

43

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, CAMP AT NAGPUR

ORIGINAL APPLICATION No. 353/2015

Date of Decision : 24.01.2019

Shri Ankush Goraknath Shinde ... **Applicant**

(By Advocate Shri Vishal Shirke, proxy counsel for
Shri S.V. Marne)

Versus

Union of India & 2 Ors. ... **Respondents**

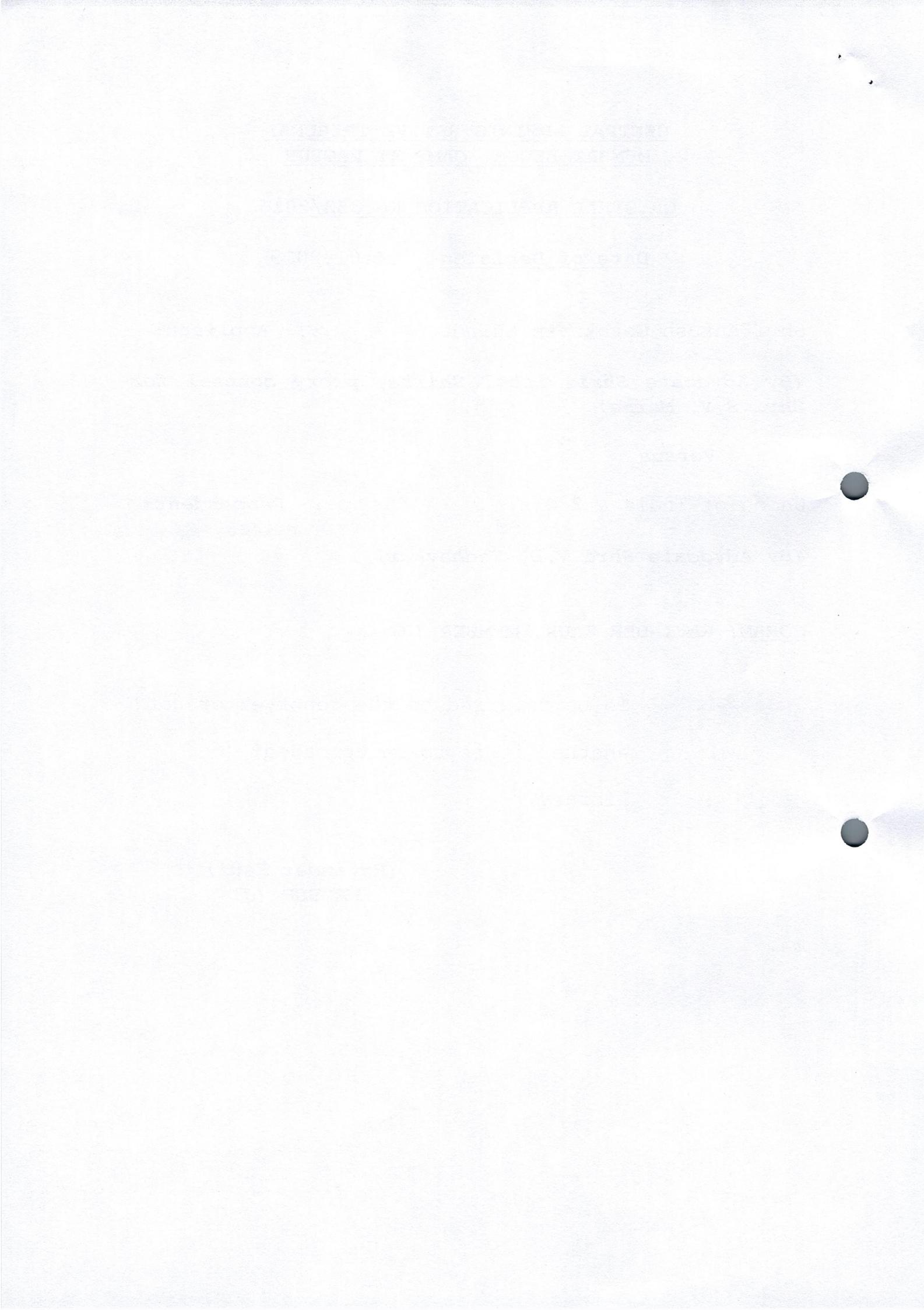
(By Advocate Shri V.D. Vadhavkar)

CORAM: RAVINDER KAUR, MEMBER (J)

- 1. To be referred to the reporter or not?
- 2. Whether it is to be uploaded?
- 3. Library.

