The Secretary,
Ministry of Railways,
Railway Board,
Rail Bhavan,
New Delhi. ... **Respondents**
(By Advocate Shri R.R.Shetty)

(Reserved on 8.4.2015)

O R D E R

Per: Ms. B.Bhamathi, Member (Administrative)

This O.A. has been filed by the applicants under

Section 19 of the Administrative Tribunals Act, 1985 seeking for the following reliefs :-

> "8(a) that this Hon'ble Tribunal may be pleased to order and direct the Respondents to fix the Applicant's monthly Pension as per rules counting the period of extra-ordinary leave sanction to him from 15.5.1977 to 14.11.1977 and 15.11.1977 to 1.9.1986 as admissible according to rules;
>
> 8(aa) that this Honourable Tribunal may be pleased to order and direct the respondents to fix the applicant's monthly pension as per rules and also to pay wages for the period from 15.5.1977 to 1.9.1986, for which period he was not given alternate employment, eventhough a vacancy was there as per records and correspondence of the respondents.
>
> 8(b) that this Hon'ble Tribunal may be pleased to issue direction/order to the Respondents to pay the arrears of the pension amount, based on the correct fixation of pension;
>
> 8(c) that this Hon'ble Tribunal may be pleased to issue direction/order to the Respondents to effect the payment of the correct commutative value of pension and all other consequential benefits;
>
> 8(d) that such other and further order or orders be passed as the nature and circumstances of the case may require;
>
> 8(e) that the costs of this Application be provided for.

Pleadings in the OA

2. The applicant's case is that he was working as Rakshak in RPF Department from 10.5.1957. On 13.8.1975, while on duty, he sustained grievous injury to his left hand. He was admitted in the Railway Hospital for treatment and certified as "Injured on duty" (IOD) by the Competent Medical Authority for the period 13.8.1975 to 20.4.1977.

2.1 He was assessed by the Medical Board as fit in Category B-1, but it was a post in Category B-1 where he would not be required to use his left hand. The medical certificate was issued on 20.4.1977. He was then granted 24 days HPL w.e.f. 21.4.1977 to 14.5.1977 and then six months extra-ordinary leave from 15.5.1977 to 14.11.1977, while a suitable alternative job was to be found under Rules.

2.2 When he approached the respondents for duties as recommended no alternate job for applicant could be found within the prescribed period. Being without any source of income, the applicant requested Chief Medical Officer for his medical re-examination in order to allow him to resume his duties. As per Rules, when an employee is de-categorized, he is given an alternate job. The applicant states that he was not given an alternate job even when he was fit to do an alternate job, which may not require the use of his left hand. On the other hand, alternate jobs have been provided to a number of decategorized employees for work of sedentary nature.

2.3 On 16.11.1977 his service was terminated w.e.f. 15.11.1977 on the ground that the respondents could not find an alternate employment and the settlement dues were paid to him. On 17.11.1977 the FA &CAO informed the RPF that a post was available with them and that applicant can be posted in the Department as a Peon subject to

following conditions :-

"i) The employee has to accept bottom seniority;

ii) Since the employee is working in higher grade, i.e. Rs.225-308/- (RS) he has to give declaration that he is prepared to work in lower grade, i.e. Rs.196-232/-(RS)".

2.4 The applicant accepted the above referred conditions as there were no alternative. But, the FA & CAO did not, eventually, accept his application as his services had been terminated. However, FA & CAO office requested the department to obtain permission of the General Manager to extend the extra-ordinary leave in order to accept the application of the applicant.

2.5 The Chief Security Officer (CSO) office referred the matter to the Chief Personnel Officer (CPO) for conveying sanction of the General Manager as per above request of the FA & CAO for extending extra-ordinary leave of the applicant for the period from 15.11.1977 till date of termination i.e. till the date of resumption of duty. The CPO advised the CSO to absorb the applicant as peon in the FA & CAO department. The CSO then requested the Railway Board to grant EOL beyond six months from 15.11.1977 with the concurrence of FA & CAO.

