

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH
CIRCUIT SITTING:INDORE

Original Applications Nos. 201/01048,1049,1050,1051/2017

Jabalpur, this Friday the 04th day of October,2019

HON'BLE SHRI NAVIN TANDON, ADMINISTRATIVE MEMBER
HON'BLE SHRI RAMESH SINGH THAKUR, JUDICIAL MEMBER

(1) ORIGINAL APPLICATION NO. 201/01048/2017

1. Manish Kumar Shrivastava age 39 years , Post-Loco Pilot,
S/o Lt. Shri P.D. Shrivastava, 156 Indira Nagar, Ratlam(MP)
Pin 457001
2. Kamal Kuishore Gehlot age 41 years, Post Loco Pilot
S/o Shri Manohar Lal Gehlot, 21"Sumano", Near Hanuman
Mandir, street No.1, Mahesh Nagar Ratlam (MP)Pin 457001
3. Pramod Kumar Jain, Age 43 years, Post Loco-Pilot
S/o Shri Prakash Chandra Jain, 191, Komal Nagar near sun city
Ratlam (MP)-457001
4. Shrikant Singh Kushwah, Age 44 years, Post-Loco Pilot,
S/o Kamla Singh, 1244/B New Railway Colony, Road No. 5
Ratlam (MP)-457001
5. Ram Babu S/o Shri Harswarup, Age 40 years Post-Loco Pilot,
82 Shubham Shree Coloney, Biryia Khedi Ratlam (MP) 457001
6. Arvind Kumar Pal, Age 39 years, Post Loco Pilot, S/o Shri Ram
Achal Pal, 154 1/d New Railway Colony Road No. 2,, Ratlam
(MP)-457001
7. Umesh Kumar Pateriya Age 42 years, Post Loco Pilot, S/o Shri
Devi Prasad Pateriya, 36 Anu Parisar (Neel Ganga), Ujjain (MP)
8. Arjun Deo Singh, S/o Shri Jagdeo Singh, Age 42 years, Post
Office Superintendent, 1255/a Railway Colony, Ratlam-457001

-Applicants

(By Advocate –**Shri Vikrant Katoda**)

V e r s u s

1. Union of India, through the Secretary,
Ministry of Railways, Rail Bhawan,
Rafi Marg, New Delhi-110001
 2. Railway Recruitment Board, Ahmedabad,
1st Floor, Meter Gauge Railway Station Building,
Kalupur, Ahmedabad, Gujarat-380002
 3. The General manager, Western Railways (GM)(WR)
Railway Head Quarter office, Church Gate, Mumbai-400020
 4. The Divisional Rail Manager, (DRM)
Division-Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001
 5. Ministry of Personnel Public Grievances & Pensions,
Through the Secretary, North Block, Central Secretariat,
New Delhi, Delhi 110001
 6. The Senior Divisional Personal Officer (WR)
Division -Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001
- Respondents**
- (By Advocate –**Ms. Geetanjali Chourasia proxy counsel of
Smt. Pratibha Walia**)

(2) ORIGINAL APPLICATION NO. 201/01049/2017

1. Ishwar lal Ghodata, age 40 years, Post Shunter,
S/o Shri Harish Chandra Ghodata, 48 Neya Gaon,
Rangrej Main Road, Ratlam (MP) Pin 457001
 2. Shiv Ram Age 36 years, Post-Driver,
S/o Shri Bala Ram, 1433/B Road No.11
Old Railway Colony, Ratlam (MP), Pin 457001
- Applicants**

(By Advocate –**Shri Vikrant Katoda**)

V e r s u s

1. Union of India, through the Secretary,
Ministry of Railways, Rail Bhawan,
Rafi Marg, New Delhi-110001

2. Railway Recruitment Board, Bhopal,
East Railway Colony, Bhopal, M.P. Pincode 462010

3. The General manager, Western Railways (GM)(WR)
Railway Head Quarter office, Church Gate, Mumbai-400020

4. The Divisional Rail Manager, (DRM)(WR)
Division-Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001

5. Ministry of Personnel Public Grievances & Pensions,
Through the Secretary, North Block, Central Secretariat,
New Delhi, Delhi 110001