(Ravinder Kaur)
MEMBER (J)

ma.



CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION NO.353/2015

Dated this Thursday the 24th day of January, 2019

CORAM:- RAVINDER KAUR, MEMBER (J).

Shri Ankush Goraknath Shinde,
Age 60 years, Son of Goraknath Shinde,
Retired Motor Lorry Driver,
residing at HEG 60, Siddharth Nagar,
Ahmedabad Road, Khar (E),
Mumbai 400 051. ***Applicant***

***(By Advocate Shri Vishal Shirke proxy counsel
for Shri S.V.Marne)***

Versus

1. Union of India,
Through the General Manager,
Western Railway, Head Office Churchgate,
Mumbai 400 020.
2. The Division Railway Manager,
Western Railway Mumbai Division,
Mumbai Central, Mumbai 400 008.
3. The Deputy Chief Electrical Engineer
(Construction),
Churchgate Sub Division Building,
Churchgate,
Mumbai 400 020. ***Respondents***

(By Advocate V.D.Vadhavkar)

ORDER

The present OA has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

"8(a) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and

after examining the same quash and set aside the order dated 31.03.2015 passed by Respondent No.2 and Pension Pay Order dated 29.06.2014 to the extent of consideration the last pay drawn at Rs.11,980/- and average emoluments at Rs.11,860/- and fixing basic-pay at Rs.5,990/-.

(b) This Hon'ble Tribunal may further be pleased to direct the Respondents to take into consideration the last Pay drawn and average emoluments at Rs.13,660 and fix the basic Pension of the Applicant at Rs.6,830 and pay to him the difference of Pension, DCRG, Commutation, Leave Encashment, etc. along with interest @12% per annum.

(c) Costs of the application be provided for.

(d) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

2. The facts are that applicant was initially engaged as a casual labour with effect from 18.09.1974 in the office of Senior Section Engineer (Construction), Mumbai Central. He was granted Monthly Rated Casual Labourer (MRCL) status w.e.f. 07.11.2015. Since he was possessing licence for heavy motor vehicle, he was posted as Motor Lorry Driver (hereinafter referred as 'MLD') on the pay scale of Rs.260-400. In the service book of the applicant, an entry was also made to the effect that he was granted MRCL status in the post of MLD w.e.f 07.11.1975.

2.1 The applicant was regularised on the post of Khalasi w.e.f. 21.04.1994 on the pay scale of Rs. 2550-3200, though he was actually

being paid the pay scale of Rs.3050-4590. He was subsequently shown to have been promoted to the post of Helper Khalasi w.e.f. 04.08.1998 on pay scale of Rs.2650-4000. He was granted stagnation increment vide order dated 09.01.2006 and in this order also he was shown as MLD. It is stated that in his service book at some places his designation is shown as CL-MLD w.e.f. 1975 and later on fresh entries were made in the service book showing his status as Khalasi w.e.f. 07.11.1975, regular Khalasi w.e.f. 21.04.1994, Helper Khalasi w.e.f. 04.08.1998 and MLD - III w.e.f. 01.11.2000 onwards. It is further stated that the applicant irrespective of his designation and pay shown in the service book was always drawing pay for the post of MLD and was never paid the salary in the pay scale of Khalasi or Helper Khalasi.

2.2 The applicant has also agitated that his case was not considered for grant of actual upgradations under the ACP/MACP Scheme as he was paid in the scale of MLD i.e. in the higher scale. However, he was considered for grant of MACP benefits under wrong assumption that he was working on the lower post i.e. Helper

Khalasi.

2.3 It is the case of the applicant that right from 07.11.1975 he continuously worked on the post of MLD for a period of 39 long years. He never discharged the duties of the post of Khalasi or Helper Khalasi even for a single day after 07.11.1995. He was always granted pay scale of the post of MLD. He attained the age of superannuation on 30.06.2013 and to the utter shock of the applicant the PPO order dated 29.06.2014, though finds his designation mentioned as MLD, however his last pay drawn was erroneously shown as 11980/- and average emoluments were shown as Rs.11861/-. It is alleged that the respondents have committed error in considering the last pay drawn by the applicant as Rs.11980/- whereas he had actually drawn last pay of Rs.13660/-. Further there is also error in calculating the average emolument for last 10 months including the number of days he worked during the month of September, 2013. That on account of consideration of wrong last pay drawn, the basic pension of the applicant was fixed at Rs.5990/- which ought to have been Rs.6830/-, thus the applicant is suffering loss of Rs.840/- p.m. in the basic pension.

