

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(S) No.6652 of 2017

- 1(a) Parthi Kumar Anthony, aged 65 years.
- (b) Sashi Kumar, aged 40 years.
- (c) P.R. Pradeep Kumar, aged 47 years.
- (d) Mary Josphin, aged 52 years.
- (e) Lily Das, aged 50 years.

All are resident of Pendurthi, P.O. & P.S.-
 Pendurthi, P.P. Pin no.533173.... ... **Petitioners**

Versus

1. The Union of India, represented through the General Manager, South Eastern Railway, Garden Reach, P.O.+P.S.-Garden Reach, Kolkata-43.
 2. Chief Personnel Officer, South Eastern Railway, Garden Reach, P.O.+P.S.-Garden Reach, Kolkata-43.
 3. The Divisional Railway Manger, South Eastern Railway, Chakradharpur Division, P.O & P.S- Chakradharpur, Pin no. 831003, Dist-West Singhbhum (Jharkhand).
 4. Senior Divisional Personnel Officer, South Eastern Railway, Chakradharpur Division, P.O & P.S- Chakradharpur, Pin no. 831003, Dist- West Singhbhum (Jharkhand).
- **Respondents**

For the Petitioner	: Mrs. M.M. Pal, Sr. Advocate Mrs. Leena Mukherjee, Advocate
For the Respondents	: Mr. Sunil Kumar, Advocate

PRESENT

HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

C.A.V. on 08.02.2024

Pronounced on 28/02/2024

Per Sujit Narayan Prasad, J.

1. This writ petition is under Article 226 of the Constitution of India directed against the order dated 21.04.2017 passed by the Central Administrative Tribunal, Circuit Bench, Ranchi in O.A. No.051/00051/2015 whereby and whereunder the relief as was sought for by the writ

petitioner before the learned Tribunal for holding her entitled to get the benefit of family pension, has been denied to be given.

2. The brief facts of the case as per the pleadings made in the writ petition, which are required to be enumerated, read hereunder as:-

This writ petition was filed by the widow (now deceased) of Late P.A. Das Ex- regular employee of S.E. Railway & when he was posted as Electrical Driver at BNDM, CKP Division, the Senior Divisional Electrical Engineer, CKP issued a notice for compulsory retirement under Rule 2046 which was served to the petitioner (now deceased) as his wife in absence of her husband which the petitioner acknowledged on 13.01.1986 in presence of witnesses.

3. After the notice dated 13.01.1986, an office order dated 10.02.1986 was issued by the DPO/CKP whereby and whereunder the husband of the petitioner (deceased widow) was ordered for compulsory retirement on attaining his age of 55 years w.e.f. 13.04.1986.

4. In that compulsory retirement order, the details of the service of her husband was mentioned and it was also specifically mentioned that Sri P.A.Das, Electric Driver, BNDM compulsorily retired after due notice served to the wife of Sri Das on 13.01.1986.

5. It is the further case of the petitioner that her husband was traceless just after the order of his compulsory

retirement and despite of her best efforts she failed to trace out her husband.

6. The petitioner also informed the same immediately to the Railway authorities concerned and made request to pay her retiral dues payable to her husband but when no action was taken on her request, Pleader's notice dated 08.04.1986, was sent to the Railway authorities for payment of her legal dues.

7. After receiving the pleader's notice dated 08.04.1986, the Senior Divisional Personnel Officer sent a letter dated 16/27.09.1994 in the name of the wife of Sri P.A. Das, namely, this petitioner, wherein this petitioner was requested to furnish Court's order to establish the claim for payment of retiral dues of husband of the petitioner.

8. Thereafter, one letter dated 25.10.99 was issued by the Senior Divisional Personnel Officer, Chakradharpur wherein with a view to settle court cases amicably to the extent possible, the petitioner was directed to meet Sr. D.P.O/DPO for hearing on the matter of her claim, which she did but no order was passed.

9. The petitioner, thereafter, made an application dated 25.10.2010 to the DRM/CKP for payment of her family pension but no effect. She filed several representations before the authorities, i.e., representation dated 04.10.2014, 20.08.2014, 25.10.2014 stating specifically that her husband P.A. Das is no more and accordingly requested to pay her the

family pension including the arrears of pension and all other death cum retiral dues of her deceased husband but no response was received.