6. The Senior Divisional Personal Officer (WR)
Division -Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001

7. The Assistant Personal Officer, WCR,
GM Office Laxmi Market, Jabalpur,M.P.

-Respondents

(By Advocate – **Ms. Geetanjali Chourasia proxy counsel of
Smt. Pratibha Walia**)

(3) ORIGINAL APPLICATION NO. 201/01050/2017

Ashok Kumar Chouhan, S/o Shri Nand Kumar Chouhan,
Age 41 years, Post-Sr. ALC, H.No. 39, Ved Vyas Coloney
Near Jain School, Ratlam (MP) Pincode 457001 **-Applicant**

(By Advocate –**Shri Vikrant Katoda**)

V e r s u s

1. Union of India, through the Secretary,
Ministry of Railways, Rail Bhawan,
Rafi Marg, New Delhi-110001

2. Railway Recruitment Board, Secunderabad,
South Lallaguda,Secunderabad, Pincode- 500017

3. The General manager, Western Railways (GM)(WR)
Railway Head Quarter office, Church Gate, Mumbai-400020

4. The Divisional Rail Manager, (DRM)
Division-Ratlam, Divisional Office, Do Batti Square,

Ratlam (MP)-457001

5. Ministry of Personnel Public Grievances & Pensions,
Through the Secretary, North Block, Central Secretariat,
New Delhi, Delhi 110001

6. The Senior Divisional Personal Officer (WR)
Division -Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001

-Respondents

(By Advocate – **Ms. Geetanjali Chourasia proxy counsel of
Smt. Pratibha Walia**)

(4) ORIGINAL APPLICATION NO. 201/01051/2017

Hari Vishnu Yadav, Age 40 years, Post Shunter, S/o Shri Kailash
Chander Yadav, Near Railway Station Palia, (Karkhana), Palia
Gram, Tehsil-Hatod, District-Indore,M.P.

-Applicant

(By Advocate –**Shri Vikrant Katoda**)

V e r s u s

1. Union of India, through the Secretary,
Ministry of Railways, Rail Bhawan,
Rafi Marg, New Delhi-110001

2. Railway Recruitment Board, Chandigarh,
S.C.O. 78-79 Sector 8-C, Chandigarh, Pin 160009

3. The General manager, Western Railways (GM)(WR)
Railway Head Quarter office, Church Gate, Mumbai,Pin-400020

4. The Divisional Rail Manager, (DRM)(WR) Division-Ratlam,
Divisional Office, Do Batti Square, Ratlam (MP)-457001

5. Ministry of Personnel Public Grievances & Pensions,
Through the Secretary, North Block, Central Secretariat,
New Delhi, Delhi 110001

6. The Senior Divisional Personal Officer (WR)
Division -Ratlam, Divisional Office, Do Batti Square,
Ratlam (MP)-457001

-Respondents

(By Advocate – **Ms. Geetanjali Chourasia proxy counsel of
Smt. Pratibha Walia**)

(Date of reserving the order:-14.03.2019))

COMMON ORDER

By Ramesh Singh Thakur, JM:-

The issue involved in all the Original Applications is the same. Hence, these are disposed off in a common order. The facts, stated in Original Application No. 201/01048/2017 are being mentioned here.

2. The following relief has been sought for by the applicant in this Original Application:-

“8. Relief Sought :

8(i) Allow the application with cost, and direct the respondents No.6 to include the applicants into statutory pension scheme under CCS(Pension) Rules 1972(Railway Services (Pension) Rules notionally treating them to been appointment as a App. Diesel/Elect. Assistant (Trainee Assistant Loco Pilot) from the date of occurrence of vacancies in the year 2001 for the limited purpose of grant of pension under CCS(Pension) Rules, 1972 (Railway Services (Pension) Rules along with consequential benefits and transfer all the amount deducted under new pension scheme in GPF Accounts of applicants.

8(ii) Direct the respondent No.6 to stop recoveries under the new pension scheme from the pay of applicants and immediate transfer all the funds under the GPF Accounts of applicants.

