

**HIGH COURT OF ORISSA: CUTTACK.**

**W.P.(C) Nos.20648, 20651, 20654, 20657, 20659, 20664, 20666,  
23107 & 22387 of 2016**

In the matter of application under Articles 226 and 227 of the Constitution  
of India.

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Dr. Karunakar Sahoo	(in W.P.(C) No.20648 of 2016)
Nimain Charan Acharya	(in W.P.(C) No.20651 of 2016)
Gouranga Sundar Dash	(in W.P.(C) No.20654 of 2016)
Dr. Susama Barik	(in W.P.(C) No.20657 of 2016)
Dr. Chittaranjan Dash	(in W.P.(C) No.20659 of 2016)
Dr. Indira Dutta	(in W.P.(C) No.20664 of 2016)
Bana Bihari Prusty	(in W.P.(C) No.20666 of 2016)
State of Odisha & Another	(in W.P.(C) No.23107 of 2016)
Dr. Bimal Chandra Mishra	(in W.P.(C) No.22387 of 2016)

- Versus-

State of Odisha & Another	(in W.P.(C) Nos.20648, 20651, 20654, 20657, 20659, 20664, 20666 & 22387 of 2016)
Dr. Bimal Chandra Mishra & Another	(in W.P.(C) No.23107 of 2016)

Counsel for Petitioners : M/s. Budhadev Routray (Sr. Counsel), S. Das, R. P. Dalai, K. Mohanty, S. Jena, S. D. Routray and S. K. Sahu (in W.P.(C) Nos.20648, 20651, 20654, 20657, 20659, 20664 & 20666 of 2016)

Mr. J. P. Pattanaik, Additional Government Advocate (in W.P.(C) No.23107 of 2016)

Mr. J. K. Rath (Sr. Counsel), M/s. Durgesh Narayan Rath, P.K. Rout and A. K. Saa (in W.P.(C) No.22387 of 2016)

Counsel for Opp.Parties : Mr. J. P. Pattanaik, Additional Government Advocate (in W.P.(C) Nos.20648, 20651, 20654, 20657, 20659, 20664, 20666 & 22387 of 2016)

M/s. Durgesh Narayan Rath, P.K. Rout and A. K. Saa (in W.P.(C) No.23107 of 2016)

**PRESENT:**

**THE HONOURABLE KUMARI JUSTICE SANJU PANDA  
&  
THE HONOURABLE SHRI JUSTICE SUJIT NARAYAN PRASAD**

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**Date of hearing and judgment : 27.06.2017**

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**S. N. Prasad, J.** These writ petitions have been taken up together since common issues are involved and as such the same are being disposed of by this common order.

2. The order passed by the Tribunal in various original applications filed in the year 2012, disposed of on 31.10.2014, part of it are under challenge by the applicants to the effect that the financial benefits beyond the period of three years has been denied by the Tribunal placing reliance upon the judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh**, reported in (2008) 2 SCC (L & S) 765.

3. The brief facts of the case is that the applicants have been appointed as Lecturers in different faculties on *ad hoc* basis for a period of six month with effect from the date of their joining or till the appointment to the post is made in consultation with the Odisha Public Service Commission, whichever is earlier.

The Governor of Odisha, in exercise of power conferred by Proviso to Clause-3 of Article 320 of the Constitution of India and in supersession of all previous regulations of the State Government, has made the regulation known as the Odisha Public Service Commission (Limitation of Functions) (Amendment) Regulations, 1986 (herein after referred to as 'the Regulation, 1986), came into force w.e.f. 5<sup>th</sup> July, 1985.

In the Odisha Public Service Commission (Limitations of Functions) Regulations, 1952 for clause (xiii) the following clause has been inserted:-

*“(xiii) Regularization of services of Lecturers appointed on ad hoc basis in Class-II of the Orissa Education Service on or before 31<sup>st</sup> May, 1984 and continuing as such on ad hoc basis on the date of commencement of the Orissa Public Service Commission (Limitations of Functions) (Amendment) Regulations, 1988 and their appointment on regular basis in Class-II of the Orissa Education Service.”*

The petitioners got included in the category of exemption from the Odisha Public Service Commission concurrence and accordingly the State Government has passed an order regularizing their services with effect from the date when they have got appointment on *ad hoc* basis as was done in case of **Nilakantha Mishra** and **Kailash Chandra Mishra** vide notification dtd.20<sup>th</sup> November, 1986.

