

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH, JAIPUR.

ORDER RESERVED ON 13.02.2015

DATE OF ORDER : 31.3.2015

CORAM:

HON'BLE MR. ANIL KUMAR, ADMINISTRATIVE MEMBER
HON'BLE SMT. CHAMELI MAJUMDAR, JUDICIAL MEMBER

1. ORIGINAL APPLICATION No. 283/2012

1. Meena Mulchandani wife of B.D. Mulchandani aged 53 years, resident of C-38, Indrapuri Colony, Lal Kothi, Jaipur.
2. Veena Dogra D/o Sardar Singh, aged 57 years, resident of 255, Avenue II Gom Defence Colony, Vaishali Nagar, Jaipur.
3. Smt. Shashi Bala Joshi wife of Pravesh Joshi, aged 54 years, resident of 119/19, Agarwal Farm, Mansarovar, Jaipur.
4. Puran Chand Mamoria son of B.L. Mamoria, aged 55 years, resident of 24 Lalpura Colony, Vanasthali Marg, Jaipur.
5. Y.K. Bhargava son of B.L. Bhargava, aged 52 years, resident of F 27 Ramesh Marg, C-Scheme, Jaipur.
6. P.P. Madan son of S.R. Madan, aged 53 years, resident of 68 Ram Gali No. 7, Raja Park, Jaipur.
7. Deepak Shrivastava son of F.L. Shrivastava, aged 56 years, resident of 73 Pawan Vihar, Jagatpura.
8. Shanti Lal Jain son of T.R. Jain, aged 56 years, resident of 103, Nirwan Vihar, PWD Colony, Vidhyadhar Nagar, Jaipur.

... Applicants

(By Advocate: Mr. S.K. Jain)

Versus

1. Union of India through Registrar General to the Government of India, Department of Census, Ministry of Home Affairs, 2 A Mansingh Road, New Delhi.
2. The Director, Directorate of Census Operation, Government of India, Jhalana Doongari, Jaipur.

... Respondents

(By Advocate: Mr. Mukesh Agarwal)

2. ORIGINAL APPLICATION NO. 569/2013

Shri Sushil Kumar Godha son of Shri Basanti Lal Godha, aged 56 years, resident of House No. 1356, Godha

Bhawan, Peetaliyon Ka Rasta, Johri Bazar, Jaipur. Now
Data Entry Operator, Census, Jaipur.

... Applicant

(By Advocate: Mr. S.K. Jain)

Versus

1. Union of India through Registrar General to the Government of India, Department of Census, Ministry of Home Affairs, 2 A Mansingh Road, New Delhi.
2. Registrar General, Government of India, Department of Census, Ministry of Home Affairs, 2A Mansingh Road, New Delhi.

... Respondents

(By Advocate: Mr. Mukesh Agarwal)

ORDER

PER HON'BLE MR. ANIL KUMAR, ADMINISTRATIVE MEMBER

Since the facts and law points are similar in both the OAs, therefore, they are being decided by a common order. For the sake of convenience, the facts of OA No. 283/2012 (Meena Mulchandani & Others vs. Union of India & Another) are being taken as a lead case.

2. The brief facts of the case, as stated by the learned counsel for the applicants, are that the applicants had been appointed to the post of Data Entry Operator Grade 'B' in the Department of Census previously known as Operators on various dates as shown below:-

S. No.	Name	Date of appointment	Date of Joining
1.	Smt. Shashi Bala Sharma	05.11.1982	06.11.1982
2.	Pooran Chand Mamoria A4	05.11.1982	06.11.1982

3.	Yogesh Kumar Bhargava A.5	05.11.1982	08.11.1982
4.	Deepak Kumar Shrivastava	22.06.1982	26.06.1982
5.	Meena Moolchandani A.1	22.06.1982	23.06.1982
6.	Veena Dogra A.2	22.06.1982	28.06.1982
7.	Prem Prakash Madan A.6	22.06.1982	23.06.1982
8.	Shanti Lal Jain		30.07.1982

3. That above appointments had been given to the applicants after the Employment Exchange sent the names and as per rules. Thus the above appointments were on regular basis though in the appointment letters it was mentioned that the above appointments are ad hoc and temporary basis. Vide order dated 14.11.1985, the applicants were appointed on regular basis in temporary capacity from the date of issue of order.

