

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application Nos. 314/94, 1116/94 and 1146/94
Transfer Application No.

1.C.L.Amin
2.J.M.Parikh
3.U.H.Mehta

Date of Decision : 28-4-1995
Applicant in O.A.314/94
Applicant in O.A.1116/94
Applicant in O.A.1146/94
Petitioner

Mr.G.S.Walia

Advocate for the
Petitioners

Versus

Union of India & Ors.

Respondents

Mr.N.K.Srinivasan

Advocate for the
respondents

C O R A M :

The Hon'ble Shri M.R.Kolhatkar, Member(A)

The Hon'ble Shri

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

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

M.R.Kolhatkar
(M.R.KOLHATKAR)
Member(A)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A.Nos.314/94, 1116/94 & 1146/94

1. C.L.Amin	.. Applicant in O.A.314/94
2. J.M.Parikh	.. Applicant in O.A.1116/94
3. U.H.Mehta	.. Applicant in O.A.1146/94

-versus-

Union of India & Ors. .. Respondents

Coram: Hon'ble Shri M.R.Kolhatkar,
Member(A)

Appearances:

1. Mr.G.S.Walia
Counsel for the
Applicants.
2. Mr.N.K.Srinivasan
Counsel for the
Respondents.

ORDER OF REFERENCE:
Per M.R.Kolhatkar, Member(A) //

Date: 28-4-95

In all these three cases, the
applicants are senior retired officers of the
Western Railway who have retired between
1-1-73 and 31-12-78, the specific dates of
retirement being as below:

O.A.314/94 - 8-7-76

O.A.1146/94 - 6-8-73

O.A.1116/94 - 31-8-76 or 31-1-76
(Note: the application
mentions both the
dates)

In all three cases, the applicants were governed
by the Contributory Provident Fund Scheme. The
Railway Board by its order dated 23-7-74 read with
dt.
Memo/29-12-79, allowed options for pension to
the serving as well as retired employees who
were in service during the period from 1-1-73
to 31-12-78. The contention of the applicant

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is that the address of the applicants were known to the respondents and the applicants also used to visit the office of the respondents for renewing passes etc. but the respondents never brought the contents of the various circulars, in particular circular dated 29-12-79 to their notice, as a result of which although they wanted to opt for pension scheme, they were precluded from doing so. None of the three applicants had sent any representation to the Railways in this regard except applicant in O.A.1146/94 ~~who~~ had sent a representation in direct November '88 which has no bearing on the issue of the case and applicant in O.A.314/94 wanted to make a representation on 28-10-93 but he did not send the same. The reason is stated to be ~~that~~ because of the policy of the railway administration not to take cognisance of such representations. All the three applicants contend that they gained knowledge about the circular dt.29-12-79 from the judgments in the cases of S.H.Desai vs. Union of India, O.A.626/92 decided by the Tribunal on 2-7-93 and V.D.Vaidya v. Union of India & another, (1991)15 ATC 392 against which SLP has been dismissed by the Hon'ble Supreme Court. Shri Desai was permitted to opt for pension scheme at a much later stage basis of alleged on the failure of the railway administration to individually communicate to him about the circular dated 29-12-79 and the applicants in these OA's claim the same relief im present.

2. All the applications have been opposed by the respondents firstly as being

time barred. Secondly it is contended by the respondents that the pension scheme was introduced by the Railways w.e.f. 1-4-57. The employee who entered service on or after 1-4-57 were automatically covered by the pension scheme instead of the Provident Fund Scheme. The employees who were already in service on 1-4-57 were given an option either to retain the Provident Fund benefits or to switch over to pension scheme. All the applicants had entered the service prior to 1-4-57. The letter dated 23-7-74 did not introduce the pension scheme but merely liberalised it and subsequent letter dt. 29-12-79 was merely part of a series of letters issued by the Railway Board extending the date of option from time to time. The first option was made open from 15-7-72 and the circulars were notified in the gazette and circulated to all concerned. The same were also exhibited on the notice board in the office where the employees usually visit for Railway passes etc. Thus the applicants were fully aware of the pension scheme while in service and hence the question of bringing to their individual notice the letter dated 29-12-79 does not arise. As against the two cases of S.H.Desai and V.D.Vaidya relied upon by the applicant, the respondents relied upon J.A.Sams vs. U.O.I. decided on 12-4-94 by division bench of the Tribunal and reported at 1994(2)SLJ (CAT)328. Although the respondents have not referred to this fact, the review petition against this O.A. viz. RP 89/94 in O.A. 689/90 was also dismissed by the same bench of the Tribunal on 23-11-94.