It has been contended that after the services having been regularized by exercising the power conferred by the Proviso to Clause-3 of Article 320 of the Constitution of India, the State Government has issued a notification on 8.12.1995 by which the following clauses in Sub-Rule 3(a) of Rule 8 of the Orissa Education Service (College Branch) Recruitment Rules, 1990 were substituted:-

*“(a) Completed eight years of regular Government Service in the post of Lecturer on the first day of January of the year in which the vacancy is proposed to be filled up.*

*Note:- In computing the period of eight years in case of Lecturer continuing as such on the date of coming into force of these rules:-*

*(i) the benefit conferred under sub-rules (3), (4) or (5) of rule 4, as the case may be, shall be taken into consideration; and*

*(ii) the period of continuous ad hoc service of Lecturer who had been appointed on the recommendation of the Director against any regular vacancy on the basis of the prescribed minimum qualification and selection, if followed, by his regular appointment or by an order of regularization, shall be taken into account.*

*Provided that if a lecturer was not recommended by the Commission once or more than once during the period of his continuance on ad hoc basis, the period of such service between the first appointment on ad hoc basis till the date of last appointment of the Lecturers in various subjects recommended by the Commission (on the basis of the general advertisement issued by the Commission) on the last occasion shall be ignored.”*

The authorities taking advantage of the Proviso to Sub-Rule 3(a) of Rule 8 of the Orissa Education Service (College Branch) Recruitment Rules, 1990, issued an order on 24.7.2001 directing the Director, Higher Education to submit proposals only in respect of lecturers who were qualified by Orissa Public Service Commission in the first available chance to the Government and thereby those lecturers who became regular on the strength of subsequent notification dtd.20<sup>th</sup> November, 1986 and 12.5.1989 were kept out of consideration to get the benefits of Career Advancement.

The aforesaid decision of the State Government was challenged by **Nilakantha Mishra** and **Kailash Chandra Mishra** before the Tribunal in O.A. No.1497 of 2001, the Tribunal vide order dtd.1.10.2001 directed the opposite party no.1 to reexamine the matter and to take a conscious decision as to whether the order dtd.24.7.2001 would be rescinded or not, however, after the order was passed by the Tribunal on 1.10.2001 in O.A. No.1497 of 2001, an order was

passed on 22.11.2001 by the State Government which was communicated by the Deputy Director, Higher Education on 12.12.2001 stating therein that there would be no need to rescind the decision dtd.24.7.2001 as it is in accordance with the decision of the State government. Accordingly, the State Government has filed affidavit to that effect before the Tribunal, but the Tribunal, after taking note of the Proviso to Article 320 (3) of the Constitution of India and its amendment of Sub-Rule (3) of Rule 8 which came into force by way of amendment vide notification No.69280 dtd.8.12.1995, has passed an order directing the State Government to take appropriate steps for counting the past services of the petitioners of those original applications for the purpose of career advancement benefit in terms of the notification and made the career advancement benefit available to them within a period of six months.

The State Government has preferred a writ petition against the said order of Tribunal in this Court vide W.P.(C) No.7462 of 2009, this court, after hearing the parties, have been pleased to dismiss the writ petition vide order dtd.3.9.2009 against which S.L.P. was filed being Special Leave to Appeal (Civil) No.35165 of 2009 which was also dismissed vide order dtd.5.1.2010.

Thereafter the State Government has implemented the decision passed by the Tribunal in O.A. No.137 of 2002 after counting the past *ad hoc* service of those petitioners for the purpose of Career Advancement benefits, accordingly the two petitioners, namely Nilakantha Mishra and Kailash Chandra Mishra have got the benefit of fixation of their pay from the date of placement as Lecturer in Sr. Scale as well as Reader Scale.

The case of the applicants / petitioners herein that they got *ad hoc* appointment on different dates, as such their services be counted from the date of their engagement on *ad hoc* basis, when the same has not been counted, they have represented before the authority to consider their cases to give them benefit of continuity in service from the date when they have been engaged on *ad hoc* basis in the light of the decision taken by the Tribunal in the case of **Nilakantha Mishra** and **Kailash Ch. Mishra**, having been attained its finality even by the Hon'ble Supreme Court.