2.6 Vide letter dt. 24.10.1986 the Railway Board communicated the President's sanction of EOL in favour of the applicant from 15.11.1977 to 1.9.1986 as a special

case in relaxation of rules and his absence from 13.8.1975 has been treated as follows :-

"13.8.1974 to 20.4.1977	)	"Medical leave "IOD" case
21.4.1977 to 14.5.1977	)	Half Pay Leave
15.5.1977 to 01.9.1986	)	as Extra-ordinary Leave. "

2.7 In pursuance of the above sanction, applicant was absorbed, treating the period as continuous service, and posted viz. HAMAL a (Peon) in the scale of Rs.196-232/- (RS) w.e.f. 2.9.1986 in the DIG's office against an existing vacancy vide order dt. 2.9.1986 and CSC's order dt. 7.12.1987. Applicant submitted his representation on 31.10.1988 and 3.1.1989 for consideration of his dues viz. salary, increments, arrears between 1977 and 1986. Applicant retired on 31.7.1993, still vide letter dt. 24.1.1994 he represented, wherein he also sought full pension and gratuity and for treating the said period as qualifying service. But when this was not responded to, he filed OA 802/1994 before the Tribunal on 4.7.1994.

2.8 The applicant being posted as Junior clerk w.e.f. 8.12.1989 in the scale of Rs.950-1500, on the basis of last 10 months Average pay which comes to Rs.10,600 divided by 10 = 1066/-. Since the employee has completed 33 years of service the pension will be 50% of the basic

pay i.e. Rs.532/-. The commutation value being 1/3 of the basic Pension would be Rs.177/- and therefore balance monthly pension would be Rs.356/- instead of Rs.270/- p.m. Applicant was paid Commutation Value of Rs.16,320/- instead of Rs.22,212/- admissible to him. Based on the last pay drawn i.e. Rs.1070/- p.m., the applicant would be entitled to DCRG amounting to Rs.27,655/- whereas he was paid Gratuity of Rs.13,375/-.

2.9 This Tribunal dismissed the OA on the ground of limitation vide order dt. 13.12.1996. The Review Petition was also dismissed in limine by the Tribunal. The applicant then approached the Hon'ble High Court of Judicature at Bombay by way of Writ Petition No.2399 of 1998. The Hon'ble High Court observed that as the cause of action for claiming pensionary benefits is always continuing, this Tribunal should have also considered the claim of applicant on merits. The Hon'ble High Court quashed and set aside the order treating all points 'as kept open'.

2.10 As per Rule 304 read with 522 and note below R-I, it was mandatory on the part of Railway Administration to provide alternate job within six months from the date of his fitness being an "IOD" case. Rule 304 reads as follows :-

> " during the period of leave so granted such a Railway servant must be offered some alternate employment on reasonable emoluments having regards to his former

employment".

2.11 In view of the above, it is clear that the applicant remained without a job from 21.4.1977 to 1.9.1986 i.e. about 9 years for none of his fault and on account of administrative delay. Had he been provided alternate job in 1977 according to the mandatory provisions he would have been in service. But, because of non-absorption he has been allowed to suffer extraordinary monetary loss and mental agony arising from delayed action. The Railway Board, in fact, took almost 7 years to decide the case of Extra-ordinary Leave. If the applicant was provided alternate employment in accordance with rules, such a situation would not arisen. The delay has resulted in the said period not being covered for the purpose of counting qualified service. Hence, the applicant's pension has been fixed wrongly leading to civil consequence arising mainly from the fault of the administration. Further, he was working as HRK in the higher grade in the scale of Rs. 225-308/- (RS), whereas he accepted lower grade in the scale of Rs.196-232/- as a Peon i.e. from present grade of Rs.825-1200/- to Rs.750-940/- (RP) merely because he was not provided an employment.

2.12 The Rules regarding counting of leave on medical certificate as qualified service are contained in the Pension Rules. In this connection, the applicant has

relied upon the Judgment in **Narender Kumar Chandla vs Haryana on 4 February, 1994 {1995 AIR 519}.**

Reply of Respondents.

3. The respondents, in reply submit that the applicant was granted leave of 24 days APL w.e.f. 21.4.1977 to 14.5.1977 and thereafter six months EOL from 15.5.1977 to 14.11.1977 as per rules with a view to find suitable employment, but alternate employment was not available within the prescribed period. Hence, they had no option but to terminate his services by letter dt. 15.11.1977 after paying all his dues as per rules. Respondents have denied that they were ever bound to give him alternate job. In any case, since no alternate job was available termination of services cannot be termed as illegal.

3.1 However, it was only after termination of service, the respondents received intimation from FA & CAO that the applicant could be absorbed in the department as a Peon and he was advised to contact the office of FA & CAO. But as he had already been terminated, the applicant could not be absorbed by the office of the FA & CAO as per rules.