3. When O.A. 314/94 came up before the single bench, learned counsel for the applicant Shri Walia stated that although judgment in Sams' case would cover the outcome of the case, all the same the review petition against the O.A. was pending at that time. Moreover there have been subsequent division bench and single bench judgments in his favour. On 30-1-95 Shri Walia prayed that the matter may be referred to a larger bench in view of conflict of decisions.

The conflict according to him is between J. Sams' case and V.D. Vaidya's case. According to him, there was also a subsequent judgment of in his favour.

Calcutta Bench. The request of Shri Walia to refer the matter to a larger bench consisting of three members was tentatively accepted. Shri Walia however, stated that he would like to suggest draft terms of reference, the most important point according to him being the point of limitation. The matter was allowed to stand over till 3-2-95 but no draft was furnished by the counsel. On 5-4-95 the matter again came up before the same bench and Shri Walia agreed to file all the material on which he relies including additional judgments on or before 12-4-1995. In fact the major portion of the week in which 12th April fell was covered by closed

holidays. We, therefore, waited for receipt of material in the week beginning 17th April but in vain.

We have proceeded to make the reference in the absence of the material. The purpose

of these observations is to underline that the

reference has been drafted on the basis
of the ~~such material as could be gathered~~ in the
absence
of additional material promised and also
to explain the ~~time lapse in drafting the~~
~~reference.~~

4. The issue involved relates to extension of time for exercising option by railway employees for pension scheme and the relevant circular in this regard is the circular of the Railway Board No. PC-III(73) PN/3 dated 23-7-74 on the subject of "Grant of option to Railway servants governed by the State Railway Provident Fund(Contributory) Rules to come over to pensionable service and to the Family Pension Scheme, 1964." The material portion of this circular is as below:

"Reference Board's letters of even number dated 2nd January, 1974, 5th April, 1974, 19th June, 1974 and 18th July, 1974 liberalising the provisions of Railway Pension Rules in respect of Railway servants on the recommendations of Pay Commission.

Taking into account the changes (i) in the pay structure applicable to the Railway servants and (ii) in the retirement benefits admissible to Railway servants under the Pension Scheme, based on the decisions of the Government on the recommendations of the Third Pay Commission, the Railway Board have decided that another opportunity to opt for the liberalised Railway Pension Rules, including the benefits of Family Pension Scheme for Railway Employees, 1964 as amended from time to time should be allowed to all Railway servants (i) who have retained the S.R.P.F.(Contributory) benefits and (ii) where in service on 1st January,

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1973 and those who quited/retired on or after 1st January,1973, and that this option should also be allowed in the cases of Railway servants who were in service on 1st January,1973 but who died/may ~~be~~ die³ during the period from 1st January,1973 to the last date for exercise of the above option. The option should be exercised within a period of 6 months from the date of issue of these orders. The option once exercised shall be final and will be subject to the terms and conditions laid down in Railway Board's letter No.F(P)63 PN-1/40, dated 17th January,1964.

2.(i) not relevant

(ii) not relevant

(iii) The contents of this letter should be brought to the notice of all retired Railway servants who are eligible for this option or to the families of all the deceased Railway servants who may have died on or after 1st January,1973 before exercising an option within the time limit allowed, and the amount to be refunded should also be advised to them simultaneously. If the retired Railway servants or the family members in question desire to take advantage of these orders, the request from them to that effect duly accompanied by the amount to be refunded by them, as afore-mentioned must be received before the last date for exercise of option, or within a period of one month from the date of receipt of the communication of these orders to them, whichever is later. General Managers may extent the above limit of one month to three months in consultation with the respective FA & CAOs on the merits of individual cases. It should be ensured that in cases covered under Paras 2(i) & 2(ii)

above the requisite advice is issued as early as possible so that it reaches the retired Railway servant/family in time to enable option being exercised before the expiry of the ~~xx~~ last date.