The State Government, when taken no decision, the original applications have been filed by them, one of them is O.A. No.1449 of 2010 along with batch of identical cases and the Tribunal, while disposing of the same by a common judgment dtd.24.2.2011, directed the opposite party nos.1 & 2 to consider the grievance of individual petitioners as has been made by them in their respective original applications treating the contents of the applications along with the annexures as their representations and dispose of the same by reasoned order keeping in view the decision rendered by the Tribunal in O.A. No.137 of 2002 which was confirmed by this court as well as by the Hon'ble Supreme Court.

The authorities have passed an order on 27.10.2011 wherein, referring to the orders passed in the case of **Nilakantha Mishra** and **Kailash Chandra Mishra** (O.A. No.137 of 2002), directed that as the date of last appointment of the Lecturers in various subjects recommended by the Commission on the last occasion, prior to regularization of the petitioners is 6.7.1988 the petitioners are allowed past *ad hoc* service benefits with effect from the next date i.e. 7.7.1988 and accordingly the placement of the petitioners in the

rank of Lecturer and Reader scale is allowed taking 7.7.1988 as the date of regular service.

The petitioners being aggrieved with such decision have approached to the Tribunal by filing original applications and the Tribunal, vide common judgment delivered on 31.10.2014, has come to a conscious finding that the issues in the cases since have already been settled by its order in **Nilakantha Mishrta's** case, has quashed the impugned orders and directed the State-respondents to count the *ad hoc* service of the applicants from their initial date of *ad hoc* appointment for placement in Sr. Scale / Career Advancement and ante date the grant of Sr. Scale / Career Advancement accordingly. Subsequent promotions, as due and admissible to the applicants as per law may also be ante dated. However, as far as claim of arrears of pay is concerned, since these are old claims, this financial benefit will be limited to what would be admissible calculating the same for the period of three years prior to filing of the respective original applications based on judgment of Hon'ble Apex Court in the case of **Union of India and others Vrs. Tarsem Singh** (supra), the exercise has been directed to be completed within period of six months from the date of receipt of copy of the order.

4. The applicants / petitioners have filed these writ petitions challenging the part of the order passed by the Tribunal whereby and where under the financial benefit has been restricted only to the period of three years relying upon the judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh** (supra) on the ground that the Tribunal cannot take different view as has been taken by it in the case of **Nilakantaha Mishra** and **Kailash Chandra**

**Mishra** wherein the order having been affirmed and attained finality by the Hon'bl Apex Court, these two persons have already got benefit from the date of appointment on *ad hoc* basis, hence they cannot be treated differently.

5. Learned Sr. Counsel Mr. Buddhadev Routray representing the applicants / petitioners have submitted that even one Narayan Prasad Mohanty and other similarly situated persons who have approached to the Tribunal in the year 2010, have got the benefit in the same line as has been given in the case of **Nilakantha Mishra**, the Tribunal, while disposing of those original applications, have directed the authorities to take decision on their representation without any delay, the said order was challenged by those applicants before this court and a coordinate bench of this court, while disposing of the writ petition by modifying the order passed by the Tribunal, has directed to extend the benefit to the applicants / petitioners of those original applications by counting the past services from the date when they have been engaged on *ad hoc* basis as has been decided in the case of **Nilakantha Mishra** and **Kailash Chandra Mishra** and the applicant in O.A. No.2430 of 2002, the said order was again been challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the same vide its order dtd.21.09.2015.

He has further submitted that even in the case of **Sarat Chandra Senapati**, similar order has been passed by this court and the Hon'ble Apex Court has dismissed the SLP vide its order dtd.10.03.2017 passed in S.L.P. No.34694 of 2014 and as such the financial benefit which has been disallowed by the tribunal is nothing but only non-application of mind by the Tribunal by treating the applicants / petitioners differently.

He further submits that the Tribunal has relied upon the judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh** (supra) but in the given facts of this case the judgment rendered in **Tarsem Singh** (supra) is not applicable because the Hon'ble Apex court has rendered the judgment in Tarsem Singh's case considering the delay of 16 years since the said Tarsem Singh has approached the court of law after delay of 16 years and in that facts and circumstances the Hon'ble Apex Court has come to finding that after delay of 16 years the money claim cannot be raised but that is not the situation here as because the petitioners are similarly situated as that of Nilakantha Mishra, Kailash Chandra Mishra, Narayan Mohanty and Sarat Chandra Senapati.