8(iii) Declare that applicants are deemed to have been appointed as a App. Diesel/Elect. Assistant (Trainee Assistant Loco Pilot) notionally from the date of vacancy arose and cover the applicants under

the CCS(Pension) Rules 1972 Railway Services (Pension) Rules.

8(iv) Grant such other relief that the Hon'ble Court may feel fit in the facts and circumstances of the case."

3. The applicants are aggrieved by their non-inclusion in pension scheme under Central Civil Services (Pension) Rules, 1972 (Railway Services (Pension) Rules by notionally pre-dating their appointment the date of occurrence of vacancy. The applicants are illegally denied the benefit of statutory pension scheme under CCS (Pension) Rules, 1972 (Railway Services (Pension) Rules due to culpable delay on the part of the respondents in finalizing the recruitment process though admittedly they were appointed against the vacancies occurred in the year 2001.

4. Respondent No. 2 invited application for the post of App.Diesel/Elect.Assistant (Trainee Assistants Loco Pilot) under the Employment Notice No-1/2001-2002 for filling up the vacancies arose on dated 30.06.2001. A copy of the said advertisement is annexed as Annexure A-1.

Applicants enrolled for the examination and two written examination's were conducted on dated 20.01.2002 and 12.05.2002. The applicants passed first examination. After few days the second written examination conducted on 12.05.2002 was cancelled by the respondent No.2. After that again written examination was conducted by the respondent No. 2 on 16.11.2003 along with psychological test dated 30.09.2004 to 05.10.2004, vision test and document verification on dated (30.11.2004, 10.12.2004) and they were finally appointed in the year 2005. Copy of appointment order is annexed as Annexure A-8.

5. Further it is submitted by the applicant that the Govt. has introduced New Pension Scheme mandatory for all new "Recruits to the Central Govt. service from 1st January 2004. Copy of the notification is annexed as Annexure A-3. Consequent upon the introduction of new scheme the employee who joined central govt. service up to 31.12.2003 are covered by the statutory pension scheme under CCS (Pension) Rules, 1972. While the new entrants

of central govt. service on or after 01.01.2004 are regulated by the contributory pension scheme (NPS). As per the Annexure A-3 scheme employees covered by the new contribution pension scheme the employees are required to contribute 10% of their pay and DA towards pension fund under the new implemented scheme.

6. It is submitted that the applicants who were recruited against the vacancies occurred on dated 30.06.2001 and the applicants are appointed on service in the year 2005 as per Annexure A-8 and Annexure A-1. It is very much clear that applicants were recruited against the vacancy which arose in the year 2001 and Annexure A-2 shows that due to culpable administrative delay and a cancellation of written exam and the long reselection process of almost four years, not only applicant's career building golden time is wasted and due to that they had faced economic challenges and finally when they appointed, their right to be covered under statutory Pension Scheme under CCS (Pension) Rules, 1972,

Railway Service (Pension) Rules is not given to them which is injustice and illegal

7. The applicants submitted detailed representation to the respondent No. 4 and requested to stop their deduction under the new pension scheme and transfer their all contribution to the old Pension Scheme CCS (Pension) Rules, 1972, Railway Services (Pension) Rules as they are appointed against the vacancy arose in the year 2001 and their appointment is delay due to the culpable administrative delay. So they should be included under the old pension scheme of CCS(Pension) Rules, 1972, Railway Service (Pension), Rules. A copy of the same is annexed as annexure A-4.

8. The main grounds of the O.A. is that Ahmedabad/Ajmer recruitment boards, both invited the application for the post of App. Diesel/Electric Assistant (Trainee Assistants Loco Pilot) which closed on 30.06.2001. Ajmer recruitment board completed recruitment process within two years and the candidates

selected by Ajmer board got appointment in the year 2003 and covered under the Old Pension Scheme of statutory pension scheme under CCS (Pension) Rules, 1972. A copy of appointment order of candidates is annexed as Annexure A-9. It is the duty of respondent No.2 to complete the recruitment process within reasonable time and it is evident from annexure A-2 that respondent NO. 2 did culpable administrative delay several times.