3. Not relevant.

4. The Railway Administration should take urgent steps to bring the contents of this letter to the notice of all concerned employees under their administrative control including those on leave or on deputation or on foreign service. To facilitate prompt circulation of these orders the Board desire that the contents of this letter should also be published by the Railways in their gazettes in an extra-ordinary issue (in English, Hindi and regional language, as necessary) as early as possible and copies furnished to the recognised unions as well suitable press releases should also be issued."

5. From this circular it is clear that the pension scheme which was already introduced was liberalised by letters dt. 2-1-74 and subsequent letters and the instant letter dt. 23-7-74 conveys the decision that another opportunity to opt for liberalised pension be given to the railway servants who were in service on 1-1-73 and to be retired on or after 1-1-73. The option was to be exercised within a period of 6 months from the date of issue of the circular. Since the order covered railway employees who were in service as on 1-1-73 and since the circular was issued on 23-7-74 i.e. to say 19 months after the relevant date, the instructions stated that the contents of the circular should be brought to the notice of all the retired servants.

However, in their case also the last date of option was the same. General Managers had the power to extend the time limits by three months by the circular. The modalities envisaged to bring the contents to the notice of the concerned employees included publication of the contents of the letter in extra-ordinary issue of Gazette, furnishing the copies to the recognised unions and issue of suitable press releases.

6. Subsequently the Railways extended the time limit from time to time and by order dated 20-5-78 the time limit was extended upto 31-12-78. But these extensions were applicable only to serving employees, they did not apply to the retired employees. However, by letter No. PC-III/78/PN/Pt.I dated 29-12-79 the extension of time was made applicable to the retired employees also. This letter is reproduced in full:

"Sub:Grant of option to Railway servants governed by the SRPF (Contributory)Rules for coming over to Pension and Family Pension Scheme,1964.

Reference this Ministry's letter of even number dated 27th December,1978. It was clarified therein that the subsequent orders extending the date of option granted vide this Ministry's letter No.PC-III/73/PN/3/ dated 23rd July,1974 were applicable to serving employees only. On a point having been raised by the A.I.R.F. representing that hardship has been caused in the cases of those who retired/died during the various extensions of options granted, the matter has been considered and it has been decided that the extension of time upto 31st December,1978 may be deemed to be applicable in the case of

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those who having been in service on 1st January, 1973 retired/quitted service/died in service during the period from 1st January, 1973 to 31st December, 1978. The options exercised in the above cases upto 31st December, 1978 may, therefore, be treated as valid and the cases regulated accordingly in terms of the provisions made in para 2 of this Ministry's letter of 23rd July, 1974, referred to above."

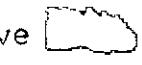
It will be seen from the above that this letter dated 29-12-1979 had the effect that the employees who retired between 1-1-73 and 31-12-78 could exercise the option upto 31-12-78 and those options were treated as valid. Nothing was said regarding the mode of communication, and therefore it is to be presumed that the mode of communication was the same as was referred to in the circular dated 23-7-74.

7. It is the interpretation of these circulars by different benches which has given rise to a conflict of judicial opinion. The relevant case law is cited below. Although the applicant has relied on the case of S.H. Desai and V.D. Vaidya, according to us the earliest case of division bench has to be treated as an authority for a proposition. From this point of view, we consider that it was the case of Joseph John Gansalves v. Union of India and others, O.A. 732/87, decided on 28-2-90 by ^a division bench which needs to be noticed. In this judgment a reference is made to Laxmi Vishnu Patwardhan's case as well as Jagan Prasad Srivastava's case of Principal Bench, New Delhi.

The case was decided on a short point. The applicant retired on 30-11-1977. After his retirement, certain instructions were issued by the Railways on 17-4-1978 and 20-5-1978 extending the date of option but the letter dtd. 27-12-1978 stated that orders extending the date of option were applicable to serving employees only but letter dated 29-12-79 amended this letter dated 27-12-1978 and stated that extension of time upto 31-12-1978 would apply to those who having been in service on 1-1-1973 retired between 1-1-1973 to 31-12-1978. The Tribunal held that the letter dated 29-12-1979 under which options of persons in service as on 1-1-1973 who retired between 1-1-1973 to 31-12-1978 and who were permitted to exercise option ought to have been brought to the notice of the applicant individually and since this was not done, the application of applicant dated 6-2-1986 purporting to exercise option for pension was directed to be accepted, though keeping in view the provisions of Section 21 of the AT Act the relief of arrears was restricted to one year prior to the date of filing of the application before the Tribunal.