He submits that Sarat Chandra. Senapati has recently been given the financial benefit and as such there is no reason to deny the said benefit to them.

It has been submitted by him that the principle of delay can be raised if there is any delay on the part of the applicant who are not vigilant to approach the court of law, but here in this case it is the State Government who has come out with the amendment in the year 1995 for giving relaxation from the concurrence of Orissa Public Service Commission by making an amendment in this regard, as such it was the duty of the State Government to take a decision in accordance with the amendment having been brought by it in a general way but the decision has not been taken which led Nilakantha Mishra and Kailash Chandra Mishra to approach the court of law in the year 2001 by filing original application before the Tribunal which has been disposed of in the year 2007, thereafter the matter went up to the level of Hon'ble Apex Court where the matter has finally been set at rest while the Hon'ble Apex Court has been pleased to

dismiss the Special Leave to Appeal No.35165 of 2009 vide order dtd.5.1.2010 and during pendency of the litigation the petitioners have approached before the authority to take decision but no decision has been taken in this regard which led them to file application before the Tribunal in the year 2010, in terms thereof the petitioners have made representation in the year 2011 which has been dismissed in the month of November 2011 and immediately thereafter the original applications have been filed before the Tribunal, as such it cannot be said that there is delay in their part rather it is the loath approach of the State Government not to extend the benefit of their own amendment and in this situation the judgment relied upon by the Tribunal in the case of **Tarsem Singh** has got no applicability.

He further submits that the petitioners / applicants have approached the Tribunal for the first time in the year 2010 wherein direction has been passed directing the State authorities to take decision but the State authorities have not challenged the said order passed in the year 2010 by the Tribunal rather they have acted upon by taking decision by rejecting their claim, now they cannot take the plea of fence sitter.

He submits that the meaning of fence sitter is that the persons waiting for the litigation and when the result has come, then if the party approaches to the court of law then in that situation the benefit will be said to be belated, but that is not the factual aspect herein as has been submitted in the preceding paragraph.

On the basis of these situation it has been submitted by the learned Sr. counsel Mr. B. Routray that denying financial benefit to them while allowing the same to others is noting but treating these applicants / petitioners differently which is directly under the teeth of Art.14 of the constitution of India.

He further submits that the judgment rendered in the case of **Tarsem Singh** (supra) is squarely in different context while the judgment relied upon by him in the case of Nilakantha Mishra and others, etc. is directly on the subject, basis upon which the financial benefit has been extended to them, hence there is no reason to deny the said benefit.

6. Per contra, learned Additional Government Advocate, refuting the claim of the applicants / petitioners, has vehemently opposed the contention of learned counsel for the applicants / petitioners and submitted that there is no infirmity in the order rather the Tribunal, after taking into consideration delay on the part of these applicants / petitioners, have rightly passed order putting reliance upon the judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh** (supra) hence the same may not be interfered with.

He submits that the amendment having been brought in the year 1995 the applicants / petitioners ought to have approached the court of law instantly but in stead of doing so they have waited for final outcome of the case of Nilakantha Mishra, as such it cannot be said that it is not a belated claim.

7. We have heard learned counsels for the parties and perused the documents available on record.

Before scrutinizing the part of the order passed by the Tribunal whereby and where under the financial benefit from the date of engagement of the applicants on *ad hoc* basis has been refused, it would be proper to have discussion regarding the factual aspect, i.e.:-

- (i) The applicants were selected for *ad hoc* appointment by the order passed by the authorities, the *ad hoc* appointment was given for a period of 6 months with effect from the date of their appointment or till appointment to the post in consultation of the OPSC, whichever is earlier;
- (ii) The state government issued notification on 27.6.1985 exercising power conferred by the Proviso to Clause 3 of Article 320 of the Constitution of India, the Governor of Orissa inserted clause (xiii) in the Orissa Public Service Commission (Limitation of Function) Regulation 1952 which is quoted below:-

*“(Xiii) Regularization of services of Lecturers appointed on ad hoc basis in Class-II of the Orissa Education Service on or before the 31<sup>st</sup> May, 1984 and continuing as such on ad hoc basis on the date of commencement of the Orissa Public Service Commission (Limitations of Functions) (Amendment) Regulations, 1988 and their appointment on regular basis in Class-II of the Orissa Education Service.”*