9. The respondent No.2 took almost four long years to complete the recruitment process initiated in the year 2001 and applicant got appointment in the year 2005 due to culpable administrative delay. Since the vacancy arose in the year 2001, the appointments of applicant notionally be effected from 2001 and entitled to be covered by statutory pension scheme under CCS (Pension) Rules, 1972 (Railway Services (Pension) Rules.

10. The applicants have cited several judgments wherein in the matters of **R.S.Mathur vs. Union of India**, (2008) 10 SCC 271 the Hon'ble Supreme Court has held that

delay in appointments ought not causes disadvantages to the employees in any manner. But in the case in hand, the delay on the part of administrative authority caused applicant here to suffer huge loss as they have compelled the applicant here to enroll in new pension scheme.

11. The other judgment cited by the applicants is in the matters of **Rekha Mukherjee vs. Ashis Kumar Das**, (2005) 3 SCC 427 , wherein the Hon'ble Supreme Court has held that "The Govt. cannot be permitted to take advantage of its own mistake". In the present case the applicants are coming with clear hands and they committed no mistakes. All the delay in recruitment process is a mistake of respondent No.2 and due to that applicants are not included in the CCS (Pension) Rules, 1972 (Railway Services (Pension) Rules and respondents has not permitted to take benefits of its own mistake and the appointments of applicant notionally be effected from 2001 and entitled to be covered by statutory pension as per rules.

12. The applicants have further cited a judgment in the matters of **State of Karnataka and others vs. C. Lalitha**, 2006 SCC (L&S), para 29 wherein it is held that “Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. In the matters of **K.C. Sharma & Ors. vs UOI & Ors.**, 1997, AIR, 3699 it is held that the benefit of the judgment given to the similarly situated placed employees and not extended to the petition, the delay in filling the application should have been condoned by the Tribunal and appellant’s be given relief on the same terms as was given to the similarly situated persons.

13. The Co-ordinate Earnakulam bench of this Tribunal vide order dated 15th February 2016 in O.A. No. 20/15 (Annexure A-5) has held that “the applicants are deemed to have been appointed from the date of vacancy arose for the purpose of availing pension under CCS(Pension) Rules, 1972”. It is submitted that the case of the applicants is similar to the applicants in Annexure A-5 & A-6. The

applicants have relied upon the principle laid down by this Hon'ble Tribunal in Annexure A-5&A-6.

14. The claim of the applicants is limited to notional appointment from the date of vacancy arose for the purpose of bringing them under the scope of statutory Pension Rules.

15. The respondents have submitted their reply. In preliminary submissions of the reply the respondents have submitted that the applicants are claiming the benefits of old pension scheme on the basis of Ernakulum Bench judgment dated 15.02.2016 passed in Original Application No. 20 of 2015. It is pertinent to mention here that the said judgment has already been challenged before Hon'ble Kerla High Court and the Hon'ble High Court has stayed the order of the Tribunal of Ernakulum Bench vide order dated 16.12.2016 and further vide order dated 12.01.2017 confirmed the same till the further order and the said matter is still pending before Hon'ble Kerla High Court therefore there is no cause of action survive for the

applicants and the present Original Application deserves to be dismissed only on this ground.

16. It is further submitted by the respondents that the applicants have been appointed after 01.01.2004 in Railway Service and when they had been appointed they were well aware that they are entitled to get pension under the New Pension Scheme 2004 but they have not chosen to challenge the same and made first representation in the year 2017 i.e. only after the decision of Ernakulum Bench judgment, therefore the claim of the applicants is hopelessly barred by limitation and its settled legal position of Hon'ble Supreme Court (in case of *Vijay Kumar Kaul and others* vs. *Union of India and others* (2012) 7 SCC 610 that "Equity that existed at one point of time melts into insignificance and becomes extinct with passage of time".

17. It is submitted by the respondents that the applicants were well aware from the very first day of their appointment that their services will be governed under the

New Pension Scheme. Moreover, the applicants can not claim that the benefit of the judgment rendered in the case of similarly situated persons to be extended to them. They would be treated as Fence-sitter and laches and delays and/or the acquiescence would be a valid ground for dismissal of their case.

