

(2013) 05 DEL CK 0122

In the Delhi High Court

Case No : Writ Petition (C) 10057, 10084 of 2009 and 4663 of 2011

Nand Kishore Sharma

APPELLANT

Vs

UOI and Others
 UOI Vs Nand Kishore Sharma

RESPONDENT

Date of Decision : 03-05-2013

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19, 20, 21, 21(1)(b), 3(r)
Constitution of India, 1950 — Article 226, 58

Citation : (2013) 136 DRJ 396 : (2013) 136 DRJ 182 : (2013) LabIC 2381 :
(2013) 3 LLN 177

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Rekha Palli, Amicus Curiae with Petitioner in person in W.P.C 10057/2009 and W.P.C 10084/2009 and Mr. R.V. Sinha in W.P.C 4663/2011, for the Appellant; Aanchal Mullick, Advocate with Mr. Pronoy Dey, Advocates for R-1 in W.P.(C) 10057/2009, Ms. Rachana Joshi Issar, Advocate with Ms. Ambreen Rasool and Ms. Nidhi Tewari, Advocates for R-3 in W.P.(C) 10057/2009 and W.P. (C) 10084/2009, Mr. R.V. Sinha, Advocate for R-1 in W.P.(C) 10084/2009 and Ms. Rekha Palli, Amicus Curiae with Petitioner in person in W.P.(C) 4663/2011, for the Appearing Parties

Judgement

Pradeep Nandrajog, J.—The facts leading to the filing of the above captioned writ petitions are that in the year 1977, Mr. Nand Kishore Sharma (hereinafter referred to as "Sharma") joined service as a Junior Engineer with the Delhi Telephone under the Department of Telecommunications (hereinafter referred to as "DOT"), Ministry of Telecommunications. On April 01, 1986, the Government of India established Mahanagar Telephone Nigam Limited (hereinafter referred to as "MTNL") by hiving off a wing of DOT with the aim of upgrading the quality of telecom services; expanding the telecom network; introducing new services and raising revenue for the telecom development needs of India's key metros-Delhi and Mumbai.

2. With the creation of MTNL, all Group "A" and "B" officers working in the Delhi

Telephone, including Sharma, were deemed to be on deputation under MTNL.

3. In the year 1994 Sharma was promoted to the post of Assistant Engineer.

4. On May 08, 2000, DOT issued a circular pertaining to the absorption of its Group "A" and "B" officers in MTNL, the relevant portion whereof reads as under:-

Subject:- Permanent absorption of group "A" and "B" officers in MTNL.

1. The undersigned is directed to say that it has been decided to fill up all the posts of Group "A", "B" and certain Group "C" posts having all India transfer liability in MTNL on permanent absorption basis and to call for options in respect of officers as shown in Annexure "A". The detailed terms and conditions and pay scales on permanent absorption in MTNL are given in Annexure "B". All the interested officers may kindly exercise their options in the prescribed proforma as at Annexure - "C", latest by 15/08/2000.

2. Options once exercised shall be final. All the officers who do not exercise their option will be deemed to have opted for DTS.

3...

4. Options received after 01/09/2000 will not be entertained under any circumstances.

(Emphasis Supplied)

5. On August 04, 2000, Sharma submitted an option for permanent absorption under MTNL.

6. Before any final decision could be taken on the aforesaid option submitted by Sharma, on October 01, 2000, the Government of India established Bharat Sanchar Nigam Limited (hereinafter referred to as "BSNL") by hiving off another wing of DOT to offer telecom services in India, except Delhi and Mumbai.

7. After the creation of BSNL, DOT started transferring some employees, including the employees who were deemed to be on deputation under MTNL to BSNL.

8. On July 23, 2001, DOT issued an order transferring Sharma (who was in deemed deputation to MTNL) from MTNL to BSNL, which order was challenged by Sharma by filing an application u/s 19 of the Central Administrative Tribunals Act, 1985 registered as O.A. No. 2116/2001 which was disposed of by the Tribunal vide order dated October 12, 2001, in the following terms:-

1. ?

2. Applicants impugn Respondents order dated 23.7.2001 (Annex-A1) transferring them from MTNL to BSNL.

3. Their case is that in terms of official respondents' circular dated 8.5.2000 they

had opted for permanent absorption in MTNL, after submitting their technical resignation from DOT. They contend that DOT is competent to transferring them from MTNL to BSNL at this stage and this transfer order has been issued out of malafide officers Association".