Consequently, the amount of gratuity, leave salary and commutation of pension is also substantially reduced. Vide present OA, the applicant has challenged the said pension order dated 29.06.2014 and order dated 31.03.2015 whereby his representation dated 18.09.2014 Annexure A-7 which was disposed of in pursuance to the direction of this Tribunal in OA No.106/2015. It is stated that the impugned orders dated 29.06.2014 and 31.03.2015 respectively are illegal and void.

2.4 The reasons accorded by the respondents while rejecting the representations of the applicant are that the substantive pay of the applicant was Rs.11980/- whereas the pay of Rs.13660/- was being drawn by him as a casual motor driver and not in the substantive capacity. The applicant has claimed that pension is to be calculated with reference to average emolument i.e the average of basic pay drawn during the last 10 months of service or the last basic pay drawn whichever is beneficial. The applicant in support of his claim that the last basic pay drawn was of Rs.13,660/- has placed on record the pay slips for the relevant period as Annexure A-5.

2.5 It is claimed that in the salary slips and all other service record the designation of the applicant is mentioned as Motor Lorry Driver. Even in the PPO as well as service certificate, it is so mentioned and consequently while fixing his pension the actual salary drawn by him during the last 10 months of his service is to be taken into consideration for fixing pension.

3. The respondents have filed their reply and have admitted that the applicant was engaged in the Railway as casual labour (MLD) and was regularised as Khalasi vide order dated 21.04.1994 and his seniority was maintained in Khalasi category in carshed unit. It is also admitted that he was promoted to the post of Helper Khalasi and posted under carshed/BCT with clear instruction to relieve the applicant to report in carshed/BCT vide office letter dated 04.08.1998 (Annexure R-1) but he failed to resume under carshed/BCT. It is stated that the applicant continued to work under SEF (G) (Const)-CCG till retirement and that SEF(G) (Const)-CCG never sent any correspondence regarding the applicant's continuing to work at his office. The

respondents have stated that the substantive pay of the applicant as on the date of retirement was Rs.11980/- and not Rs.13660/- which he was drawing as CMLD. As per their version, the applicant's pension was calculated rightly on the basis of his substantive pay of Rs. 11980/- to the post of helper Khalasi and consequently, there is no infirmity in both the impugned orders.

4. I heard the arguments addressed by Shri Vishal Shirke, proxy counsel for Shri S.V. Marne, learned counsel for the applicant and Shri V.D. Vadhavkar, learned counsel for the respondents at length and have carefully gone through the material available on record.

5. Learned counsel for the applicant has drawn the attention of the Tribunal to Rule 50 of the Railway Services (Pension) Rules, 1993 which is reproduced as follows:-

"50. Average emoluments - Average emoluments shall be determined with reference to the emoluments drawn by a railway servant during the last ten months of his service.

Note 1. If during the last ten months of his service a railway servant had been absent from the duty on leave of which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the

emoluments which he would have drawn, had he not been absent from duty or suspended, shall be taken into account for determining the average emoluments:

.....
.....
....."

6. Both the counsels for the applicant and counsel for the respondents are at consensus that above referred Rule 50 is applicable in the present case. However, the dispute is as to whether the pay actually drawn by the applicant during the last 10 months of his service is to be taken into consideration or the pay to which he was entitled as Helper Khalasi during the 10 months of his service is relevant.

7. The learned counsel for the applicant has drawn the attention of the Tribunal to the various documents issued by the respondents wherein the designation of the applicant is mentioned as MLD with pay scale of Rs.3050-4590/-. One such order is dated 09.01.2006 issued from DRM's office, Mumbai Central whereby the applicant was granted stagnation increment. In this order the designation of the applicant is mentioned as MLD.GR.III and pay scale of RS.3050-4590. The service certificate Annexure A-6 also finds mention his designation

as MLD-III and basic pay as Rs. 13660/- . This certificate is issued to the applicant on his attaining superannuation on 30.06.2014. The salary slips Annexure A-5 (colly) for the month of January, 2008 January 2009, January 2010, January 2011, January 2012, September 2013 to December 2013, January 2014 to June 2014 are placed on record. On perusal of the same, it is seen that in all these salary slips the designation of the applicant is mentioned as MLD- III and the pay scale mentioned as 05200-20200-1900 which is of the post of MLD-III. From all these documents it is crystal clear that the applicant had throughout worked as MLD and was drawing the salary of MLD only.