4. That the Department issued orders rejecting the prayers of the persons who had been appointed on ad hoc basis along with the applicants after due selection on regular basis for counting length of service of the alleged ad hoc period for grant of ACP. Those persons being aggrieved challenged the order and prayed for counting the services on ad hoc basis for grant of ACP in OA No. 197/2000, **Arnold Grey Rai & Others vs. Union of India & Others** before the Hon'ble Tribunal, which was allowed vide order dated 08.11.2006. Similar OAs nos. 430, 436, 437/2004 and 48/2005 were also filed. The above OAs were also allowed by the Hon'ble Tribunal granting the benefit of ACP after counting the ad hoc period for this purpose. The Writ Petition was filed by the respondents against the order of this Tribunal passed in OA No. 197/2000, **Arnold Grey Rai & Others**

(supra), which was dismissed by the Hon'ble High Court, Rajasthan at Jaipur Bench vide order dated 19.03.2002 (Annexure A/6). The Department accepted this decision of the Hon'ble High Court and did not challenge the same before the Hon'ble Supreme Court. Consequently the respondents granted the benefit of ACP to the applicants of that OA after counting the period of ad hoc service.

5. That the seniority list dated 12.12.2005 (Annexure A/4), the names of the above employees have been shown from sr. no. 41 to 47 and 49 while the names of the applicants are much above them. The names of the applicants are at sr. no. 28, 29, 32, 33, 37 to 40 and thus the applicants are senior to those employees who have already been given ACP counting their ad hoc services. The benefit of ACP is to be given on completion of 24 years of service. As such the respondents have acted in a arbitrary manner in not giving the benefit of ACP to the applicants while the same has been given to the junior persons who are similarly situated like the applicants.

6. That the applicants then filed OA No. 293/2007, 496/2006, 444/2006, 439/2006, 468/2006, 467/2006, 294/2006 and 295/2006 before the Hon'ble Tribunal and the Hon'ble Tribunal came to the conclusion that since the applicants have not completed 24 years of service, they cannot be given the benefits. However, the Tribunal directed the respondents to pass speaking order in the light of letter dated 12.03.1991 and to undertake whether the applicants were appointed on ad hoc

basis as they fulfilled the requisite qualification as indicated in the recruitment and promotion rules for direct recruitment or there was any departure in it. The respondents were directed to complete this exercise within a period of three months from the date of decision.

7. That vide order dated 03.03.2008, the respondents held that period of ad hoc service cannot be counted. Since the applicants were from the same job and were senior to those employees who were given the benefit of ad hoc service for grant of ACP, therefore, the present applicants could not have been discriminated against by the respondents. The respondents have taken a plea that the benefit of ad hoc service could not be extended to the applicants on the ground that they had been appointed against the reserved vacancies. This contention of the respondents is wholly false and baseless in as much as the applicants had never been reverted/ terminated on the ground that they had been appointed illegally dehorse the rules. Under the reservation rules, the appointment of non reserved community person could not be made without the dereservation of the post. In other words, the appointment of the applicant had not been done against the reserved posts but they were appointed against the general posts. Hence the ad hoc appointment could not be made by the respondents on the ground that all the posts being reserved. Thus the contention of the respondents that the applicants were appointed on ad hoc basis and not on regular basis is wrong and contrary to the facts of the case. The applicants were appointed after following the

due process. The learned counsel for the applicant submitted that the rules of recruitment came into existence in 1986. Prior to that there were no rules of recruitment. Therefore, the respondents be directed to give the benefit of ACP by treating the period of ad hoc service being on regular basis. Besides the applicants have been illegally discriminated against those employees who have been given the benefit of ACP by counting their ad hoc service though they are junior to the applicants and similarly situated.

8. The learned counsel for the applicants referred to the following judgments/orders in support of his averment:-

1. Rudhra Kumar Sain & Others vs. UOI & Ors.
ATJ 2000 (3) 392
2. K.C. Sharma & Others vs. UOI & Others
1997 (6) SCC 721
3. Bombay Telephone Canteen Employees Association, Prabhadevi Telephone Exchange vs. UOI & Another
1997 (6) SCC 723
4. Smt. D.V. Pandit & Others vs. UOI & Others
WP 523/2002 decided 18.12.2012 (Bombay High Court)
5. Md. Shah Nawaz Haque & others vs. Union of India & Others
Writ Petition No. 4997/2002 dated 05.06.2009 (Gauhati High Court)
6. Union of India & Others vs. Md. Shah Nawaj Haque & Others SLP NO. 19137/2010 (Hon'ble Supreme Court)
7. Ramesh K. Sharma & Another vs. Rajasthan Civil Services & Others
ATJ 2001 (1) 514
8. State of Haryana vs. Shri B.L. Gulati & Another
ATJ 2001 (1) 524
9. The Direct Recruit Class II Engineering Officer's Association and Others vs. State of Maharashtra & others
ATJ 1990 (20) 35
10. V.S. Charati vs. Hussein Nhanu Jamadar (Dead) by Lrs. 1999 (1) SCC 273.
11. Shreedhar Kallat vs. Union of India & Others
1995 (4) SCC 207
12. Smt. Naseem Bano vs. State of U.P. & Others