The applicants got included in the category of exemption from the OPSC by virtue of the amendment as indicated in the preceding paragraphs and accordingly an order was passed on 20<sup>th</sup> November 1986 whereby and where under they have been regularized in the post of Lecturers with effect from the date of the notification;

- (iii) After such regularization, by exercising power conferred to proviso to Clause 3 of Article 320 of the Constitution of India, the State Government

has issued a notification on 8.12.1995 by which the following clauses in Sub-Rule 3(a) of Rule 8 of the Orissa Education Service (College Branch) Recruitment Rules, 1990 were substituted:-

*“a) Completed eight years of regular Government Service in the post of Lecturer on the first day of January of the year in which the vacancy is proposed to be filled up.*

*Note:- In computing the period of eight years in case of Lecturer continuing as such on the date of coming into force of these rules:-*

*(i) the benefit conferred under sub-rules (3), (4) or (5) of rule 4, as the case may be, shall be taken into consideration; and*

*(ii) the period of continuous ad hoc service of Lecturer who had been appointed on the recommendation of the Director against any regular vacancy on the basis of the prescribed minimum qualification and selection, if followed, by his regular appointment or by an order of regularization, shall be taken into account.*

*Provided that if a lecturer was not recommended by the Commission once or more than once during the period of his continuance on ad hoc basis, the period of such service between the first appointment on ad hoc basis till the date of last appointment of the Lecturers in various subjects recommended by the Commission (on the basis of the general advertisement issued by the Commission) on the last occasion shall be ignored.”*

- (iv) However, decision has been taken by the State Government for giving exemption by virtue of the amendment brought vide notification dtd.27.6.1985 and amendment inserted in the recruitment rule, 1990 vide notification dtd.18.12.1995 but no benefit has been extended to the concerned employees, hence an original application was filed being O.A. No.1497 of 2001 before the Odisha Administrative Tribunal by one Nilakantha Mishra for counting his past services. Vide order dtd.1.10.2001 a single member Bench of the Tribunal disposed of the case with a direction upon the State Government to re-examine the case of the applicant in the light of what was indicated in the case and to take a conscious decision as

to whether the order dtd.24.7.2001 would be rescinded or not, for better appreciation the order dtd.24.7.2001 is quoted below:-

*“In continuation of this Department letter under reference, I am directed to say that while recommending the proposals for further career advancement benefit as mentioned in the letter, only the cases of Lecturers who have qualified OPSC in their first available chance should be sent to Government.”*

In terms of the order of Tribunal, the Deputy Director, Higher Education passed an order on 12.12.2001 stating therein that there is no need to rescind the decision since it is in accordance with the wish of the Legislature on the basis of the judgment passed by the Tribunal in earlier cases.

- (v) The Tribunal after taking note of the submission and the amendment notified on 27.6.1985 and the amended Recruitment Rule, 1990, while disposing of the original application, has passed an order that the past service of the applicants were required to be taken into consideration for the purpose of career advancement benefit for which the decision taken by the authority cannot be considered to be justified one, accordingly the order passed by the authority has been set aside, in consequence upon the same the authorities were directed to take steps for counting the past services of the applicants for the purpose of career advancement benefit in terms of 1995 notification and make the career advancement benefit available to the applicants within 6 months from the date of receipt of the order.
- (vi) The order passed by the Tribunal in the case of Nilakantha Mishra has been challenged before this court vide W.P.(C) No.7462 of 2009, this court while disposing of the writ petition vide order dtd.3.9.2009 has refused to

interfere with the order passed by the Tribunal accordingly the writ petition has been dismissed.

The order passed by this court in W.P.(C) No.7462 has been assailed by the State of Odisha before the Hon'ble Apex Court and the Hon'ble Apex Court vide its order dtd.5.1.2010 has been pleased to dismiss the SLP.

The state of Odisha has further filed a review being REVIEW PETITION (C) No.718 of 2010 but the Hon'ble Apex Court vide its order dtd.28.4.2010 has dismissed the review petition.