3.2 It is in this context and in support of applicant that the respondents moved a proposal to the Railway Board to extend the period of EOL beyond six months by relaxing the rules after obtaining due sanction of

President conveyed vide letter dt. 24.10.1986 to treat the period from 15.11.1977 to 1.9.1986 as EOL. This was done as a special case in relaxation of the rules. However, the said order did not provide that the said period should be counted towards qualifying service for the purpose of pensionary benefits. The aforesaid order only provided that the said period be treated as EOL in order to regularize absence and to treat his service as continuing service not to give break in service and to provide an alternative job which had by then become available. The said period was not sanctioned and granted to be treated to cover for the purpose of granting pensionary benefits. The respondents action is therefore neither arbitrary nor unconstitutional. In fact, they have provided alternate job after relaxation of the rules. The respondents have justified calculation of pension, DCRG and commutation value on the basis of qualifying service so arrived at. The same had been paid in time.

Rejoinder by applicant (pre-remand)

4. The applicant filed a rejoinder, to explain that there was no delay (although no delay condonatin was formally filed by way of Misc. Application). He submits that he filed a representation in 1988, 1989, but they were not responded to. He could have represented regarding pensionary benefits only after PPO was issued

on 5.8.1993 after his retirement, which he did in 1994. The cause of action starts from then, i.e. when he first came to know that the period between 1977 to 1986 had not been included/counted as qualifying service. He filed the OA without any delay in 1994, when no response was forthcoming.

4.1 Even in this OA, the department filed reply after repeated orders of the Tribunal, after 2 years i.e. on 3.6.1996. This was delay on the part of respondents.

4.2 Even though the information regarding availability of job with FA & CAO was made known to them in 1977, it was reported to the Railway Board only in 1979 after 2 years. Thereafter, the department did not take any steps for 7 long years. Again, there was callous neglect resulting in delay.

4.3 The CPO clarified vide his letter dt. 17.2.1978 advised the employee can be absorbed in the service after 6 months. Still no action was taken.

4.4 The final settlement was made on 27.3.1980, while it was known that a vacancy existed and even when Board had been approached. The settlement was done without reference to the above facts and circumstances.

4.5 Although he conveyed his willingness for Hamal's post on 20.5.1982, the CSO after 3 months regretted that it was more than 5 years from the date of decategorization from 20.4.1977. Hence, his absorption

was rejected, even though absorption was mandatory as per provisions of Chapter XIII of IREM Vol.I. There was administrative delay in this respect also.

4.6 For Class III & Class IV the GM is competent to sanction EOL less than 5 years and for period beyond that the President has to be moved for approval. Had they not delayed administrative action, the proposal would not have needed to be sent for Presidential approval, inasmuch as, due to non application of mind, the GM who is the competent authority was not approached in time for sanction of leave, which was then below the 5 year period.

4.7 The respondent did not reply to the applicant's representation dt. 31.10.1988 addressed to the GM for full payment of salary. Instead they sent the case to the President. After receiving the reply they should have referred back to the President for orders to clarify if the said regularized period should have been considered for purpose of pensionary benefits or for qualifying service. They simply assumed it was not.

4.8 The Railway Board's reply to the CSO's letter on 24.10.1986 after the reference was made on 10.7.1979 i.e. after 7 years again showed inordinate administrative delay.

4.9 Even in case of wilful absence from duty, though not covered by grant of leave, it will not entail loss of lien. The period of absence not covered by grant of

leave is treated as 'dies non' for all purposes viz. increment, leave and pension. Such absence without leave where it stands in isolation and not in continuation of any authorised leave of absence, will constitute an interruption of service for the purpose of pension. Unless sanctioning authority exercises its power to treat the leave without allowance the entire past service will stand forfeited. The applicant states and submit that, in his case, the President of India has considered his case specially and rules have been relaxed. It is not specifically stated that the period will not be counted for the purpose of pension and therefore the negative interpretation by the respondent is totally wrong. The period sanctioned beyond 5 years will have to be counted for the purpose of Pension.

4.10 Since the respondents have violated Rule 2605 IREM, the pension and gratuity is to be counted on the same scale as and when he was declared unfit so that he should be compensated to some extent. (Para 15) **N.Jannathan v. Union of India {1989 4 SLJ 260}.**

4.11 Relying on the Judgment in the case of **R.S.Gramopadhya v. Union of India {1988 8 ATC 804 (Goa)}**, the applicant has contended that when vacancy was available and the applicant was advised accordingly then, absorbing him after several years is bad in law, as he is deemed to have been absorbed on the date when the vacancy

was available.