10. Having failed to get any order from the authorities concerned, the petitioner again made a representation dated 26.11.2014 through Speed Posts before the DRM stating specifically that consequence upon the death of her husband namely Late Paul Anthony Das, Ex- Electrical Driver/ RSO/BNDM, she is entitled for the family pension and others legal dues which are still due.

11. It is the further case of the petitioner that when no response was given to her last representation dated 26.11.2014, having no alternative moved before the learned Central Administrative Tribunal by filing original application being O.A. No.05/00051/20151 for redressal her grievance.

12. The learned Tribunal, after hearing the parties, has dismissed the said original application vide order dated 21st April 2017 holding that the claim of the applicant after a lapse of 30 years has become a stale claim and it cannot be entertained, against which the present writ petition has been filed.

13. It is evident from the fact that the writ petitioner being aggrieved with the rejection of her claim by non-consideration of the applicant by the authority concerned had preferred original application before the learned Central Administrative

Tribunal praying therein for a direction upon the respondents to pay family pension along with arrears.

14. The learned Tribunal had called upon the respondents who had filed written statement. The ground had been taken therein that the service of the husband of the writ petitioner was reviewed on attaining the age of 55 years and was served with a notice dated 13.01.1986 and thereafter, he was retired compulsorily on 13.04.1986 under Rule 2046 of the Indian Railway Establishment Code.

15. The other ground was taken before the learned Tribunal that the wife of the deceased employee had knocked the door of the Tribunal in the year 2015 claiming for family pension since the deceased employee never got the family pension during his life time as he was compulsorily retired from service on 13.04.1986 and such matter cannot be adjudicated after the lapse of a long time, hence, no relief is fit to be granted.

16. The learned Tribunal, has accepted the aforesaid contention and dismissed the original application against which the present writ petition.

17. Mrs. M.M.Pal, learned senior counsel appearing for the writ petitioner, has taken the following grounds in assailing the impugned order :-

- (i) The husband of the writ petitioner became entitled for pension the moment he has been retired compulsorily under the principle of weeding out in view of the

provision of Rule 2046 of Indian Railway Establishment Code, hence, the respondents were duty bound during the life time to release the pension but the said benefit has not been granted, as such, there is laches on the part of the respondents and if the laches have been committed by the respondents, the plea of delay and laches cannot be allowed to be taken.

- (ii) The compulsory retirement on weeding out principle since not a punishment, hence, the deceased husband of the writ petitioner became entitled under the provision of Railway Pension Rules, 1950 which contains a provision under Rule 102 which entitled the deceased husband of the petitioner to get the benefit of pension by virtue of retirement.
- (iii) The learned counsel appearing for the writ petitioner, based upon the aforesaid grounds, has submitted that order passed by the learned Tribunal, therefore, be quashed and set aside.

18. Per contra, Mr. Sunil Kumar, learned counsel appearing for the respondents, has defended the impugned order by taking the following grounds :-

- (i) The relief which was sought for by the deceased husband of the writ petitioner is after 30 years from the date of compulsory retirement and, as such, the principle of delay and laches will well be applicable. The learned Tribunal has taken note of the aforesaid legal

position by going through the factual aspect and considered the claim so agitated by the deceased husband of the writ petitioner to be barred under the principle of delay and laches.

- (ii) The deceased husband of the writ petitioner since has retired from service on weeding out principle, hence, he is not entitled for the benefit of pension.
- (iii) Since the deceased husband of the petitioner has not got pensionary benefit during his life time, hence, there is no question of holding the writ petitioner entitled for the family pension.
- (iv) The husband of the writ petitioner has opted the scheme which was floated by virtue of Master Circular No.53 introduced on 16.11.1957.

19. In response to the submission made on behalf of learned counsel for the respondents, Mrs. M.M.Pal, learned senior counsel, has submitted that so far as the contention of applicability of Master Circular No.53 is concerned, the same since was introduced on 16.11.1957 which is to be applied for such employees who had entered in service on or after 16.11.1957.

20. Herein, the husband of the writ petitioner had entered in service sometime in the year 1950, the day when the Railway Pension Rules, 1950 was applicable which entitled the deceased husband of the petitioner to have the right of

the pensionary benefit in view of the provision of Rule 102 of Railway Pension Rules, 1950.

21. This Court has heard learned counsel for the parties and perused the finding recorded by the learned Tribunal and has also gone through the pleadings made on behalf of the parties.