18. It is submitted that New Pension Scheme (NPS) is wholly settled and become final on the employees those are appointed after 01.01.2004.

19. It is submitted that the Ministry of Personnel, Public Grievances and Pensions has examined the aspect regarding applicability of Railway Services (Pension) Rules, 1993 in respect of those appointed prior to 01.01.2004 and put on induction training, vide letter dated 11.10.2006, under which, it is clarified that those employees who were put on induction training after their appointment prior to 01.01.2004 and are paid salary from the date would be covered under CCS (Pension) Rules, 1972. Hence, as per said circular applicants are not entitled

for old pension scheme. The said letter was circulated by Railway Board on 14.11.2006, a copy of which is filed as Annexure R-1. It is further submitted that, at the time of their joining as a Railway employee, all the applicants have willingly filled up NPS forms, which are related to NPS. Based on these documents a unique sixteen digit Permanent Retirement Account Number has been generated and allotted in favour of the each applicants and are being operated without any objection by the applicants.

20. In para-wise reply the respondents have submitted that the applicants have been appointed in the year 2004 and when they had been appointed they were well aware that they are entitled to get pension under the New Pension Scheme 2004, but they have not chosen to challenge the same and made first representation only after the decision of Ernakulum Bench judgment in the year 2016. Therefore, the claim of the applicant is hopelessly barred by limitation and it is a settled legal position of Hon'ble Supreme Court (in case of Vijay Kumar) that "Equity that

existed at one point of time melts into insignificance and becomes extinct with passage of time”. So the present Original Application deserves to be dismissed on the ground of delay and laches.

21. It is pertinent to mention here that the judgment of Ernakulum Bench has already been challenged before the Hon’ble Kerla High court by way of Writ Petition OP (CAT) 304/2016 and the Hon’ble High Court has stayed it vide order dated 15.02.2016 passed by Ernakulum Bench dated 16.12.2016 till the next date of hearing and which to be confirmed further on dt. 12.01.2017 as I.R. to be continued till the further order and the said matter is still pending before the Hon’ble Kerla High Court.

22. It is further submitted in the para-wise reply that on perusal of Annexure A-4 it reveals that Annexure A-4 is only a forwarding letter of incharge of applicant No.8. However, no such representation of the applicant No.8 is filed along with the O.A. It is also pertinent to mention here that the representation of the rest of the applicants has

not been forwarded by the office in-charge of the applicants and also there is no receipt of this office on Annexure A-4.

23. The applicants have filed their rejoinder wherein they have re-iterated its earlier stand taken in the Original Application. The applicants in its rejoinder have submitted that the order passed by the Hon'ble Ernakulum Bench is only stayed by Hon'ble Kerla High Court but it still hold the validity because the same is not quashed by the Hon'ble High Court. It is submitted in the rejoinder that when the applicants appointed they were in an impression that they will be included in the old pension scheme because the vacancy arose in the year 2001 and the examination process started well before the implementation of new pension scheme.

24. The respondents relied on the judgment passed by the Hon'ble Supreme Court in the matters of Vijay Kumar (Supra). In this case only the grant of back wages is not granted by the court but the appointment will be effective

from 01.05.1985 to the applicants therein and granted the other consequential benefits including seniority.

25. It is submitted that the present applicants do not fall into the category of Fence Sitter. In the matters of State of U.P. vs. Arvind Kumar Shrivastava & Ors. (Civil Appeal No. 9849 of 2014) which clearly defined the difference between similarly situated and the fence sitters is based on how people are placed. The term “Fence Sitter” are applicable on the “identically placed persons”. In the present O.A. applicants are not identically placed.

26. In the present case the applicants are from the Railway and similarly situated persons and they are not identically placed with the applicants in O.A. No. 180/00020/2015 because they belongs from the department of post. Both have different selection process.