4.12 While calculating the qualifying service, Rule 1228, 1230, 1231 and 1234 of Indian Railway Administration and Finance Code has not been followed. The code lays down the detailed procedure. The applicant relies on the case of **P.D.Simon v. Union of India {1996 33 ATC 436}.**

4.13 As per Railway Board Circular dt. 11.4.1988 it is mandatory that medically decategorised staff should be absorbed in suitable alternative posts in a regular cadre only. Further, the Railway Board Circular dt. 18.1.1989 has ordered that in case no suitable post to accommodate is available then they should consider for absorption in alternative posts in any other department within the framework of provisions contained in Chapter XXVI of the IREM.

4.14 The job was available few days after termination order was issued. This could have been easily avoided if they had exercised due diligence in looking for an alternative job. Further, the respondents should have cancelled the termination order, such action being within G.M's power and absorbed him, but violated mandatory provisions laid down by the Board and did not consider the welfare of the employee and went into correspondence and red-tapism.

Delay condonation application by applicant (post-remand

5. The applicant has now filed MA no: 347/2015 for

delay condonation after the matter has been remanded by the Hon'ble High Court to this Tribunal.

5.1 He has submitted that the pleadings in the OA and averments in the rejoinder clearly show that the respondents did not take any concrete steps to provide an alternative employment to the applicant and terminated his services on the ground that alternate employment was not available even though vacancies were available then. Communication dt. 17.11.1077 is a concrete proof that the vacancy was available. However, he was given alternative employment only in 1986.

5.2 He made representations in 1988 claiming full salary for the period 1977-1986. There was no response. After retirement in 1993 he made one more representation in 1994, this time seeking for counting of the period from 1977-1986 for the purpose of pension and gratuity and other retirement benefits etc. When the pension order was issued on 5.8.1993 only then he realised that the period from 1977-1986 was not counted for pensionary benefits. As fixation of pension is a continuing cause of action , there is no delay in filing the OA. Hence, he has prayed for condonation of delay.

6. We have gone through the O.A. along with Annexures-A-1 to A-13, M.A. No.1072 of 1994 for amendment and M.A. No.347/2015 for condonation of delay.

7. We have also gone through the Reply filed on

behalf of the respondents to Misc. Petition No.1072 of 1994.

8. We have heard the learned counsels on behalf of the applicants and respondents and perused the facts and circumstances and law points of the case.

Findings

9. Two issues requires adjudication in this OA. First, pertains to maintainability of the OA on account of alleged delay. Second, relates to the facts and circumstances of the case. The Railway Board having regularized the period of absence from 1977 to 1986 whether applicant was entitled to have this period counted as qualifying service for purposes of pension? Ancillary to this is the question is whether a case of administrative delay on the part of respondents stands established or not leading to denial of substantive and procedural justice.

10. The applicant's services was terminated on 16.11.1977 on expiry of six months EOL on 15.11.1977 when respondents could not find an alternative job for placement of applicant as per IREM. Para 1304 of the IREM Vol.I reads as follows :-

> "1304. *Railway servants incapacitated for service in posts held by them*
>
> (a) permanent Railway servants - A permanent railway servant in group (ii) of Para 1302 above must also cease to perform the duties of the

post, he was holding from the date he is declared medically unfit. Here again, no officer has the authority to permit him to perform his duties in that post beyond that date. He should be granted leave as admissible to him, under the leave Rules by which he is governed, from the date he is incapacitated subject to the proviso that where the railway servant has not got six months leave to his credit, his leave shall be made upto six months by the grant of extraordinary leave. If an alternative employment cannot be found for such a person within the period of leave so granted his service should, be extended by grant of extraordinary leave, subject to the condition that the total amount of extraordinary leave to be granted to the railway servant does not exceed six months. It should be possible within the period of leave thus extended to find either a permanent or a temporary post for his absorption. If the railway servant is absorbed against a temporary post in a permanent cadre a supernumerary post may also be created and his lien counted against that post. It should, however, be noted that.

(i) the actual creation of super-numerary post will follow the acceptance of offer of alternative post;

(ii) the supernumerary post should be abolished as soon as a permanent post is found for the railway servant concerned.