1993 (4) SLR 803

9. On the other hand, the respondents have submitted their written reply. In the written reply, the respondents have stated that the applicant, Smt. Meena Moolchadani (previously known as Meena Thaddani) was appointed as Operator on purely temporary and ad hoc basis against the reserved vacancies. She joined the post on 23.06.1982. The other seven applicants were also similarly appointed on purely temporary and ad hoc basis against the reserved vacancies as Operator and joining as under:-

S.No.	Name of the applicant	Date of joining as temporary/ ad hoc basis
1.	Km. Veena Dogra	28.06.1982
2.	Smt. Shashi Bala Joshi	06.11.1982
3.	Shri Puran Chand Memoria	06.11.1982
4.	Shri Yogesh Bhargav	08.11.1982
5.	Shri Prem Prakash Madan	23.06.1982
6.	Shri D.K. Shrivastava	26.06.1982
7.	Shri Shanti Lal Jain	30.07.1982

10. That the applicants were regularized to the same post w.e.f. 14.11.1985 vide order dated 14.11.1985 after the de-reservation of vacancies. Further all the applicants were declared as 'Permanent' to the post of Operator vide office order dated 08.06.1990 w.e.f. 24.05.1990.

11. That the applicants were awarded first ACP w.e.f. 09.08.1999 vide office order dated 05.11.1999. The benefit of second MACP was awarded to all the applicants vide office order dated 13.10.2011 w.e.f. 01.09.2008.

12. That as per Para 3.2 of the OM dated 09.08.1999 (Annexure R/1) 'Regular service' for the purpose of ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in the terms of relevant recruitment/service rules. As per condition no. 5.2 of the Annexure-I annexed with the OM dated 09.08.1999, "Residency periods (Regular Service) for the grant of benefit under the ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit. Further, as per para 14 of the OM dated 09.08.1999 "Any interpretation/ clarification of doubt as to the scope and meaning of the provisions of the ACP Scheme shall be given by Department of Personnel & Training.

13. The respondents in view of the Para 14 of the aforesaid OM referred the matter to the DOPT for clarification. The DOPT observed that the position has already clarified in OM dated 10.02.2000, that the ad hoc service shall not be counted. Even otherwise, the eligibility service prescribed in Recruitment Rules for promotion is the service rendered after regular appointment to the post in the feeder grade. Therefore, the ad hoc service cannot be counted for the purpose of granting ACP. The photocopy of the letter dated 19.08.2003 along with clarification of DOPT is annexed at Annexure R/2.

14. That the Hon'ble Supreme Court in the case of **State of Haryana vs. Haryana Veterinary and ATHS**, 2000 (8) SCC 4, considered that "whether the service rendered as a result of ad

OA 283/2012 & OA 569/2013

hoc appointment could be counted for the purpose of 12 years regular service of grant of selection scale". The Hon'ble Supreme Court observed that, the service rendered on ad hoc basis prior to regular appointment cannot be held "regular service", nor it can be counted for the purpose of selection scale. This judgment has been further relied in the case of **State of Punjab & Another vs. Ashwini Kumar & Others**, 2008 (12) SCC 572. The relevant para of the judgment is reproduced as under:-

"6. We do not feel it necessary to delve further into the merits of the case in view of decision of this Court in *State of Haryana vs. Haryana Veterinary & AHTS*. We are satisfied that the ratio in that case applies to the case in hand. The resultant position that emerges is that the judgment/order passed by the High Court holding that ad hoc service is to be including in calculating period of service for giving the higher scale of pay is unsustainable and has to be vacated. Accordingly, the appeal is allowed and the judgment/order of the High Court under challenge is set aside."

15. That the Division Bench of Hon'ble Punjab and Haryana High Court in the case of ACP in **Union of India vs. CAT & Others** vide order dated 18.07.2011 (CWP No. 5781-CAT of 2011) **(Annexure R/3)** set aside the order of Hon'ble CAT Bench Chandigarh dated 15.03.2010 whereby the Hon'ble CAT allowed the OA to count ad hoc period of service for granting ACP, and held that for the purpose of seniority, promotion or some other benefits, the service rendered in work charge basis, ad hoc basis or daily rate basis could not be counted.

Thus in view of above, it is clear that the period of the applicants prior to their regularization in that they rendered service on ad hoc temporary basis cannot be counted for the

purpose of ACP/MACP and the OA of the applicants deserves to be dismissed.

16. The respondents have also stated that perusal of office order dated 30.04.1984 (Annexure A/1) would show that the appointment of the applicants was purely on temporary and ad hoc basis against the reserved vacancies and they were extended for further period upto 31.08.1984 or till the posts are filled on regular basis from reserve class, whichever is earlier. This order further states that service can, however, be terminated even earlier without assigning any reason therefor. Thus the contention of the learned counsel for the applicant that they were appointed on regular basis is denied. The services of the applicants were regularized in temporary capacity vide office order dated 14.11.1985 from the date of the issue of the order (Annexure A/2).