4. No materials have been shown by applicants to establish that their options for permanent absorption in MTNL have been finally accepted. Mere submissions of option forms for permanent absorption in MTNL does not automatically imply that applicants cease to be employees of DOT and have become employee of MTNL unless the same is finally accepted. Indeed applicants themselves even in para 4.4 of the OA have said that the scheme for permanent absorption have not yet been finalized.

5. We also find that applicants have rushed to the Tribunal without even filing a representation to the appropriate authorities in regard to their grievance, which they should have done in the first instance in the light of the Hon'ble Supreme Court's ruling in Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani,

6. Under the circumstances this OA is disposed of holding that if applicants are aggrieved by the impugned transfer order, they should in the first instance file a representation to respondents within 3 weeks from today, which Respondents should dispose of by reasoned order under intimation to applicants within 6 weeks of its receipt. While doing so Respondents should apply their mind as to whether it is necessary in public interest to transfer applicants to BSNL when they are keen for permanent absorption in MTNL.

7. The OA is disposed of in terms of para 6 above.

(Emphasis Supplied)

9. It is the claim of Sharma that he submitted a representation to the Competent Authority in terms of the aforesaid order dated October 12, 2001 passed by the Tribunal but he heard nothing from the department in respect thereof. It is further claimed by him that since no order relieving him from MTNL was served upon him at any point of time he continued to work in MTNL.

10. On December 28, 2001, DOT issued another circular on the subject of absorption of its employees in MTNL, the relevant portion whereof reads as under:-

The undersigned is directed to issue the following Clarifications, in accordance with the Judgment and Order dated 12-10-2001 passed by Hon'ble CAT (Principal Bench) in OA No. 1252/2000; Indian Telecom Service Association Vs. Union of India; to the Office Letter No. 400-41/98-STG-III dated 8-5-2000 and these Clarification may be read together with the Office Letter:

1. These Clarifications shall be applicable to both, Group "A" and "B" officers.

2....

3. The services of the officials not absorbed in MTNL shall be utilized in Bharat Sanchar Nigam Ltd. (BSNL) on deemed deputation or in the Department of Telecommunications including telecom. Engineering Centre (TEC) and all of them will be governed as per the rules described in Para 2 above.

4. The officials mentioned in Para 3 above will be asked to opt for permanent absorption in BSNL if and when appropriate scheme is finalized.

5. All the interested officers including those who exercised their options earlier if so desire, may kindly exercise their options latest by 28th February, 2002

(Emphasis Supplied)

11. Thereafter, on January 14 and 29, 2002, DOT issued 2 more circulars reiterating the contents of the circular dated December 28, 2001.

12. Soon thereafter a number of applications were filed by the employees of DOT in the Tribunal challenging the legality of the aforesaid circulars dated December 28, 2001 and January 14 and 29, 2002. Vide order dated August 06, 2002, the Tribunal disposed of the aforesaid applications in the following terms:-

6. We find force in the submissions made by Shri E.X. Joseph, learned senior counsel for the applicants and Shri Neeraj Kaul, learned counsel. In terms of the official respondents' own Notification dated 30.9.2000 and the aforesaid judgments of the Tribunal in O.A. 1232/2000 and the Hon'ble Delhi High Court in CW No. 7544/2001, it is necessary for the respondents to spell out in somewhat more detail and clearly the pay scales and fitment formula as well as promotional avenues pertaining to the applicants who have been given an option. In the impugned order issued by the respondents dated 14.1.2002, they have stated, inter-alia, that the options exercised by the officers shall be final. In the facts and circumstances of the case, particularly also having regard to the fact that in furtherance to the Tribunal's order dated 12.10.2001, further clarifications have been issued by them in their letter dated 28.12.2001, para 4 of the annexure to that letter has to be clarified. The appropriate Scheme for absorption of employees in BSNL has also not been finalized. Therefore, at least in the two major points, namely, the pay-scale and fitment of Group "B" officers as well as promotional avenues, these should be clarified by the respondents. In the facts and circumstances of the cases, the contention of the learned counsel for the applicants that they can given an option whether, to be absorbed in BSNL/MTNL or remain in the Department only when they are informed of the terms and conditions of their service on absorption, cannot be lightly brushed aside. They have also emphasized during the arguments that they would be satisfied if the terms and conditions of their service on absorption in BSNL are spelt out to the extent that was done by the respondents in the case of MTNL. We also see force in the argument that even though MTNL had been formed way back in 1986, their terms and conditions were spelt out only in May, 2000. In the present case, BSNL has been formed on 1.10.2000 but taking into account their earlier experience and the terms and conditions applicable to the earlier organization,

that is MTNL, the department ought to have been in a better position to finalize the Scheme and relevant Rules and regulations for absorption of the DOT employee in BSNL by this time.