- (vii) One Sarat Chandra Senapati has also approached the Tribunal vide O.A. No.2430 of 2002, the Tribunal has disposed of the O.A. putting reliance upon the order passed by it in the case of Nilakantha Mishra in O.A. No.137 of 2002, which has again been challenged by the State before this court and this court has been informed by the State Authorities that the order passed by the Tribunal has been complied with and accordingly the writ petition has been rendered infructuous.
- (viii) The applicants / petitioners who have approached to the government for redressal of their grievance, when no decision has been taken, they have approached to the Tribunal in the year 2010 by filing O.A. No.3909 of 2010 along with other analogous cases. The tribunal has passed order giving declaration that the applicants in all the original applications are similarly situated persons like that of Nilakantha Mishra and Kailash Chandra Mishra, applicants of O.A. No.137 of 2002, hence they are entitled to get the same treatment, as such the original applications have been disposed of by

a common order directing the State Authorities to take decision within stipulated period, but the applicants being aggrieved with the decision of the Tribunal, so far as it relates to remitting the matter before the authority to take a decision when the issue has already been decided by the Tribunal, approached this court, this court after taking into consideration entire aspects of the matter by modifying the order of the tribunal, has directed the State Authorities to give the benefit of applicants / petitioners as has been given in the case of Nilakantha Mishra and Others (supra).

The said order was challenged by the state of Odisha before Hon'ble Apex court, but the Hon'ble Apex Court, vide its order dtd.21.9.2015 has been pleased to dismiss the same.

The state of Orissa has also approached to the Hon'ble Apex court against the order passed by this court as well as the Tribunal giving the benefit with respect to one Sri Sarat Chandra Senapati and the Hon'ble Apex Court has been pleased to dismiss the Special Leave to Appeal (C) No.34694 of 2014.

- (ix) The petitioners have approached to the Tribunal, the Tribunal has disposed of the application vide order dtd.24.2.2011, the Commissioner-cum – Secretary while disposing of the application in terms of the order of the Tribunal, has given the past *ad hoc* service benefit w.e.f. 07.07.1988. The applicants / petitioner being aggrieved with the order passed by the Commissioner whereby and where under the benefit of past services has only been given w.e.f. 07.07.1988 relying upon the proviso to the

notification issued in the year 1995 have approached to the tribunal to challenge the said order.

- (x) The Tribunal, while dealing with the facts and circumstances of the case, taking into consideration the ratio laid down by it in the case of Nilakantha Mishra and Kailash Chandra Mishra which has attained its finality by Hon'ble Apex Court, has passed an order at paragraph 15 which is being quoted herein below:-

*“15. Since the issues in these cases have already been settled by the order of this Tribunal in Nilakantha Mishra case, we quash the impugned orders and direct the State respondents to count the ad hoc service of the applicants from their initial date of ad hoc appointment for placement in the senior scale / career advancement and ante date the grant of senior scale / career advancement accordingly. Subsequent promotions, as due and admissible to the applicants as per law may also be antedated. However, as far as claim of arrears of pay is concerned, since these are old claims, this financial benefit will be limited to what would be admissible calculating the same for the period of three years prior to filing of the respective O.As. based on judgment of Hon'ble Apex Court in Union of India and Others Vrs. Tarsem Singh, reported in (2008) 2 SCC (L & S) 765. The entire exercise be completed within a period of six months from the date of receipt of a copy of the order.”*

The Tribunal however has quashed the order of the authority which has been passed relying upon the proviso to notification of 1995 by putting reliance upon the judgment rendered in the case of Nilakantha Mishra which has been passed on the basis of the amendment made by the State Govt. under the provision of Article 320(3) of the Constitution of India, but however, the benefit has been restricted only for the period of three years and the said finding has been given putting reliance upon the judgment rendered in the case of **Tarsem Singh** (supra).

That part of the order is under challenge whereby and where under the financial benefit has only been restricted for the period of three years.

8. From the facts as has been discussed herein above, it is evident that the applicants / petitioners are of the same category as that of Nilakantha Mishra, Kailash Chandra Mishra, Sarat Chandra Senapati, etc. who have been given financial as well as service benefits as per the amendment made by the State Government in the Recruitment Rules, 1990 and the relaxation in pursuance to the provision of Article 320(3) of the Constitution of India and also they have been given financial benefit.

Learned counsel representing the opposite party – State has defended the order passed by the Tribunal which has already been discussed herein above and the same is not being repeated.

9. So far as the contention raised by the learned Additional Government Advocate that the judgment rendered in the case of **Union of India and others Vs. Tarsem Singh** (supra) is squarely applicable in the facts and circumstances of this case, we thought it proper to discuss the judgment rendered by the Hon'ble Apex court in the case of Tarsem Singh (supra).