17. The respondents have further stated that against the order dated 05.08.2005 and 09.08.2005 passed by this Tribunal in OA Nos. 430/2004, 436/2004, 437/2004 and OA 48/2005, Writ Petition before the Hon'ble Rajasthan High Court are still pending. Thus as per the judgment of the Hon'ble Supreme Court and clarification issued by the DOPT, the action of the respondents regarding not counting of ad hoc temporary service for grant of financial upgradation under ACP/MACP scheme is legal and justified.

18. With regard to the contention of the learned counsel for the applicant that the applicant in the present OA have been discriminated against being similarly situated to those employees who were given ACP/MACP counting their ad hoc service, the DOPT has clarified that the benefit of ACP granted to the applicants of OA No. 197/2000 in pursuance of the order of the Hon'ble CAT has been in violation of the relevant instructions and hence the mistake once committed cannot be repeated. The respondents have further given the details in Para 4.9 of their reply about the OAs filed by the applicant and decided by the CAT, Jaipur Bench, which is reproduced below:-

S.No.	OA No.	Filed by	Date of Decision
1.	293/2007	Smt. Shashi Bala Joshi	17.03.2008
2.	294/2007	Sh. P.C. Mamoria	17.03.2008
3.	295/2007	Sh. Yogesh Kr. Bhargava	17.03.2008
4.	439/2006	Km. Veena Dogra	06.12.2007
5.	440/2007	Smt. Meena Moolchandani	06.12.2007
6.	467/2007	Sh. Shanti Lal Jain	06.12.2007
7.	468/2007	Sh. P.P. Madan	06.12.2007
8.	469/2007	Sh. D.K. Shrivastava	06.12.2007

19. In the above OAs, the applicants had prayed for counting their ad hoc service for the purpose of granting them benefit of second ACP. The OA mentioned as sr. no. 1, 2, 3 were decided by a common order dated 17.03.2008 and OA nos. 4 to 8 were decided vide separate orders dated 06.12.2007. In compliance of the directions issued by the CAT, Jaipur Bench, Jaipur in these OAs, the representations of the applicants were decided by the respondents in the first three OAs vide letter dated 05.05.2008 separately in each OA. The representation of Veena Dogra (applicant in OA No. 439/2006) was considered and decided vide order dated 03.03.2008. Similarly the representation of Smt.

Meena Moolchandani (applicant in OA No. 440/2006) was decided vide order dated 04.01.2008. The representation of Shanti Lal Jain (applicant in OA No. 467/2006) was decided vide order dated 04.01.2008. The representation of Smt. Prem Prakash (applicant in OA No. 468/2006) was decided vide order dated 03.03.2008. The representation of D.K. Shrivastava (applicant in OA No. 469/2006) was decided vide order dated 06.12.2007.

20. The respondents have stated that the applicants have not challenged such orders passed on their representations as per the directions of this Tribunal. They have further stated that as per law, laid down by the Apex Court in various judgments, the ad hoc temporary service period cannot be counted in the residency period to grant the benefits of financial upgradation under ACP/ MACP Schemes. Further, as per the clarification issued by the DOPT (Annexure R/2) also, ad hoc service period cannot be counted. Therefore, in view of the judgment of the Hon'ble Apex Court, the action of the respondents is legal and justified.

21. The respondents have submitted that the applicants were appointed on ad hoc basis during 1982 against the reserve vacancies of SC/ST & Ex-servicemen and on availability of regular vacancies and filling up of the backlog in this cadre of SC/ST & Ex-servicemen, the services of the applicants were regularized with effect from 14.11.1985. As per the existing rules, the ad hoc service is not accountable for the purpose of

seniority as well as promotion. Therefore, their ad hoc service has not been treated as regular service for the purpose of ACP/MACP.

22. As per the instructions contained in Ministry of Personnel, Public Grievances & Pension OM dated 09.08.1999, the employees of Group 'C' and 'D' are entitled for first and second ACP after completing 12 and 24 years of regular service respectively. Further 'Regular service' has been interpreted in Para No.3.2 of the OM as under:-

"3.2 **"Regular Service"** for the purpose of the ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in term of relevant Recruitment/Service Rules."

23. The respondents have further submitted that the applicants of present OA were regularized on 14.11.1985. Therefore, they became eligible for first ACP on 09.08.1999 and second MACP on 14.11.2009 but as the Modified Assured Career Progression Scheme (MACP) was introduced with effect from 01.09.2008, therefore, all the applicants of the present OA have been awarded the benefit of second MACP with effect from 01.09.2008 vide order dated 13.10.2011 (Annexure A/8). They have also submitted that recruitment rules to the post of Operator required for regular appointment came into force on 22.12.1984.