NOTE :-The purpose of granting extra-ordinary leave envisaged in this para is that in case the Railway administration is able to find a suitable alternative employment for a medically incapacitated employee, there should be no break in his

service. Since the period of such extraordinary leave counts for the purpose of special Contribution to P.F. in the case of a railway servant governed by the state Railway Provident Fund Rules but not in the case of pensionable Railway servant the letter employee may not like to avail of the extraordinary leave but may instead prefer to quit service on pension, immediately on the expiry of his period of leave with allowances. In such case extraordinary leave need not be granted to a railway servant, if he so desires.

2. In the matter of absorption of a medically incapacitated staff in alternative post, Railway administrations, should take care to ensure that the interests of staff in service are not adversely affected as far as possible. The alternative appointment should be offered only in posts which the staff can adequately fill".

11. Para 1306 of the IREM, Vol.I describes the steps to be taken for finding alternative employment. This para lists out the logical and exhaustive steps to find placement eventually in any manner of speaking, so that medically de-categorized employee is not adversely affected. The spirit in which paras 1304 to 1306 has been framed is clearly evident of the fact that nobody can actually or potentially go without an alternative employment before completion of the six months

extraordinary leave granted to a medically de-categorized person i.e. while the Railways are on the job to find a suitable placement for absorption. The said paras, therefore, do not envisage a situation where an alternative job could never ever be found, if the railway authorities do a thorough scan of vacant positions and due diligence in finding an alternative job. The relevant paras of IREM also do not state that if no job is found the services of the employee would be terminated, because the assumption is that a job will have to be found.

12. It is not stated by the respondents as to the nature of the efforts taken by the respondents to find an alternative job where applicant could be absorbed. Para 1304 clearly states that the applicant could even have been absorbed against a temporary post in a permanent cadre for which a supernumerary post could be created and his lien could be counted against that post. Hence, the responsibility to find any appropriate job for the applicant rested entirely on the railway authorities.

13. It is noted that after his period of absence from 1977 to 1986 got regularized, later the applicant had even accepted a Hamal's post carrying a pay scale of lower than that of a Rakshak, which shows that he was willing to accept a job involving lower level of emoluments. Para 1309 of the IREM clearly states that

the alternative post to be offered to railway servant should be the best available for which employee is suited to ensure that the loss in emoluments is minimum. But the low level of emoluments should not deter officers concerned from issuing an offer if nothing better is available after giving the employee due opportunity to accept. There is nothing to show on record that the railway authorities even found a suitable job involving lower emoluments within the period of grant of extraordinary leave.

14. Further and clinching proof of lack of due diligence on the part of the railway authorities came up in the wake of the fact that the FA & CAO informed within just two days of the termination of the applicant's services that a permanent vacancy was available as a Peon in the office. Hence notwithstanding the fact of permanent vacancy being available before termination of his service, the applicant was not absorbed against that available vacancy and still his services were terminated. Nothing prevented the railway authorities from considering withdrawal of the termination order on 62nd day in the light of letter of CPO dated 17.2.1978.

15. Hence, in violation of IREM even when an alternative job was available the applicant was not given the job or he was offered one when it was in official terms considered too late. It is not clear under what

provisions of law as contained in the IREM that his services were terminated, as the IREM does not even envisage a situation where no job would be available and termination could be warranted. There is nothing on record to show the standard operating procedure (SOP) for identifying suitable job for placement of a medically decategorized employee and his absorption in any available job was carried out by the authorities. If the FA & CAO could offer to take him against a Peon's job two days after the services were terminated, it shows that even the minimum inter-divisional consultations required under IREM were not followed and which costed the applicant his career. Hence, we have also no doubt in our mind that the IREM carrying no provisions for termination, even the termination order was invalid and illegal and non est in the eyes of law.

16. The respondents would contend that following the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the existing provision of IREM were modified to show greater concern to persons suffering from disabilities resulting in their medical decategorization. But, such a law was passed only in 1995 after the applicant superannuated on retirement and hence the progressive and beneficial provisions of the said Act cannot be invoked retrospectively in respect of

applicant. Para 1305 of the amended IREM after enactment of law alone states that it is statutory to create a supernumerary post to absorb and accommodate medically incapacitated employees.

17. However, it is clear that even the pre-amended IREM contains some provisions for creation of supernumerary posts, but which was not invoked in the case of the applicant. In view of the foregoing the Railway Board's order rightly, (but delayed) regularized his period of absence from 1977 to 1986 paying him his salary, increment, arrears etc. With the order of Railway Board treating the period as continuous service there is nothing to contradict the fact that the person was deemed to have been working. If he was paid salary for the period, it is assumed that he has also deemed to have been working and therefore it cannot be the case that while he is paid the salary for the said period, that period itself shall not be counted for the purposes of pension. The Railway Board order was passed taking into account all facts and circumstances, including provisions of IREM and notwithstanding administrative delays. Hence, denial of pensionary benefits is illegal. We hold, therefore, that the applicant is entitled to receive pension for the period 1977 to 1986.