The fact of the said case is that the respondent – Tarsem Singh who was working in Indian Army was invalidated out of army service on medical category on 13.11.1983. He approached the High Court in 1999 seeking a direction to pay him disability pension. In that situation the Hon'ble Apex Court has come to a finding that since Tarsem Singh has approached the court of law after lapse of 16 years, hence there is admittedly delay of 16 years which would affect the consequential claim for careers and on that pretext the order has been passed.

It is settled that any judgment cannot be given its general application rather the judgment will be said to be applicable on the basis of facts and circumstances of each and every case.

It is also settled that if in a given facts and circumstances the issue has been decided then certainly for the same set of facts the judgment rendered in the same type of case will be applicable rather than making the applicability of the judgment given in different facts and circumstances.

We have already dealt here in above that the order passed by the Tribunal in similar facts have attained its finality by the Hon'ble Apex Court.

10. In this situation it is to be scrutinized as to whether the applicants /petitioners will be said to be fence sitter or not and the benefit which has been extended to others can be denied to these petitioners?

There is no denial about the fact that the fence sitter cannot be allowed to get the benefit of judgment by invoking the jurisdiction of court of law after lapse of long delay. But simultaneously it is also settled that when a particular set of employee is given relief by the court, all other identical set of persons need to be treated alike by extending the 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 matter more emphatically as the service jurisprudence 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.

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. 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 itself to extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularization and the like. 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, reliance in this regard may be made to the judgment

rendered by Hon'ble Apex Court in the case of **State of Uttar Pradesh & Others** **Vrs. Arvind Kumar Srivastava & Others**, reported in (2015) 1 SCC 347.

In the light of these settled proposition when we have scrutinized the factual aspect of the instant case, we have gathered from the record that it is the State Government who have taken decision, i.e. by way of policy decision by issuing notification on 27.6.1985 which was issued in exercise of power conferred by the proviso to Clause 3 of Article 320 of the Constitution of India by which the concurrence from the O.P.S.C. has been given relaxation so far as the regularization of services of applicants / petitioners and the similarly situated persons are concerned.

Further policy decision was taken on 18.12.1995 making amendment in the Recruitment Rules, 1990, the Tribunal, after taking note of the amendment made in the light of the provision as contained in Article 320(3) of the Constitution of India, has passed a specific direction in the case of Nilakantha Mishra (supra) that "keeping in view the notification dtd.27.6.1985, we are of the view that the past services of the applicants were required to be taken into consideration for the purpose of career advancement benefit for which the decision taken in Annexure-17 cannot be said to be justified one, accordingly we set aside the order. The respondent no.1 is directed to take appropriate steps for counting the past service of the applicants for the purpose of career advancement benefit in terms of 1995 notification and make the career advancement available to the applicants within period of 6 months from the date of receipt of copy of the order".

The direction passed by the Tribunal which has attained its finality by the Hon'ble Apex Court clearly reflects that the same has been passed on the basis of the policy decision of the State Government and as has been settled by Hon'ble Apex Court in the case of **Arvind Kumar Srivastava** (supra) that if the policy decision is there then the principle of fence sitter will not be applicable rather it is the duty of the State Government to implement the same uniformly to all and extend the benefit if they are otherwise eligible but the State Government, instead of doing so, has waited for the order of the court of law and extended the benefit who have come with an order of court which cannot be said to be proper action by the State Government.

Moreover the petitioners / applicants have approached to the authority by making representation in pursuance to the order passed by the Tribunal, wherein the Tribunal has directed the authorities to consider the grievance of the petitioners and the representation of the petitioners have been taken into consideration by the authority but passing the order not in the light of the Government policy decision or the order passed by the Tribunal in the case of Nilakantha Mishra which ultimately been challenged by them before the Tribunal which is the subject matter of the instant writ petition, as such now the State Government cannot take the plea of fence sitter because whatever order has been passed by the authority i.e. on 27.10.2011, the same has given the fresh cause of action to the applicants / petitioners having been challenged before the Tribunal which is the subject matter of the instant writ petition.

The points available to the State Authorities to raise the issue of fence sitter was available to them when the Tribunal has passed an order in O.A.