24. The respondents have also relied on Para nos. 16 and 18 of the judgment of the Hon'ble Supreme Court in the case of

State of Rajasthan vs. Jagdish Narain Chaturvedi, 2009
(12) SCC 49.

25. Thus the respondents stated that the present OA has no merit and it should be dismissed.

26. The applicants have also filed the rejoinder.

27. Heard the learned counsel for the parties, perused the documents on record and the case law referred to by the learned counsel for the parties.

28. The learned counsel for the applicant has also submitted his written arguments. The learned counsel for the applicant submitted that the appointment of the applicants were on regular basis after following the process for selection/recruitment after following due process. Therefore, as such the appointment cannot be deemed to be a ad hoc/ temporary appointment. The applicants fulfilled all the requirement meant for direct recruitment. That their juniors in the seniority list have been given the benefit of ACP counting the period of appointment of ad hoc service, therefore, the applicants being similarly situated are entitled for the same benefit as **Arnold Grey Rai & Others (supra)**. The order of the CAT in OA No. 197/2000 has attained finality as the Writ Petition filed by the respondents against this order has been dismissed and hence the order of CAT is binding on the respondents. The learned counsel for the applicant also relied on the judgment of the Hon'ble Supreme Court in the case

of **Direct Recruits Class II Engineers Officers Association vs. State of Maharashtra**, 1990 (2) SLJ (SC) 40. He argued that as per the ratio decided by the Hon'ble Supreme Court in this case, the period of ad hoc service of the applicants had to be counted by the Department for grant of ACP. The learned counsel for the applicant further relied upon the order of CAT passed in OA No. 1098/2010 (Bombay Bench) dated 29.11.2010 in the case of **Suresh Kumar vs. Secretary, Ministry of Shipping & Others** where it has been held that employee is entitled to count the ad hoc temporary service for the purpose of grant of ACP. The learned counsel for the applicants has also relied upon the judgment of the Hon'ble Supreme Court in the case of **K.C. Sharma vs. Union of India & Others**, 1997 (6) SCC 721, wherein it has been held that similar treatment should be granted to similarly situated persons.

29. The learned counsel for the applicant argued that the judgment of the Hon'ble Supreme Court as referred to by the respondents in the case of *State of Rajasthan vs. Jagdish Narain Chaturvedi*, 2009 (12) SCC 9 = 2009 (8) SLR SC 505, is not applicable under the facts & circumstances of the present OA because clear vacant posts existed against which the applicants were appointed and that due procedure was followed for appointment of the applicants. The respondents have not stated in the reply which rule was not followed in the appointment of the applicants in 1982. Therefore, the contention of the respondents that the applicants were not appointed as per the rules is without any force and liable to be ignored. Therefore, he

argued that the respondents be directed to grant the ACP to the applicants after counting their ad hoc service being the regular service for the purpose of counting requisite period for ACP and the applicants are also entitled for arrears and interest thereon.

30. On the other hand, the learned counsel for the respondents reiterated the facts as mentioned in their reply. With regard to the statement of the learned counsel for the applicant that since **Arnold Grey Rai** has been given ACP counting his ad hoc service as regular, the learned counsel for the respondents submitted that if a mistake has been committed in some case then on the basis of that mistake, the applicants are not entitled for the same treatment. That an employee is entitled for similar treatment in case other employee has been granted same benefit according to the rules. The learned counsel for the respondents submitted that the applicants were appointed on ad hoc basis during 1982 against the reserved vacancies of SC/ST and Ex-servicemen and subsequently the services of the applicants were regularized with effect from 14.11.1985. As per the existing rules, ad hoc service is not countable for the purpose of seniority as well as promotion. Therefore, the ad hoc services of the applicant cannot be treated as regular service for the purpose of ACP/MACP. He also emphasized on the judgments referred to by them in written reply.

31. We have perused the office order dated 30.04.1984 (Annexure A/1) which clearly states that the applicants were

working on purely temporary and ad hoc basis against the reserved vacancies and period was extended for a further period upto 31.08.1984 or till the posts are filled up on regular basis from reserved class whichever is earlier. This order also states that the service can, however, be terminated even earlier without assigning any reason therefor. Further office order dated 14.11.1985 (Annexure A/2) states that Operators who are appointed on purely temporary and ad hoc basis against the reserved quota are hereby appointed on regular basis in temporary capacity from the date of issue of the order. From the careful perusal of these two orders, it is clear that applicants were appointed on purely temporary and ad hoc basis. These orders are not under challenge. Even if admittedly there were no service rule with regard to the appointment on the post of Operator in the year 1982, applicants were appointed on purely temporary and ad hoc basis. If the applicants had any grievance with regard to their appointment as purely temporary and ad hoc basis then they should have challenged the order of appointment at the appropriate time. It is not disputed that these applicants were appointed against the reserved vacancies and they were regularized after de-reservation of the vacancies. Therefore, we are not inclined to agree with the arguments of the learned counsel for the applicants that the applicants were appointed on regular basis.