8. Learned counsel for the respondents has submitted that despite the fact that the applicant was promoted to the post of Helper Khalasi, he did not leave the post of MLD and never sought relieving since he was getting more salary while working as MLD, therefore now he cannot claim the benefit of the same for the purposes of fixation of his pension too. The applicant has not denied that he was promoted to the post of Helper Khalasi. However, it is observed that the applicant was never relieved

from the post of MLD to join the post of Helper Khalasi and thus it was beyond his control to have left working as MLD to work as Helper Khalasi. It is not the case of the respondents that the applicant was working on the post of MLD as per his choice but the respondents had taken the work from him for the said post throughout, even after his regularisation as Khalasi and promotion as Helper Khalasi, for the reasons best known to them. Even in the speaking order dated 31.03.2005 which is impugned in the present OA, it is categorically mentioned that the applicant was promoted as KH/Helper and that SEF(G)/BCT(Construction) was advised to relieve him to Division to join after promotion under Carshed/BCT, but SEF/G/Const./Office did not relieve him and he continued to work under SEF(G)/BCT(Const.) till retirement. Hence it is clear from the impugned order that the respondents never allowed the applicant to work on the post of Khalasi or Helper Khalasi on promotion till the date of his retirement. It is also observed that in his both the representations dated 18.09.2014 (Annexure A-7) and dated 08.10.2014 (Annexure A-8), the applicant has categorically raised

the issue that for calculating his pension, his last drawn pay i.e Rs.13660/- which he received while working as MLD was to be taken into consideration for fixation of his pension. In the impugned order though it is admitted by respondents that the applicant had drawn last pay of Rs.13,660/- but it is claimed that this was drawn by him as a casual MLD and not in substantive capacity. I find no force in this argument of the respondents. In support of their contention, the respondents have relied upon the judgment in the case of Union of India and Others Vs. Shri Bhanwar Lal Mundan, Civil Appeal No.7292/2013

dated 27.08.2013. The judgment cited by the learned counsel for the respondents is not applicable to the facts and circumstances of the case as the applicant was neither holding the post of MLD on deputation nor he was repatriated to his parent cadre before his retirement instead he was throughout working as MLD-III and was never given an opportunity to work on his substantive post of Khalasi or promoted post of Helper Khalasi.

9. The term 'pay' has been defined in FR(9) Rule 21(a) and as per the same the pay means

which has been sanctioned for the post held by the Government servant substantively or in an officiating capacity. The relevant portion of the above referred Rule 21(a) is reproduced as below:-

"21(a) Pay means the amount drawn monthly by a Government servant as -

(I) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and
(ii).....
(iii)....."

10. In the present case, the applicant was though promoted to the post of Helper Khalasi and his pay on the said post was Rs.11,980/-, however since he never held this post at any point of time during his entire service and had throughout have been officiating as MLD and was drawing pay of Rs.13660/- in that capacity, as per Rule 50 of Railway Services (Pension) Rules, 1993, average emoluments shall be determined with reference to the emoluments drawn by the applicant during the last 10 months of his service and not to the pay to which he would have been entitled if he had been working on the post of Helper Khalasi. It

is undisputed fact that the applicant even prior to his regularization to the post of Khalasi was working as MLD and after being regularised and promoted to the post of Helper Khalasi, he continued to work as MLD till the date of his retirement and had been drawing the pay for the post of MLD. In the circumstances for fixation of his pension, the average emoluments which are required to be considered in the present case are as per the pay drawn by the applicant during the last 10 months of his service which is of Rs.13660/- and therefore, his pension is required be fixed accordingly. Consequently, the pension pay order dated 29.06.2014 and the impugned order dated 31.03.2015 are hereby quashed and set aside. The respondents are directed to refix the pension of the applicant considering the average emoluments drawn by the applicant during the last 10 months of his service at the rate of Rs.13660/-. The respondents are further directed to grant the consequential benefits to the applicant with interest @8% p.a. The abovesaid exercise shall be carried out by the respondents within a period of eight weeks from the date of receipt of copy of this Order.

11. In view of the above, the Original Application is allowed with the above directions. No order as to costs.

(Ravinder Kaur)
Member (Judicial)

ma.

JW
112