8. The Tribunal in ^{"il"} Sams case held otherwise. It had also noticed V.D.Vaidya's case but noting that Gonsalves case as well as V.D.Vaidya's case heavily relied on Laxmi Vishnu Patwardhan's case, The Tribunal in Sams case had pointed out that Laxmi Vishnu Patwardhan's case was required to be restricted to the facts of that case. The Tribunal had also noted earlier that the various judgments of the Tribunal prior to Supreme Court Judgment in Krishena Kumar v. Union of India, AIR 1990 SC 1982 were heavily

influenced by the fact that Ghanashyam Das's case had cast a doubt on the validity of various options given by the railway board. The Tribunal therefore emphasised that ratio of Laxmi Vishnu Patwardhan's case can no longer be followed on the point of limitation and ratio of Ghanashyam Das's case ~~was no longer~~ good law on the point of validity of various options. In this ^{in Sams case} connection Tribunal observed at para 12 as below:

"12. If the last date for exercise of option was 31-7-1977, further extended to 31-12-1978, then can an employee approach this Tribunal in September, 1990 i.e. to say after a lapse of 14 years saying that the railways were under an obligation to inform him individually about the last date. The ratio of Laxmi Vishnu Patwardhan's case from which this obligation is derived appears to be confined to facts of that particular case. The pension scheme was introduced for the first time in 1957 and there was an admission of the railway administration that through oversight the letter was not individually communicated to the late husband of the widow. This is not so in the present case. After a lapse of 14 years, the present applicant approached this Tribunal on the ground that Railways failed in their obligation to communicate to him individually the extension of date. Whatever applied to 1957 scheme cannot be said to have  applied to subsequent cases and if the railway administration has taken the stand that every action was taken to widely circulate change in the extension of date of the pension scheme, it will have to be assumed that in the (normal)

official course it was so circula-
ted and railways cannot be held to be
under obligation to inform each of
the retirees individually. If such
an obligation is assumed, it would
amount to going against the ratio of
Krishna Kumar's case which refused
to extend the benefit of the circular
dated 8-5-1987 to all CPF retirees
irrespective of whether or not they
were in service on 1-1-1986."

On the point of limitation the Tribunal noticed
the Supreme Court judgment in Balkrishna Savalaram
Pujari Waghmare & Ors. v. Shree Dnyaneshwar
Maharaj Sansthan & Ors., AIR 1959 SC 798 where
the Supreme Court had distinguished between
continuing wrong which gives cause of action
versus continuing damage which does not afford it.
To quote: (para 9 of Sams judgment)

"It is the very essence of a conti-
nuing wrong that it is an act which
creates a continuing source of injury
and renders the doer of the act
responsible/liable for the continuance
of the said injury. If the wrongful
act causes an injury which is complete,
there is no continuing wrong even
though the damage resulting from the
act may continue. If, however, a
wrongful act is of such a character
that the injury caused by it itself
continues, then the act constitutes a
continuing wrong. In this connection,
it is necessary to draw a distinction
between the injury caused by the
wrongful act and what may be described
as the effect of the said injury. It is
only in regard to acts which can be pro-
perly characterised as continuing wrongs
that Section 23 can be invoked.

It is true that in the present case
because of non-applicability of the
scheme the applicant would be deprived

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of monthly pension but it is merely the effect of the injury and is not the injury itself. The wrong or the injury was done when the applicants were not allowed to get the benefit of the scheme and their first representation went unanswered. The applicants were free to seek relief within three years from the date of the wrong committed and that was not done. The claim here would therefore be barred by time under Section 21 of the Administrative Tribunals Act. "

9. In the order of review petition of Sams case
the question of limitation was further noticed in the context of the circular dated 23-7-74 read with 29-12-79. It was observed that for an employee to become eligible for being considered for pension the following three conditions were required to be filled:

- (i) he must be in service on 1-1-73
- (ii) he must have quitted or retired from service between 1-1-73 and 31-12-78;
- (iii) he must have exercised option during the above period.