7. In the result, for the reasons given above, we dispose of the above cases with the following directions:

(1) Respondents 1 & 2 should clarify the conditions on absorption of employees in BSNL if they exercise the option to do so. In particular the pay scales, fitment formula and promotional avenues of the officers like the applicants who belong to Group "B" service should be given so as to enable them to take an informed decision whether they would prefer to opt for BSNL or remain where they are, that is as employee of the DOT;

(2) Respondents 1 and 2 shall issue the appropriate clarifications/instructions/rules with regard to the points mentioned above as early as possible and in any case within two months from the date of receipt of a copy of this order;

(3) In the circumstances, the date for submissions of options in terms of the impugned letter dated 14.1.2002 shall also be extended suitably;

(4) Meanwhile, the respondents are at liberty to consider taking appropriate steps in respect of those who have already submitted their options as per the previous date specified for permanent absorption in BSNL, leaving the question of seniority open;

(5) In the circumstances, the interim orders granted in any of the O.A.s referred to above, stand vacated.

(Emphasis Supplied)

13. On July 28, 2003 Sharma was issued a charge memo listing 1 charge against him, which read as under:-

Article-I

Shri N.K. Sharma, SDE (Staff No. 19135) was transferred from MTNL, New Delhi to BSNL vide DOT order No. 3-11/2000-STG-II (Pt-I) dated 23.7.01 and relieved by MTNL, New Delhi vide their order no. STA-1/1-1/TFR/2000/KW/31 dated 18.8.01 to report to BSNL Corporate Office for further duties. He has however not reported to BSNL Corporate Office for duty till date. As such, Shri N K Sharma is unauthorisedly absence from duty since 19.8.01.

14. On August 29, 2003, DOT issued another circular pertaining to the absorption of its Group "B" officers in BSNL/MTNL in compliance of the aforesaid order dated August 06, 2002, passed by the Tribunal; the relevant portion whereof (circular dated August 29, 2003) reads as under:-

1. I have been directed to say that in pursuance of the directions of Hon'ble CAT Principal Bench dated 6.8.2003 in OA No. 298/2002 the absorption of Group B officers in BSNL/MTNL is to be completed expeditiously. For this purpose

following actions may be taken by the BSNL/MTNL urgently.

2. ...

3. A single option form has been revised requiring the officials to indicate their order of preference (i.e. providing multiple option) of absorption in MTNL/BSNL or retention of Government status. A copy of the option form is enclosed. The BSNL/MTNL may circulate this option form to all the circles under them and allow 45 days time with effect from 5.9.2003 to exercise the option by the officers. The details of optees/options forms may be furnished to the DOT in 15 days thereafter. This time schedule is to be attached to very strictly.

4. ...

5. For the present options from available Group B officers only will be called. The absorption will take place in the substantive grade as of 1.10.2000.....

6. The options from officers retired after 1.10.2000 will be considered, if they so desire.

7. The options already received after 28.12.2001 will be displayed/put on internet. In regard to list of optees of absorption in MTNL this will be done by DOT on its website. An list for optees of absorption in BSNL, this will be done by BSNL, CO. on BSNL website, on behalf of DOT. Those desirous to revise their option will be allowed to do so.

(Emphasis Supplied)

15. In continuation of the circular dated August 29, 2003, on September 04, 2003, DOT issued another circular regarding absorption of its employees in MTNL/BSNL, the relevant portion whereof reads as under:-

1. In pursuance of Ministry of Communications, Deptt. of Telecommunications No. 400-23/2003-STG. III dt. 29.8.03 (copy enclosed), it has been decided to fill up all posts of Gr. B & certain Gr. C posts having all India transfer liability in MTNL on permanent absorption basis and to call for options in respect of officers. The detailed terms and conditions on permanent absorption in MTNL are given in Annexure A. The clarification raised is replied on Annexure B. All the interested officers may kindly exercise their options in prescribed proforma at Annexure C latest by 20.10.2003. Options in respect of JTOs who are working in MTNL Delhi/Mumbai/MS only.

Annexure A

2. Terms & Conditions

(b) MTNL would absorb optees subject to the number of posts existing in the MTNL as on 30.9.2000 in various grades/services. In case the number of optees is more than the number of posts existing on 30.9.2000, the senior most optees in their cadre/grade would be given preference. No officer shall give any conditional option. Conditional option, if any, given by the officer, shall be treated

as having opted for retention of government status. Officers not exercising any option as prescribed will be deemed to have opted for Government service.