22. This Court, in view of the fact, as referred hereinabove, is required to answer the following questions :-

- (i) Whether the Railway Pension Rules, 1950 will be applicable in the case of the deceased husband of the petitioner by holding him entitled for pension or the scheme as contained in Master Circular No.53 introduced on 16.11.1957 will be applicable?
- (ii) Whether merely because the deceased husband of the writ petitioner has not approached the court immediately after his compulsory retirement under the weeding out principle, can the benefit of pension be snatched away if the said issue has been agitated after 30 years, as the ground has been taken in the impugned order?
- (iii) If the statutory rule confers entitlement upon the deceased husband of the writ petitioner under Rule 102(C) of the Pension Rules, 1950 and if the same has not been adhered to by the respondents, can the respondents be allowed to take the ground of

delay and laches of 30 years in agitating the said issue?

- (iv) Whether merely because the benefit of pension has not been extended in favour of the husband of the writ petitioner, can the benefit of family pension be denied if the court comes to the conclusion in view of the provision of Rule 102(C) of the Railway Pension Rules, 1950?

23. Since all the four issues are interlinked, the same are being taken together for answering all the issues hereinafter.

24. This Court, in order to answer the aforesaid issue first deems it fit and proper to refer the Railway Pension Rules, 1950, revised edition of the said Rule was published in the year 1958. The said Rule was promulgated as the Liberlized Pension Rules, 1950 vide Railway Board's letter No.E48-CPC/208 dated 8th July, 1950.

25. The aforesaid Rule contains a provision under Rule 102 at Chapter-I thereof which provides that the ordinary gratuity/pension becomes due on quitting service on account of any one of the following reasons :-

- (a) abolition of post;
- (b) medical invalidation;
- (c) retirement on completion of 30 years' qualifying service;
- (d) superannuation.

No ordinary gratuity/pension is, however, payable if the Railway servant dies while in service. A permanent Railway servant who quits service before completion of 10 years' qualifying service is given an ordinary gratuity but no pension. Pension is granted only if a permanent Railway servant quits service after completion of at least 10 years' qualifying service.

26. The reference of Rules, 1950 has been made since the reliance has been placed by learned senior counsel upon the said Rule for the purpose of holding the deceased husband of the writ petitioner entitled for pension on the ground that her husband had been compulsorily retired on the weeding out principle with effect from 13.04.1986.

27. While on the other hand, learned Central Government counsel has relied upon the scheme as contained under Master Circular No.53 wherein as per the aforesaid scheme the pension option must be given to all those in pensionable service who were in service on 01.04.1957 and had joined service between 01.04.1957 and 16.11.1957, for ready reference Part A under Chapter-I which contains two provision of the scheme is being referred hereunder as :-

28. The question of entitlement admittedly depends upon the statutory rule. There is no dispute about the admitted fact having not been disputed by the learned Central Government Counsel or the respondents herein, which would

be evident from the pleading made by them in the written statement filed before the learned Tribunal or the counter affidavit filed in this proceeding that the deceased husband of the writ petitioner was made to compulsorily retire under the weeding out principle in view of Rule 2046 of the Indian Railway Establishment Code with effect from 13.04.1986.

29. It is settled position of law that if the person concerned is separated from service on the weeding out principle in the public interest, the same will not amount to a punitive order and by virtue of that, such public servant is entitled for all retiral/pensionary benefit. Otherwise, if the retiral benefit or the pension will not be extended in favour of such public servant who has been separated from service under the weeding out principle, then there will be no difference in between the order of compulsory retirement passed by way of punishment and order of compulsory retirement passed under the weeding out principle.

30. The husband of the writ petitioner since has been separated from service under the weeding out principle with effect from 13.04.1986, hence, the argument has been advanced by taking aid of the provision of Rule 102 (c) of Railway Pension Rules, 1950.

31. This Court requires to consider the provisions of Railway Pension Rules, 1950 and the scheme as contained in Master Circular No.53 to come to the conclusion as to whether Rule

102 (c) of Railway Pension Rules, 1950 or Master Circular No.53 will be applicable in the facts of the present case.