The Various circulars were interpreted in Gonsalves case
so as to read the requirement of sending an individual communication as in the case of Laxmi Vishnu Patwardhan's case. In para 10 of the Gonsalves judgment it was stated as below:

"There is no affirmation in the respondents' written statement that the requisite publicity had been given to any of the concerned letters in so far as retired railway employees are concerned. During the course of oral arguments Mr. Kasturey did tell us that the letters had been given publicity through the railway's gazettes. But this will be of help only so far as

serving employees are concerned. We do not see how this can help in so far as retired railway servants are concerned. Based on this discussion we cannot help but hold that the applicant was required to be informed that he could exercise a fresh option to come over to the pension scheme and that he had not been so informed."

In the review order on RP/Sams judgment it was noted that although the railway administration ~~that~~ circular envisages the contents of the letter to be brought to the notice of the retired railway employees ~~who are eligible~~ for this option but there was no mention regarding individual letters being sent as in the case of 1957 circular. The Tribunal in Gonsalves case relying on the ratio of Laxmi Vishnu Patwardhan's case read that requirement into the 1973 circular which was not correct.

10. Thus Sams case essentially differed from Gonsalves case, in its reading of Railway Board's circulars. The Division Bench in Sams case felt it fit to differ with the ratio of an earlier division bench for the simple reason that, that division bench judgment (i.e. Sams Judgment) was rendered when the benefit of Supreme Court judgment in Kishen Kumar's case was available. Accordingly, in summary of Sams judgment it was clearly stated as below:

"(1) The Supreme Court Judgment in Kishen Kumar's case settles the matter regarding validity of option orders issued by the Railway Board from time to time. Various judgments of this Tribunal or other Tribunals holding otherwise are not good law.

(2) Any attempt to seek to exercise option at a belated stage on the ground of failure of Railway Admn. to communicate change in option individually to a pensioner amounts to obliteration of rationale of different options and is against the ratio of Kishen Kumar."

In para 3 of the summary it was stated that limitation applies to pension cases. This was admittedly if read in isolation too broad a statement but the authority on which it was made has to be appreciated viz. ^{SC Judgment} Balkrishna Savalram Pujari, Waghmare & Ors. v. Shree Dnyaneshwar Maharaj Sansthan & Ors. referred to above.

11. In the review petition No. 89/94 for praying review of ~~Sam~~ judgment, a reference was made, however, to the judgment in Hamir Singh v. U.O.I., 1991(1)ATJ 646, which was a division bench judgment of Chandigarh Bench which was rendered after Supreme Court judgment in Krishna Kumar. Hamir Singh had noticed Krishna Kumar's case and had still chosen to follow Gonsalves principle. This was, however, not brought to the notice of the Bench which rendered the judgment in ~~Sam~~ case. In the order rejecting review there is a reference to para 8 of Hamir Singh's judgment as quoted below:

"8. Reading Annexures A-3 and A-4 together, it is evident that there was obligation on the part of the Railway authorities to bring the contents of Annexure A-4 to the notice of the retired railway employees like the applicant. This view is fortified by the judgment of Jodhpur Bench (Annexure A-7) to which one of us was a party. There is no material to establish that the contents of Annexure A-4

had been brought to the notice of the applicant. Since the contents of Annexure A-4 had not been brought to the notice of the applicant, the impugned order declining to allow the applicant for pensionary benefits cannot be sustained."

In the review judgment it was further observed that Hamir Singh's judgment proceeded on the basis that contents of Annexure A-4 (circular dated 29-12-79) had not been brought to the notice of the applicant. It was therefore concluded that Hamir Singh's judgment proceeded on the facts of that particular case. But there is also ^a second aspect of Hamir Singh's case. It considered the point of limitation from the point of right to sue. It noted that the applicant had made a representation and a reply was sent by the railways and the O.A. was filed within the limitation period prescribed by Section 21 of the A.T.Act. Hamir Singh's judgment therefore did not go into the larger question of whether the right to sue can be said to be irrelevant

when the cause of action was very stale which was the view taken by the Sams case.