32. The learned counsel for the respondents argued that the applicants filed different OAs whose details are given in Para 4.9 of the reply and these OAs were decided as per details given in

Para No. 18 of this order. That the respondents in compliance of the direction of the CAT passed a reasoned & speaking order on the representations of the applicants on different dates in 2008 but the orders passed by the respondents have not been challenged.

33. The learned counsel for the applicant vehemently argued that in the case of Arnold Grey Roy, the respondents have given the ACP counting the period of their ad hoc services and the applicants being the similarly situated are entitled for the same benefit. The learned counsel for the respondents submitted that the applicants were granted the benefit of ACP in compliance of the order of the Hon'ble CAT. However, the instructions regarding the grant of ACP/MACP provides for regular service. Therefore, the mistake once committed cannot be repeated. The equality before law is when some employees are given some benefit according to the provision of law/scheme but not otherwise. We have carefully perused Para 3.2 of the OM dated 09.08.1999 regarding the grant of ACP Scheme which clearly provide that regular service for the purpose of ACP Scheme shall be interpreted to meet the eligibility service counted for regular promotion in terms of relevant recruitment/service rules. As per condition No. 5.2 of the Annexure-I annexed with OM dated 09.08.1999 residency period (regular period) for the grant of benefits under ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit. The DOPT has also clarified vide OM dated 10.02.2000 that ad hoc service shall not be counted for the purpose of granting ACP. Therefore,

we are of the opinion that ad hoc service cannot be counted for granting the ACP/MACP.

34. We have carefully perused the case law referred by the learned counsel for the applicant. The learned counsel for the applicant relied on the judgment of the Hon'ble Supreme Court in the case of **Direct Recruits Class II Engineers Officers Association vs. State of Maharashtra (supra)**. The learned counsel for the applicants argued that the applicants are entitled to count their service spent on ad hoc basis on condition No. A & B of Para 44 of the said judgment (Para No. 4 (xvi) of the OA refers). We have perused the judgment of the Hon'ble Supreme in the case of Direct Recruits Class II Engineers Officers Association (Supra) and we find that it is Para No. 47 of the judgment and not Para 44 of the judgment, as stated by the learned counsel for the applicant. Para 47 A of the judgment is quoted below:-

"47 (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation."

In this case, the applicants were appointed in 1985 on regular basis and they were confirmed in 1990. Therefore, according to the ratio decided by the Hon'ble Supreme Court in this case, the seniority of the applicants will not be counted from the date of confirmation but from the date of appointment. The Hon'ble Supreme Court in the same Para 47 (A) has also stated as follows:-

"The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and

made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."

In the present case, the initial appointment of the applicants is on ad hoc basis as is clear from the perusal of office order dated 30.09.1994 (Annexure A/1) in which it has been clearly mentioned that the applicants were working on purely temporary and ad hoc basis against the reserved vacancy. Thus according to the judgment of the Hon'ble Supreme, the services rendered on ad hoc basis cannot be taken into account for considering the seniority. Para 47 (B) of the judgment is quoted below :-

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating will be counted."

35. The learned counsel for the applicant argued that since the applicants were appointed in accordance with the existing rules at the time of appointment, therefore, the said appointments were not dehorse the rules and hence the period of ad hoc services has to be counted by the Department. The learned counsel for respondents has argued that under the fact of the present OA, the ratio decided by the Hon'ble Supreme is not applicable. On the other hand, they referred to Para Nos. 16 & 18 of the judgment of the Hon'ble Supreme Court in the case of **State of Rajasthan vs. Jagdish Narain Chaturvedi (supra)**.

In this case, the Hon'ble Supreme Court has held that:-

"16. There is another hurdle in the way of the writ petitioners. When the order of regularization was passed, according to learned counsel for the respondent - writ

petitioners the initial appointment was a substantive appointment. If that was the position, there was need to take the proficiency test which undisputedly all the respondents have taken. If initially the appointment was a substantive appointment, the respondents-writ petitioners could have challenged when the order of regularization was passed. There was no challenge to the order of regularization and benefits therefrom and there was no challenge to the order of regularization in any of the cases. If the plea of the respondents-writ petitioners is accepted it would mean that in their cases the regularization was done long back. There was no challenge at the relevant point of time. Therefore, the belated approach only for the sake of getting advantage of ad hoc or work charge service cannot be countenanced."

"18. In order to become "a member of service" a candidate must satisfy four conditions, namely,

- (i) the appointment must be in a substantive capacity;
- (ii) to a post in the service i.e. in a substantive capacity;
- (iii) made according to rules;
- (iv) within the quota prescribed for the source.