32. This Court has considered the scheme as contained in Master Circular No.53 which was introduced on the Railways on 16.11.1957 effective from 01.04.1957. It is evident therefrom that all Railway employees who entered service on and after 16.11.1957 are governed by the said scheme. The new pension scheme was practically an adoption of the provisions of the Railway Pension Rules 1950 promulgated as the Liberlised Pension Rules, 1950.

33. It further appears that at the time of introduction of the pension scheme of the Railway, pension option was also allowed to all those non-pensionable railway servants who were in service on 01.04.1957 or had joined railway service between 01.04.1957 and 16.11.1957 in preference to the Provident Fund scheme by which they were governed, for ready reference, the aforesaid part of the scheme is being referred herein :-

“Introduction of Pension Scheme on Railways and Pension options for the employees governed by Provident Fund Scheme.

1. Pension scheme was introduced on the Railways on 16.11.1957 effective from 1.4.1957 vide Railway Boards letter No.F(E)50/RTI/6 dated 16.11.1957. All railway employees who entered service on and after 16.11.1957 are governed by the said Pension Scheme. The new Pension Scheme was practically an adoption of the provisions of the Railway Pension Rules 1950 promulgated as the Liberalised Pension Rules, 1950 vide Railway Boards letter No.E48-

CPC/208 dated 8th July 1950, as amended & clarified from time to time.

2. At the time of introduction of pension scheme on the Railways, pension option was also allowed to all those non-pensionable railway servants who were in service on 01.04.1957 or had joined railway service between 01.04.1957 and 16.11.1957 in preference to the Provident Fund scheme by which they were governed. This option was open until 30.09.1959.”

34. It is, thus, evident from the Master Circular No.53 as per the content of the said scheme, the same is applicable to the employees working in the Railways, who had entered into service on and after 16.11.1957. Further, it is evident that the same is allowed to be applicable to those non-pensionable Railway servants who were in service on 01.04.1957 or who had joined Railway service between 01.04.1957 and 16.11.1957.

35. Admittedly, herein the deceased husband of the writ petitioner was appointed under the service of the Railway in the year 1950 which is prior to 16.11.1957. Therefore, this Court is of the view that the scheme as contained in Master Circular No.53 will not be applicable so far as the case of the deceased husband of the writ petitioner is concerned, rather, the Railway Pension Rules, 1950 will be applicable. It is for the reason that the Master Circular No.53 was introduced on 16.11.1957. Further, it has been stipulated therein that the all railway employees who entered service on or after 16.11.1957 are governed by the said Pension Rules. Herein,

the deceased husband of the writ petitioner had entered service sometime in the year 1950.

36. Since this Court has come to the conclusion that the provision of Railway Pension Rules, 1950 will be applicable, hence, this Court is proceeding to examine as to whether there is any provision under the Railway Pension Rules, 1950 for the purpose of extending the benefit of pension to the employees who had been separated from service under the weeding out principle.

37. This Court, for the aforesaid purpose has considered the provision of Rule 102 of Railway Pension Rules, 1950 wherein the employee working under the Railway has been held entitled for the gratuity/pensionary benefit in four eventualities. One of the eventualities is that under Rule 102(c) that the employee working under the Railway will be entitled for pension if retired from service. It has not been stipulated therein under Rule 102(c) that the retirement on attaining the age of superannuation, rather, the word used is “**retirement on completion of 30 years**” which has been provided to be the qualifying service and the fourth condition is “**superannuation**”.

38. Since the case of the deceased husband of the writ petitioner is not abolition of post as per Rule 102(a) nor the medical invalidation as per Rule 102(b), rather, the case of the deceased husband of the writ petitioner is retirement on completion of 30 years of qualifying service. The case

pertaining to superannuation is altogether a different category under the provision of Rule 102(d).

39. Herein, the deceased husband of the writ petitioner was appointed in service sometime in the year 1950. He has been compulsorily retired on the weeding out principle on 13.04.1986. it is evident that the deceased husband of the writ petitioner has completed 30 years of service and, as such, he became qualified for the purpose of ordinary gratuity/pension as per the condition stipulated under Rule 102(c) of the Railway Pension Rules, 1950.

40. This Court is now proceeding further to consider the ground of rejection which is the principle of delay since the such claim has been raised after lapse of 30 years.