27. The respondents have filed the reply to the rejoinder filed by the applicants wherein they submitted that the Railway Recruitment Board issued the notification on the basis of requirement based on present as well as

anticipation requirement and under which category the applicant was appointed can not be stated at the time of appointment. Hence, the contention of applicant is baseless.

28. That the applicant referred some judgments in the rejoinder a seriously objected as far as the quoted judgments there are all judgments have their own separate merits and facts. How much it can bind depend upon after reading of all whereas the applicant has not annexed any judgment therefore it is difficult to presume their reliance up to what extent.

29. That, on other way the applicant stated that he was in an impression that he will be included in the old pension scheme because the vacancy arose in the year 2002 and it is stated that the applicant himself filled up the form of PRAN at the time of appointment without a protest (Annexure R-2). There is no any choice or alternative after generating the PRAN rather than to agree upon new Pension Scheme and it can not be amendable further.

30. We have heard the learned counsel for the parties and carefully perused the documents annexed therewith.

31. From the pleadings the main contention of the applicants are that the process for recruitment for the post of App.Disel/Elect.Assistant (Trainee Assistants Loco Pilot) was advertised in the year 2002 and the written examination was conducted on 20.01.2002 and 12.05.2002. The applicants have qualified the written examination and also the Psychological test which were conducted on 16.11.2003 and 30.09.2004 to 05.10.2004. The document verification was done on 30.11.2004 and 10.12.2004 and finally they were appointed in the year 2005.

32. It is specifically submitted by the applicant that the applicants were recruited against the vacancies occurred dated 30.06.2001 and due to culpable administrative delay and a cancellation of written exam and the long reselection process the applicants have been given appointment in the year 2005. In the meanwhile, the respondent department

has floated the New Pension Scheme which came into operation with effect from 01.01.2004. Due to this the applicant have been prejudiced to have the benefits of pension in the old rule under CCS (Pension) Rules, 1972.

33. Secondly, it is contended by the applicants that Ahmedabad/Ajmer recruitment boards both invited the application for the same post which was closed on 30.06.2001. Ajmer recruitment board completed recruitment within two years and the candidates selected by Ajmer board got appointment in the year 2003 and covered under the Old Pension Scheme of statutory pension scheme under CCS (Pension) Rules, 1972. So the same organization has initiated the recruitment process in the year 2001 and in the case of applicants the appointment has been held by four years whereas the recruitment regarding the Ajmer Board the appointment has been given in the year 2003.

34. The Applicant relied upon the judgment passed by the Hon'ble Supreme Court in the matters of **R.S.Mathur**

vs **Union of India**, (2008) 10 SCC 271 wherein it has held that delay in appointments ought not causes disadvantages to the employees in any manner. The applicants further relied upon the judgment decided by the Hon'ble Apex Court in the matter of **Rekha Mukherjee vs. Ashis Kumar Das**, (2005) 3 SCC 427 , wherein the Hon'ble Supreme Court has held that "The Govt. cannot be permitted to take advantage of its own mistake". The applicants have further relied upon the judgments in the matters of **State of Karnataka and others vs. C. Lalitha**, 2006 SCC (L&S), para 29 wherein it is held that "Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. In the matters of **K.C. Sharma & Ors. vs UOI & Ors.**, 1997, AIR, 3699 it is held that the benefit of the judgment given to the similarly situated placed employees and not extended to the petition, the delay in filling the application should have been condoned by the

Tribunal and applicants be given relief on the same terms as was given to the similarly situated persons.

35. In addition to this the applicants have also relied upon the judgment passed by this Tribunal in the matters of **Sheeba B. vs. Union of India and Ors.**, passed in Original Application No.180/00020/2015 dated 15.02.2016 and also by this Bench in Original Application No.203/00290/2017 dated 20.04.2017, whereby it has been held by the Tribunal that the applicants are due to have been appointed from the date vacancy arose and that they shall be included in the CCS (Pension) Rules, 1972.