Ad hoc appointment is always to a post but not to the cadre/service and is also made in accordance with the provisions contained in the recruitment rules for regular appointment. Although the adjective 'regular' was not used before the words "appointment in the existing cadre/service" in Para 3 of the G.O. dated 25.1.1992 which provided for selection pay scale the appointment mentioned there is obviously a need for regular appointment made in accordance with the Recruitment Rules. What was implicit in the said paragraph of the G.O. when it refers to appointment to a cadre/service has been made explicit by the clarification dated 3.4.1993 given in respect of Point 2. The same has been incorporated in Para 3 of the G.O. dated 17-2-1998."

36. In the present case also, the services of the applicants were regularized vide order dated 14.11.1985. Therefore, we are inclined to agree with the averments of the learned counsel for the respondents that if the applicants had any grievance against the order of regularization then they should have challenged that order at the relevant point of time. At this belated stage, the applicants cannot claim that they were regularly appointed in

1982. The ratio decided by the Hon'ble Supreme Court in the case of State of Rajasthan vs. Jagdish Narain Chaturvedi (supra) is applicable under the facts & circumstances of the present OA.

37. The learned counsel for the applicants relied upon the judgment of the Hon'ble Supreme Court in the case **Rudra Kumar Sain & Others etc. vs. Union of India & Others, ATJ 2000 (3) Page 392**, (Writ Petition No. 490/1987 with other connected Writ Petitions decided on 22.08.2000). We have gone through the judgment of the Hon'ble Supreme Court and we are of the opinion that under the facts & circumstances of the present case, the ratio decided by the Hon'ble Supreme Court in this judgment is not applicable. In the case before the Hon'ble Supreme Court, the issue with regard to the seniority between the direct recruits and the promotes was under challenge whereas in the present OA, the relief is with regard to the grant of ACP. Therefore, the ratio decided by the Hon'ble Supreme Court in the case of Rudra Kumar Sain & Others etc. (supra) would not be applicable.

38. The learned counsel for the applicant also relied upon the order of the Central Administrative Tribunal, Bombay Bench in the case of **Suresh Kumar vs. Secretary, Ministry of Shipping & Others** (OA No. 1098/2010 decided on 29.11.2010) wherein the services rendered by the applicant on ad hoc basis before their regularization for grant of benefit under ACP shall be included but this point has been considered by the Five Member Bench of the Central Administrative Tribunal, Calcutta Bench in

OA 283/2012 & OA 569/2013

OA No. 148/AN/2011 (S.P. Sarkar), OA No. 164/AN/2011 (M. Thiruchangu) and OA No. 165/AN/2011 (Babu Yohanan) vs. Union of India & others and by a common order, the Hon'ble Central Administrative Tribunal, Calcutta Bench vide its order dated 08.09.2014 has held :-

On the question whether seniority to be counted by adding the ad hoc service when service was regularized on the strength of such ad hoc service, the Apex Court answered negatively holding inter alia that ad hoc service not countable even for fixing seniority in the cadre. Reliance is placed in the judgement passed in the case of State of Haryana & Others v. Vijay Singh & Others, reported in 2012 (8) SCC 633. The same view in the case of seniority as well as promotion matter, was expressed by earlier Larger Bench in the case of P.P.C. Rawani (Dr.) & Others v. Union of India & Others, reported in 2008 (15) SCC 332. Hence, having regard to judicial pronouncements discussed above, ad hoc service is not countable for grant of benefit under ACP Scheme.

Hence, having regard to the aforesaid facts reference was answered accordingly holding, temporary & ad hoc services, cannot be considered as regular service for grant of ACP benefit, now renamed as MACP and for pensionary benefits. Thus in view of the Five Members Bench's order dated 08.09.2014, the ratio decided by the CAT, Bombay Bench in the aforesaid OA is not applicable.

39. We have also carefully perused the order of the Hon'ble Supreme Court in the case of **Ramesh Kumar Sharma & Another vs. Rajasthan Civil Services & Others, ATJ 2001 (1) 514**, as relied upon by the learned counsel for the applicant and we are of the opinion that the judgment of the Hon'ble Supreme Court in this case is not applicable under the facts & circumstances of the present OA. The applicants were appointed

on purely temporary ad hoc basis against the reserved vacancies, therefore, it cannot be said that they were substantively appointed on that post. The applicants have not challenged their appointment order or their regularization order dated 14.09.1985. On the other hand, the respondents have relied upon the judgment of the Hon'ble Supreme Court in the case of **State of Haryana vs. Haryana Veterinary and ATHS, 2000 (8) SSC 4** where the Hon'ble Supreme Court has observed that service rendered on ad hoc basis prior to regular appointment cannot be held regular service nor it can be counted for selection scale. The respondents have further relied on the judgment of the Hon'ble Supreme Court in the case of **State of Punjab & Another vs. Ashwini Kumar & Others, 2008 (12) SSC 572**. In this judgment, the Hon'ble Supreme Court has held that judgment/ order passed by the High Court holding that ad hoc services to be included for calculating period of service for giving higher scale of pay is unsustainable and has to be vacated. Accordingly the appeal was allowed and the judgment/order of the High Court was set aside.