41. There is no dispute about the legal position that the belated claim cannot be entertained by the court of law on the ground of the applicability of principle of delay and laches as per the judgment rendered by the Hon'ble Apex Court in the case of ***U.P. Jal Nigam & Anr. V. Jaswant Singh & Anr.* [(2006) 11 SCC 464]**, wherein on the ground of principle of delay and laches as under paragraph nos. 9 to 11, it has been held that the delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution of India, for ready reference paragraph nos. 6, 9 and 10 of the judgment are reproduced as under:-

“6. The question of delay and laches has been examined by this Court in a series of decisions and

laches and delay has been considered to be an important factor in exercise of the discretionary relief under Article 226 of the Constitution. When a person who is not vigilant of his rights and acquiesces with the situation, can his writ petition be heard after a couple of years on the ground that same relief should be granted to him as was granted to person similarly situated who was vigilant about his rights and challenged his retirement which was said to be made on attaining the age of 58 years. A chart has been supplied to us in which it has been pointed out that about 9 writ petitions were filed by the employees of the Nigam before their retirement wherein their retirement was somewhere between 30-6- 2005 and 31-7-2005. Two writ petitions were filed wherein no relief of interim order was passed. They were granted interim order. Thereafter a spate of writ petitions followed in which employees who retired in the years 2001, 2002, 2003, 2004 and 2005, woke up to file writ petitions in 2005 and 2006 much after their retirement. Whether such persons should be granted the same relief or not?

9. Similarly in *Jagdish Lal v. State of Haryana* reported in (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* reported in (1995) 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* reported in (1997) 3 SCC 395 it was observed as follows: (SCC p. 398, para 9)

‘9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi v. Union of India 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.”

42. Likewise, in the judgment rendered in ***Government of West Bengal v. Tarun K. Roy & Ors. [(2004) 1 SCC 347]***, Their Lordships considered delay as serious factor and not granted relief, and hold at paragraph 34 as under:-

“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 reported in (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.”

43. But, it is equally settled that the ground of delay and laches is to be tested by taking into consideration the fact as to whether the laches committed or delay caused is on whose account. Although the fact about not approaching the court is to be considered by the Court in that circumstances the balance is to be weighed.

44. Herein, we are dealing with the matter of pension and it is settled position of law that if a person is entitled for pension and if pension under the statutory applicable rule, is not being paid, then the same will have the recurring cause of action.

45. Before delving upon the issue, we deem it fit and proper to deal with recurring cause of action. “Recurring” means suffering of the litigant, particularly, the public servant if the suffering is continuing day by day, the same will be said to be recurring cause of action. Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. A recurring or successive wrong, occurs when successive acts, each giving rise to a distinct and separate cause of action, are committed. Each act, in itself wrongful, constitutes a separate cause of action for sustaining a claim or a complaint.

46. The Hon'ble Apex Court in the case of ***Union of India & Ors Vs Tarsem Singh [(2008) SCC 648]*** at paragraph 4 held as under:-

4. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. A “continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in *Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan* [AIR 1959 SC 798] explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

“31. ... It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

47. The law is already settled by Hon'ble Apex Court that the pension will be said to be recurring cause, reference in this regard be made to the judgment rendered in the case of –

M.L.Patil (Dead) through Legal Representatives v. State of Goa and Another reported in **(2023) 1 SCC 660**, for ready reference the relevant paragraph of the aforesaid judgment is being quoted hereunder as :-

“6. As such, the High Court may be right and/or justified in denying any salary for the period of two extra years to the writ petitioners if they would have continued in service, on the ground of delay. However, as far as the pension is concerned, it is a continuous cause of action. There is no justification at all for denying the arrears of pension as if they would have been retired/superannuated at the age of 60 years. There is no justification at all by the High Court to deny the pension at the revised rates and payable only from 1-1-2020. Under the circumstances, the impugned judgment and order [Laxman J. Chavan v. State of Goa, 2020 SCC OnLine Bom 236] passed by the High Court is required to be modified to the aforesaid extent.”

48. This issue has also been considered by Hon'ble Apex Court in the case of ***Rushibhai Jagdishbhai Pathak v. Bhavnagar Municipal Corporation*** reported in **2022 SCC OnLine SC 641** wherein at paragraph 10 it has been held which is being referred and quoted hereunder as :-

10. At the same time, the law recognises a ‘continuing’ cause of action which may give rise to a ‘recurring’ cause of action as in the case of salary or pension. This Court in *M.R. Gupta v. Union of India*,¹⁰ has held that so long as the employee is in service, a fresh cause of action would arise every month when they are paid their salary on the basis of a wrong computation made contrary to the rules. If the employee's claim is found to be correct on merits, they would be entitled to be paid according

to the properly fixed pay-scale in future and the question of limitation would arise for recovery of the arrears for the past period. The Court held that the arrears should be calculated and paid as long as they have not become time-barred. The entire claim for the past period should not be rejected.