No.1449 of 2010 along with other analogous cases but instead of challenging the said order they have acted upon the same and taken a decision which ultimately has been challenged before the Tribunal in series of original applications which is under consideration before us in these writ petitions.

In the facts and circumstances of the case the principle of fence sitter is not applicable.

11. So far as the judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh** (supra) as has already been discussed by us that the factual aspect of the case is quite different to that of the facts of the instant case, hence the same is not applicable.

12. The learned counsel for the State has also relied upon one order passed by us in W.P.(C) No.1723 of 2016, putting reliance upon the same it has been submitted that the same order has been affirmed by this court vide order dtd.17.1.2017 hence it would not be proper to take different view.

Learned Sr. Counsel representing the petitioners has submitted that the plea taken by the learned Additional Government Advocate in this regard is not sustainable in view of the fact that the writ petition being W.P.(C) No.17123 of 2016 has been preferred by the State Authorities challenging the order passed by the tribunal in O.A. No.1685 of 2014 only to the effect by which the Tribunal has directed to count the *ad hoc* service of the applicant from the initial date of *ad hoc* appointment for placement in sr. scale / career advancement and antedate the grant of sr. scale / career advancement accordingly and the State is not aggrieved with the part of the direction depriving the applicants / petitioners of the said writ

petition of the financial benefit restricting only to 3 years relying upon the judgment of Tarsem singh (supra).

We, after considering the rival submission of the parties in this regard, are of the considered view that this court has taken into consideration the fact that the State Authorities have challenged the order whereby and where under the Tribunal has directed to count the *ad hoc* service of the applicants from their initial date of *ad hoc* appointment for placement in the sr. scale / career advancement and ante date, accordingly they have not challenged the part of the order restricting the financial benefit only for the period of three years relying upon the judgment rendered in the case of Tarsem Singh (supra) which has not been disputed by the learned Additional Government Advocate, rather he has fairly submitted that the State is not aggrieved with that part of the order which has been decided by the Hon'ble Apex Court in its judgment rendered in the case of **Union of India and others Vrs. Tarsem Singh** (supra), even in these cases the stand of the State is that the Tribunal has not erred in passing the order regarding arrears relying upon the judgment rendered in the case of Tarsem Singh, which itself suggests that this issue has not been assailed by the State in W.P.(C) No.17123 of 2016. Further it is evident from the order passed by this court in W.P.(C) No.17123 of 2016 that there is no finding to this effect.

It is settled that parties cannot be restrained from challenging an order if they are aggrieved, only exception is the principle of resjudicata, but according to our considered view the principle of resjudicata will not be applicable for the reason that this issue has not been decided by this court in W.P.(C) No.17123 of 2016, as would be evident from the order since this court has passed

order confirming the order passed by the Tribunal in O.A. No.1685 of 2014 relying upon the order passed by the Tribunal in the case of Nilakantha Mishra and another which attained its finality, in pursuance thereto Nilakantha Mishra and others have been given entire benefits from the date of their engagement on ad hoc basis. This obviously goes to show that denial of arrears from the date of engagement was not the subject matter of adjudication prior to this litigation.

Taking into consideration the submission advanced on behalf of the parties, we are of the considered view that disposal of writ petition being W.P.(C) No.17123 of 2016 is in no way related to the relief sought for by the petitioners in the instant writ petitions.

13. We after discussing in detail the factual aspect as well as the ratio laid down by Hon'ble Apex Court in the case of Arabinda Kumar Sribastav and the order passed by the Tribunal, confirmed by this court as well as by the Hon'ble Apex Court, are of the considered view that the petitioners also deserve to be given the financial benefit as that of Nilakantha Mishra and Kailash Chandra Mishra, Sarat Chandra Senapati and Narayan Prasad Mohanty.

14. Accordingly, the part of the order of the tribunal whereby and where under the financial benefit i.e. arrears of pay as has been restricted only for a period of three years is hereby set aside with a direction to the authorities to extend the financial benefit to these petitioners as has been extended in favour of Nilakantha Mishra and Kailash Chandra Mishra, Sarat Chandra Senapati and Narayan Prasad Mohanty within reasonable period, preferably within 12 weeks from the date of receipt of copy of this order.

With these observations and directions the writ petitions stand disposed of.

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**S.N.Prasad, J.**

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**Sanju Panda, J.**

*Orissa High Court, Cuttack,  
Dated the 27<sup>th</sup> June, 2017/Manas*