18. We have also taken due notice of the timelines in which the applicant's case for finding an alternative job

took place, followed by regularization of leave involving withdrawal of termination order in 1986. The applicant has rightly pointed out that although FA & CAO informed the RPF that the post was available on 17.11.1977, it was reported to the Railway Board only in 1979 for extension of EOL. Thereafter, the department did not take any steps for 7 long years till the order was issued in 1986 regularizing the period between 1977 and 1986 and appointing him in 1986.

19. In terms of Rule 510 of IREM Presidential sanction is required only if the leave was beyond 5 years. It is on record that the CPO informed CSO/RPF vide letter dt. 17.2.1978 that there was no objection to employ him after six months, but for grant of EOL special case should be made out to the Board. Hence, at that point in time the General Manager was competent to sanction EOL for a period of less than 5 years for Class-III and Class-IV employees. Had the General Manager sanctioned leave then the matter need not have been referred for Presidential approval which further built up the pre-existing delay and the inaction on the part of Respondent no:2 at the relevant point in time.

20. Further, while the FA & CAO on the very next day following his termination i.e. 17.11.1977 informed RPF that there was a vacant post in that office, still the RPF wrote to the CPO only on 8.12.1977 and the CPO

replied only on 17.2.1978. This administrative delay has also not been explained.

21. In 1982 he was offered the post of Hamal and he underwent an interview. It is not clear as to how he was considered against the post in 1982 when his services had already been terminated in 1977. It only showed that there was an intention to appoint the applicant and make good the injustice done to the applicant, even as the reference to the Railway Board made in 1979 was pending before the Railway Board. Four years later in 1986, the President granted him EOL for the period 1977 to 1986 absorbed him as a Peon and treated him to have been in continuous service and granted him the same pay as before, following which the applicant also refunded the settlement dues.

22. In view of the above, we have no doubt in our minds that the respondent no:2 did not exercise due diligence as envisaged under the IREM to absorb him in an alternate job within the prescribed period. Having failed in the responsibility enjoined upon them under law, the action to terminate his services not provided in the IREM, was illegal. Having terminated him illegally the administrative delay coupled with inaction continued on the part of all the respondents resulted in denial of due relief by way of absorption, which was done only after 9 long years, all of which affected the

interests of the applicant very adversely costing him his career for having been injured not in any personal circumstances, but while on duty. The violation of the rights of the applicant and denial of justice is apparent resulting in immeasurable harm to him.

23. As regards maintainability of the OA on grounds of delay, it has been rightly contended by the applicant that after he was absorbed in 1986 he represented in 1988 and in 1989 for claiming his wages, increments, arrears etc. Following his retirement in 1993 he claimed full pension and gratuity when PPO showed that the pension was denied by not counting the regularized period from 1977-1986. No response was forthcoming from the respondents, despite his representation in 1994 claiming full pension and gratuity. The OA was filed a month before the pension order was issued i.e. on 4.7.1994. It is clear from the above that the applicant could have known about the denial of pension only after the pension order was issued. There was no delay in filing the OA. Further, pension being matter of continuing cause of action, we are of the firm view that there was no delay in filing the OA and requirement for condonation of delay does not lie.

24. Keeping the foregoing in view, the OA succeeds both on merits and on the maintainability of the OA. The applicant is now 80 years old and it would only be in the

fitness of things for the respondents to not further harrass in the waning years of his life and grant him the pension and pensionary benefits as would be applicable to him today without having to file any fresh representation, to grant him the relief sought for, as due under extant rules/guidelines. The respondents are directed to identify a responsible officer who will liase between the applicant, wherever he resides and the department for obtaining his signatures, processing the papers and issue of sanction order within three months of the date of receipt of a certified copy of this order. The Chief Security Commissioner shall be personally responsible for carrying out the regular and duly documented reviews on a weekly basis regarding work in progress to ensure that further delays do not hamper completion of this work within the time lines provided for in this order.

25. Accordingly, the OA is allowed. The respondent authorities shall deposit Rs.5000/- by way of costs to the applicant immediately.

B. Bhamathi
(Ms.B.Bhamathi)
Member (A)

(Arvind J. Rohee)
Member (J)

B.