49. Admittedly, herein, the rule made the deceased husband of the writ petitioner entitled for the pension but aforesaid benefit has not been given.

50. The deceased husband of the writ petitioner has approached the court after making repeated representations before the authorities for release of pension in view of the provision or Rule 102(c) of the Railway Pension Rules, 1950 but the same has been denied on the ground that such claim has been agitated after lapse of 30 years.

51. The question herein is that if the Rules, 1950 had permitted the deceased husband of the writ petitioner to get the pensionary benefit, then it was the bounden duty of the authority concerned to release the pensionary benefit but on one pretext or the other, the said benefit has been denied.

52. This Court has also considered the issue on different angle as to whether the petitioner can be said to be a fence sitter?

53. The law is well settled that the principle of fence sitter is not applicable if the statute is there but that has not been applied in favour of the party concerned who is to be benefitted.

54. The issue of fence sitter has elaborately been discussed by the Hon'ble Apex Court in the case of ***State of Uttar Pradesh and Ors. Vrs. Arvind Kumar Srivastava and Ors., (2015) 1 SCC 347***, wherein, at paragraph 18 and 19, the Hon'ble Apex Court has been pleased to hold:-

“18. in U.P. Jal Nigam v. Jaswant Singh reported in (2006) 11 SCC 464 where the issue was pertaining to entitlement of the employees of U.P. Jal Nigam to continue in service up to the age of 60 years. In Harwindra Kumar v. Chief Engineer, Karmik reported in (2005) 13 SCC 300 this Court had earlier held that these employees were in fact entitled to continue in service up to the age of 60 years. After the aforesaid decision, a spate of writ petitions came to be filed in the High Court by those who had retired long back. The question that arose for consideration was as to whether the employees who did not wake up to challenge their retirement orders, and accepted the same, and had collected their post-retirement benefits as well, could be given relief in the light of the decision delivered in Harwindra Kumar reported in (2005) 13 SCC 300. The Court refused to extend the benefit applying the 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, his writ petition 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 their retirement. In para 7, the Court quoted from Rup Diamonds reported in (1989) 2 SCC 356. In para 8, S.M. Kotrayya reported in (1996) 6 SCC 267 was taken note of. 19. Some other judgments on the same principle of laches and delay

are taken note of in paras 9 to 11 which are as follows: (Jaswant Singh case reported in (2006) 11 SCC 464, SCC pp. 469-70).

“9. Similarly in Jagdish Lal v. State of Haryana reported in (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 reported in (1995) 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 reported in (1997) 3 SCC 395 it was observed as follows: (SCC p. 398, para 9)

„9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi v. Union of India 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 reported in (2004) 1 SCC 347, 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* reported in (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.”

55. Here, in the given facts of the case, the law is already there since the year 1957 but even then the benefit of pension/family pension has not been paid, therefore, the wrong committed by the respondents in not discharging the statutory duty cannot be allowed to be taken as a ground to deny the said entitlement as per statutory command.

56. The law is also settled that a wrong doer cannot be allowed to take advantage of the principle of delay and laches as has been held by Hon'ble Apex Court in the case of ***Kusheshwar Prasad Singh vs. State of Bihar and Ors.,***

(2007) 11 SCC 447, wherein at paragraphs-14, 15 and 16, the Hon'ble Apex Court has observed as under:-

“**14.** In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in *Mrutunjay Pani v. Narmada Bala Sasmal* [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim *commodum ex injuria sua nemo habere debet* (no party can take undue advantage of his own wrong).

15. ... This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:

“It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, “a wrongdoer ought not to be permitted to make a profit out of his own wrong”.”