12. The review petitioner had also pointed out that Trimbak Sitaram's case, O.A.529/90 which was referred to in Sams case vide para 9, had since been reviewed. The facts were that the applicant who retired on 30-6-1982 was required to exercise option for pension scheme by 23-2-1983 but did not exercise the same; he sent representations on 10-11-1983 and 13-7-1985. He approached the Tribunal on 24-7-1990. The Tribunal rejected

the application on the ground that he did not approach the Tribunal within the time prescribed under Section 21 of the Administrative Tribunals Act and hence it is time barred. First of all it would be observed that Trimbak Sitaram's case did not deal with the case of option left open by circular dated 23-7-74 read with circular 29-12-79. Apart from this it is a fact that Trimbak Sitaram's case was reviewed in R.P.78/93 decided on 28-3-94. The review was allowed on the short ground that the applicant should have knowledge of pension scheme as well as the extension of time within which the benefit of the scheme could have been availed of. Thus in Trimbak Sitaram's case the ratio of Gonsalves case appears to have been accepted. In the review judgment of Sams~~o~~ case this fact was noted but it was further observed that the R.P. in question was not brought to the notice of the Division Bench who decided Sams~~o~~ case.

13. It may be noted that Sam's case was not alone in holding that various judgments of the Tribunal including that in Ghanshyam's case were no longer good law in view of Krishna Kumar's case. In this connection the Tribunal had referred to the judgments of Bombay Bench in Tukaram Mohite v. Union of India(O.A.No.750/89) decided on 7-10-91 and ~~xxxxxx~~ Govind Daji's case(O.A.915/89) decided on 9.2.1993. Extracts from ~~those~~ judgments also were given in Sams~~o~~ case.

14. It would thus be seen that there is a cleavage of judicial opinion and so far as we are able to notice, the conflict is between following two sets of judgments:

(i) Tukaram Mohite vs. Union of India, O.A. No. 750/89, decided on 7-10-91 by Bombay Bench
(ii) Govind Daji's case, O.A.915/89 decided on 9-2-1993, (iii) J.A.Sams case, O.A.689/90, decided by Bombay Bench on 12-4-94 and R.P.89/94 in O.A.689/90 decided on 23-11-94. All these judgments may be said to have broadly subscribed to summary of Sams judgment given in para 14 of the same.

On the other hand we have a second set of judgments viz. (i) Joseph John Gonsalves vs. Union of India and others, O.A.732/87 decided on 28-2-1990, (ii) Hamir Singh vs. U.O.I. division bench judgment of Chandigarh Bench reported at 1991(1)ATJ 646, and (iii) R.P.78/93 in O.A.529/90 Trimbak Sitaram v. U.O.I. (Bombay Bench). The second set of judgments would hold the view opposed to what is summarised in Sams judgment. It is necessary, therefore, to resolve this cleavage of judicial opinion. We, therefore, feel that the same should be settled by constitution of larger bench consisting of three members. The terms of reference of this bench may be as below :

15. (a) Whether the Railway Board Circular dated 23-7-74 read with circular dated 29-12-79 imposed on the Railway Board an obligation to communicate the related instructions to the railway employees

individually and where a railway employee is able to show that such an individual communication was not received, he is entitled to exercise the option even if he is not able to fulfil the pre-requisite conditions of exercising the option;

(b) If so, whether the option can be exercised at any stage irrespective of lapse of time since the dates of original circulars;

(c) Whether a railway employee who has not at all represented to the railway administration regarding exercising of option can claim to exercise option relying on his knowledge of certain judgments of the Tribunal which came to his notice at the time of filing of the O.A. (This part particularly arises in present OA's)

(d) In the light of the above whether Joseph John Gonsalves case, Hamir Singh's case and Trimbak Sitaram's cases were decided correctly or require reconsideration;

(e) In the light of the above whether Tukaram Mohite's case, Govind Daji's case and especially J.A. Sams case were decided correctly or require reconsideration ?

16. Let the Registry arrange to send the record of this and other relevant and available cases along with a copy of this order incorporating terms of reference for a full bench to be constituted to the Principal Bench, New Delhi

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for being placed before the Chairman of
C.A.T. at New Delhi for appropriate orders.
Let this be done expeditiously so that the
Full Bench can sit on 7th and 8th August '95
or immediately thereafter.

M.R.Kolhatkar

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(M.R.KOLHATKAR)
Member(A)