36. The applicants has also relied upon the judgment passed by the Hon'ble High Court of Uttarakhand at Nainital, (Annexure A-7) Special Appeal No. 330 of 2013 with Special Appeal No. 523 of 2013 wherein the Hon'ble High Court has held that when petitioners applied for the post, old pension scheme was in existence, therefore, petitioners had every reasonable expectation that they would be governed by the service conditions prevailing on

the date posts were advertised and recruitment process was commenced. So the service conditions prevailing on the date recruitment process commenced cannot be permitted to be altered in disadvantage of the recruitees.

37. On the other side the respondents has specifically argued that the applicants were appointed in year 2004. The applicants were well aware but the entitlement under New Pension Scheme and they have not chosen to challenge the said. But only after judgment of Ernakulam Bench, in year 2016, the applicant made the representation and the said judgment has been stayed by the Hon'ble High Court of Kerala in W.P. OP (CAT) 304/2016 and the same is hit by limitation and also on the principle of fence sitter.

38. It is pertinent to mention that as per reply filed by the respondents that the New Pension Scheme is formulated by the Ministry of Finance duly approved by the parliament and the Gazatte notification dated 22.12.2003 has been issued by the Government of India. The CAT

Principal Bench has considered this notification in O.A.No.3404/2017 decided on 06.12.2018. The relevant portion of this as under:-

“10. Before advertizing the aforesaid issue, this Court feels to note the Gazette Notification dated 22.12.2003 which reads as under:-

"F.No. 5/7/2003 - ECB &PR- The government approved on 23rd August, 2003 the proposal to implement the budget announcement of 2003 - 04 relating to introducing a new restructured defined contribution pension system for new entrants to Central Government service, except to Armed Forces, in the first stage, replacing the existing system of defined benefit pension system.

(i) The system would be mandatory for all new recruits to the Central Government service from 1st of January 2004 (except the armed forces in the first stage). The monthly contribution would be 10 percent of the salary and DA to be paid by the employee and matched by the Central government. However, there will be no contribution from the Government in respect of individuals who are not Government employees. The contribution and investment returns would be deposited in a non-withdrawable pension tier-I account. The existing provisions of defined benefit pension and GPF would not be available to the new recruits in the Central Government service.

(ii) In addition to the above pension account, each individual may also have a voluntary tier-II withdrawable account at his option. This option is

given as GPF will be withdrawn for new recruits in Central government service. Government will make no contribution into this account. These assets would be managed through exactly the above procedures. However, the employee would be free to withdraw part or all of the „second tier“ of his money anytime. This withdrawable account does not constitute pension investment, and would attract no special tax treatment.

(iii) Individuals can normally exit at or after age 60 years for tier-I of the pension system. At the exit the individual would be mandatorily required to invest 40 percent of pension wealth to purchase an annuity (from an IRDA - regulated life insurance company). In case of Government employees the annuity should provide for pension for the lifetime of the employee and his dependent parents and his spouse at the time of retirement. The individual would receive a lump-sum of the remaining pension wealth, which he would be free to utilize in any manner. Individuals would have the flexibility to leave the pension system prior to age 60. However, in this case, the mandatory annuitisation would be 80% of the pension wealth.

Architecture of the new Pension System

(iv) It will have a central record keeping and accounting (CRA) infrastructure, several pension fund managers (PFMs) to offer three categories of schemes viz. option A, B and C.

(v) The participating entities (PFMs and CRA) would give out easily understood information about past performance, so that the individual would be able to make informed choices about which scheme to choose.

2. The effective date for operationalization of the new pension system shall be from 1st of January, 2004."

39. From the plain reading of the aforesaid Notification, it is quite clear that this new pension system is mandatory in nature for all new recruits to the Central Government service from 1st of January 2004, except the armed forces in the first stage. Further the effective date of operationalization of the new pension system shall be from 1.1.2004. However, there are certain cases in which this Tribunal as well as High Court found that the applicants/petitioners therein were deprived to join the services before 1.1.2004 and the same was not due to fault of the applicant/petitioner but due to compelling circumstances, which deprived them to join before the date of 1.1.2004.

40. It is settled law that a candidate cannot be considered to have been an employee of the government from a date prior to the date of joining the government. The other

service matters have to be those which are in operation at the time of their joining.