57. Further, in ***Advanta India Limited vs. B. N. Shivanna and Anr.***, **(2018) 14 SCC 666**, the Hon'ble Apex Court has been pleased to observe at para-20 which reads as under:-

“20. After going through the record, we find that the BCI has shown undue indulgence to the respondent by allowing him to take advantage of his own wrong, in the guise of exercising its review power. It is a case of *nullus commodum capere potest de injuria sua propria* meaning thereby that a party cannot take advantage of its own wrong. This maxim is explained in Eureka Forbes Ltd. v. Allahabad Bank in the following manner: (SCC p. 217, para 66)

“66. The maxim *nullus commodum capere potest de injuria sua propria* has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations.”

58. This Court, based upon the aforesaid position of law and considering the fact that the pension is a recurring cause of action causing grievance due to non-disbursement of the pensionary benefit and subsequently, after death of the employee, the family pension to his widow, is of the view that merely because the issue has been agitated after lapse of 30 years, the same cannot be allowed to be negated otherwise the wrong doers will be given premium to commit such type of illegality.

59. The other question which requires to be answered that the writ petitioner is not entitled for family pension since the deceased husband of the writ petitioner has not been extended the benefit of pension.

60. Since this Court has reached to the conclusion as above that the deceased husband of the writ petitioner became entitled for pensionary benefit in view of the provision of Rule 102(c) of the Railway Pension Rules, 1950, therefore, the moment we have come to such conclusion, the normal consequence would be that the writ petitioner being the widow of the deceased employee, will also become entitled for the family pension.

61. This Court, having discussed the factual aspect along with the legal issues as above and taking into consideration the position of law to exercise the power so far as it relates to the order passed by the learned Tribunal in view of the judgment rendered in the case of **L. Chandra Kumar v. Union of India and Others**, reported in **(1997) 3 SCC 261** whereby and whereunder the Constitution Bench of Hon'ble Apex Court has conferred the power of judicial review to be exercised under Article 226 of the Constitution of India.

“99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic

structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.”

62. The ground is available to exercise the power of judicial review as per the discussion made hereinabove. The reason in sum and substance, as per the discussion made hereinabove, is that the learned Tribunal has failed to consider :-

- (i) The applicability and implication of the provision or Rule 102(c) of the Railway Pension Rules, 1950.
- (ii) The learned Tribunal has failed to appreciate that the pension as per the statutory mandate was required to be extended by the respondents but not extended, hence, the inconvenience caused to the party in not making

payment of the pensionary benefit has not been adjudged.

(iii) If the benefit of pension has not been given to the deceased husband of the writ petitioner, the same since is in the teeth of the provision of Rule 102(c) of the Railway Pension Rules, 1950 and once the statutory provision commands holding a public servant entitled for the pensionary benefit, the same is required to be paid by the respondents on the principle that the pension is not bounty, rather, it is a right under Article 300 A of the Constitution of India, as has been held by Hon'ble Apex Court in the case of ***Deokinandan Prasad vs. State of Bihar & Ors.*** reported in ***(1971) 2 SCC 330*** (Para 33).

(iv) The applicability of the scheme of Master Circular No.53 was not agitated before the learned Tribunal and it has been raised before this proceeding, however, this Court has already answered this issue with respect to applicability of the Railway Pension Rules, 1950 or Master Circular No.53, as above.

63. Considering the aforesaid reasons, this Court is of the view that the impugned order needs to be interfered with.

64. Accordingly, the impugned order dated 21.04.2017 passed by the Central Administrative Tribunal, Circuit Bench, Ranchi in O.A. No.051/00051/2015 is hereby quashed and set aside.

65. In the result, the instant writ petition stands allowed.

66. In consequence thereof, the respondents are directed to release all arrears of difference of pension with statutory interest by way of pension which accrued in favour of the deceased employee from the date of compulsory retirement till his death.

67. Since the widow of the deceased employee has also died during the pendency of the writ petition, therefore, the legal heirs have been substituted in place of the widow of the deceased employee, and, as such, so far as the arrears pertaining to the family pension is concerned, the same is only to be paid in favour of the legal heirs, i.e., the writ petitioners herein, from the date of death of the employee till the date of death of the widow.

68. Accordingly, the respondents are directed to release the arrears of pension as also the family pension in favour of the legal heirs (writ petitioners herein) within a period of four months from the date of receipt/production of a copy of this order.

69. With these observations and directions, this writ petition stands disposed of.

(Sujit Narayan Prasad, J.)

I agree.

(Pradeep Kumar Srivastava, J.)

(Pradeep Kumar Srivastava, J.)