40. Thus in view of the ratio decided by the Hon'ble Supreme Court in these cases and in the case of Central Administrative Tribunal, Calcutta Bench in OA No. 148/AN/2011 & two other OAs, decided on 08.09.2014, we are of the view that temporary & ad hoc service cannot be considered as regular service for grant of ACP/MACP benefits.

41. With regard to the contention of the learned counsel for the applicant that since similarly situated persons have been given the benefits, therefore, the applicants are entitled for the same, we are inclined to agree with the arguments of the learned counsel for the respondents that this principle is applicable if the benefit is accorded to the provisions of law. The equality before the law is for the action taken according to the provisions of law. The mistake once committed cannot be repeated.

42. The Hon'ble Five Member Bench of Central Administrative Tribunal, Calcutta Bench in OA No. 148/AN/2011 and other connected matters has also examined the issue of discrimination of similarly situated persons. In the present OA, the learned counsel for the applicant has relied upon the order of this Tribunal in OA No. 197/2000, Arnold Grey Rai & Others (supra) and on the basis of this order, the learned counsel for the applicant has sought relief in the present OA. The Hon'ble Five Member Bench of Central Administrative Tribunal, Calcutta Bench while examining the issue of discrimination has held as under:-

"The applicants in the applications have set up a case of discrimination by referring the case of one Shri Asish Ghosh, who being identically situated in service tenure like the applicants, got benefits of counting ad-hoc service to fulfil residency period for 2nd financial upgradation benefit under ACP Scheme by the judgment of the Tribunal and High Court at Calcutta as referred to in the pleadings. The action of the administration granting benefit to Shri Asish Ghosh cannot be applied to grant identical benefit in terms of Article 14 of the Constitution of India to the present applicants. Article 14 of the Constitution of India is not a negative concept, but a positive one. In a case of discrimination, under Article 14 of the Constitution of

India, the Court of law always will consider first as to whether the person has a legal right to claim and thereafter will consider the issue of discrimination.

Reliance is placed in the judgment passed in the case of Union of India v. International Trading Company, reported in 2003 (5) SCC 437 wherein it is held that principle of equality cannot be pressed into service which claim is based on a wrong order in action. Two wrongs do not make a right. It has been held further that it would not be setting a wrong right but would be perpetuating on other wrong if identical order is passed. The Court further has gone to hold that the question of discrimination issue would not arise in the language it would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India cannot press into service in such cases. What the concept of equal treatment presupposes, is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. The parties have to establish strength of their case on some other basis and not by claiming negative equality. The same view expressed in the case of Vikrama Shama Shetty vs. State of Maharashtra, reported in 2006 (6) SCC 70. In the case of National Council for Teacher Education v. Committee of Management reported in 2006 (4) SCC 65, it is held that "Article 14 carries a positive concept and only because some illegalities had been committed, the same may not be itself a ground for perpetrating the illegality."

The concept of identical treatment of identical cases cannot be considered negatively. Reliance is placed to the following cases as stated below:-

Equality under Article 14 of the Constitution of India is not a negative equality, if some other persons granted benefit inadvertently or by mistake, such order does not confer any right to the petitioner to get same benefit and court of law should not perpetuate wrong but should try to rectify it, is the view expressed by the Apex Court in the case of State of Orissa & Another vs. Mamata Mohanty, reported in 2011 (3) SCC 436....."

43. Having regard to the ratio decided by the Five Member Bench of Central Administrative Tribunal, Calcutta Bench, the provision of Article 14 of the Constitution of India is the concept based on equality on legal parameters and not negative equality

OA 283/2012 & OA 569/2013

on the basis of some benefits granted either inadvertently or by mistake or by a Court of law.

44. We are of the opinion that since in the provision of the Scheme, only regular service is to be counted for grant of ACP/MACP, therefore, the applicants cannot be given the benefits of ad hoc service for the purpose of grant of ACP/MACP to them. Hence it cannot be said that the applicants have been discriminated against viz-a-viz Arnod Grey Rai & others.

45. Thus on the basis of above discussion, we are of the view that the OA has no merit. Consequently it is dismissed with no order as to costs.

46. The Registry is directed to place the copy of this order in the file of OA No. 569/2013 (Sushil Kumar Godha vs. Union of India & Others).



(SMT. CHAMELI MAJUMDAR)
MEMBER (J)



(ANIL KUMAR)
MEMBER (A)

Abdul