41. The Hon'ble Apex Court in the matter of *Harwindra Kumar vs. Chief Engineer, Karmik* (2005) 13 SCC 300, the Court has refused to extend the benefit to the similar situated persons after applying principle of delay and laches. It was held that an important factor in exercise of discretionary relief under Article 226 of the Constitution of India is laches and delay. When a person who is not vigilant of his rights and acquiesces into the situation, the applicant cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to the persons similarly situated who were vigilant about their rights and challenged the impugned order. The Hon'ble Apex Court has taken note of some other judgments on the same principle of laches and delays are taken note of in paras 9 to 11 of judgment *State of Karnataka and others vs. S.M. Kotrayya and others* (1996) 6 SCC 267 which are as follows:

“9. Similarly in [Jagdish Lal v. State of Haryana](#), (1997) 6 SCC 538, this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p. 542)

“The delay disentitles a party to discretionary relief under [Article 226](#) or [Article 32](#) of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from [Union of India v. Virpal Singh Chauhan](#), (195) 6 SCC 684. The appellants' desperate attempt to redo the seniority is not amenable to judicial review at this belated stage.”

10. [In Union of India v. C.K. Dharagupta](#), (1997) 3 SCC 395, it was observed as follows:

“9. We, however, clarify that in view of our finding that the judgment of the Tribunal in [R.P. Joshi v. Union of India](#), OA No. 497 of 1986 decided on 17-3-1987, gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of Joshi case. In view of our finding that the benefit of the judgment of the Tribunal dated 17-3- 1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief.”

11. [In Govt. of W.B. v. Tarun K. Roy](#), (1997) 3 SCC 395, their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows: (SCC pp. 359-60, para 34)

“34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in [State of W.B. v. Debdas Kumar](#), 1991 Supp (1) SCC 138. The plea of delay, which Mr. Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law.”

The Court also quoted following passage from the Halsbury's Laws of England (para 911, p.395):

“In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.”

22) *Holding that the respondents had also acquiesced in accepting the retirements, the appeal of U.P. Jal Nigam was allowed with the following reasons:*

“13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or while it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to

meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

23) *The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:*

(1) Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of [Article 14](#) of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

(2) However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated

persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

(3) However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra)). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.

42. Admittedly, the applicants are appointed after 2004 i.e. after implementation of New pension Scheme. It is also admitted fact that the applicants were aware about the implementation of New Pension Scheme. It is also admitted fact that the applicants made representation after judgments of Earnakularm Bench of CAT in the year

2016. From the pleadings it is also admitted fact that the said order of CAT Ernakulam Bench is pending/under challenged before the Hon'ble High Court of Kerala and stay has been granted in favour of the respondent-department.

43. Though the applicants have relied upon the judgment of Hon'ble Apex Court in the matter of R.S. Mathur vs. Union Of India (supra), Rekha Mukherjee vs. Ashish Kumar Dev (supra) in which it is held that any mistake on behalf of the Govt. cannot be permitted to disadvantage to employees. But in the instant case, these submissions are not relevant, due to the fact that it is a policy matter and the applicants have been appointed after a cutoff date. Moreover the applicants were aware of this fact while joining the service. Furthermore, the applicants do not choose to challenge the said till 2016, when the judgment of CAT Ernakulam Bench came. So, it is clear case of fence sitter. Furthermore, the Hon'ble High Court has stayed the order of CAT Ernakulam Bench and Writ

Petition is still pending. Regarding judgment of Hon'ble High Court Uttranchal at Nainital is concerned, the said judgment has been stayed by the Hon'ble Apex Court on 13.02.2015 in SLP (C) 2412-2413/2015, and a final verdict is awaited. Moreover, its basic law in service jurisprudence that those rules are applicable which are in existence, on the date of joining.

44. In view of the above, we are of affirmed view that there is no illegality, ambiguity with the action of the respondent-department. Resultantly the O.A. is dismissed and no order for costs.

45. Since the question of same issue is involved in other three O.A's, same are dismissed accordingly.

(Ramesh Singh Thakur)
Judicial Member

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(Navin Tandon)
Administrative Member