(C) The effective date of absorption will be 1.10.2000.

(d) The options already exercised by the officers vide this office letter of even number dated 29.1.2002, shall remain valid. However, those desires of changing their earlier exercise offer can submit their option afresh in the revised proforma attached at Annexure C.

3. Option of Officers facing Disciplinary Cases

The officers with on-going disciplinary cases can also opt for absorption in MTNL but the absorption will be subject to the outcome of the vigilance case. The appeal/petition cases for these officers will also be decided by DOT authorities.

(Emphasis Supplied)

16. It is claimed by Sharma that on October 01/07, 2003, he submitted letters to the competent authority seeking permission to submit his (revised) option for absorption in BSNL/MTNL or retention in DOT in terms of the circulars dated August 29 and September 04, 2003, but he got no response from the department in respect thereof and was not allowed to submit a revised option.

17. On March 31, 2004 Sharma assumed charge to the post of Additional Director in DOT.

18. All this while, the disciplinary inquiry initiated against Sharma was proceeding, in which inquiry, Sharma did not participate. On November 29, 2004 the Inquiry Officer submitted a report indicting Sharma of the charge levied against him.

19. Vide order dated February 09, 2005 acting as the Disciplinary Authority, the Member (Services), Telecom Commission, DOT held that the charge levied against Sharma stood proved and imposed the penalty of reduction in pay by one stage in the time scale of pay for a period one year with immediate effect. It was further directed that Sharma will not earn increments of his pay during the period of such reduction and on expiry of the period, the reduction will have the effect of postponing the future increments of his pay.

20. On May 25, 2005 DOT issued a show cause notice to Sharma as to why the period from August 19, 2001 to March 30, 2004, during which Sharma remained unauthorizedly absent from service should not be treated as dies-non in terms of FR-17A.

21. At that stage aggrieved by the order dated February 09, 2005 inflicting penalty upon him, Sharma preferred an appeal before the Appellate Authority i.e. the President.

22. While the aforesaid appeal filed by Sharma was pending adjudication, on June 13, 2005, DOT issued an order stating therein that in view of the option for

his permanent absorption in MTNL being exercised by Sharma pursuant to the circular dated May 08, 2000, he i.e. Sharma would be treated as absorbed in MTNL with effect from October 01, 2000.

23. On June 24, 2005, DOT issued a letter to MTNL requiring MTNL to adjudicate the appeal filed by Sharma against the order dated February 09, 2005. However, the ball came back to the court of DOT inasmuch as MTNL did not decide the appeal filed by Sharma and returned the same to DOT for adjudication.

24. Thereafter, the Appellate Authority in DOT i.e. the President, forwarded the record of the case to UPSC for its advice.

25. On April 30, 2007 UPSC tendered its advice with regard to the appeal filed by Sharma, the relevant portion whereof reads as under:-

4.1 The Commission observe that it is evident from Exb. (S-1) order dated 23.07.2001 that the onus lay on the CGM concerned to intimate the station of posting within seven days from the date of issue of the order purporting to transfer 18 officers from MTNL to BSNL (where the Appellant's name figured at Sl.No. 18). The order is not marked to the individual officers. The Commission also notice that, as the Appellant has agitated, he was not served with any relieving order in pursuance of the transfer order. There is no office order available on record revealing that the Appellant was duly relieved by his controlling officer.

4.2. The Commission further observe that Exb. (S-2) order dated 18.08.2001 states that the Appellant was relieved by GM (E) vide letter 12.07.2001 for GM (OP & C) but he did not report there. The IO in his report has observed that the prosecution could not produce relieving orders of the Appellant from GM (E). The DA has failed to establish that the transfer/relieving orders were actually served on the Appellant since there is no acknowledgment whatsoever in this regard. As the DA has contended, while it may be a fact that the Appellant was aware of his transfer orders, it was his controlling officer's responsibility to have relieved him in terms of the transfer order. In other words, the controlling officer of the Appellant could not implement the same.

4.3. The Commission observe that the letter dated 03.12.2003 apparently reveals that the Appellant was working continuously in MTNL. It can thus be well imagined that the Appellant was not relieved by his controlling officer. The Commission held that the charge leveled against the CO. is not established and he has been made a scapegoat. To hold him guilty in the absence of proper evidence will be against the canon of justice.

5. In the light of their findings as discussed and after taking into account all the aspects relevant to the case, the Commission consider that since the charge against Sh. N.K. Sharma has not been conclusively proved, his appeal against the above penalty earlier imposed on him should be accepted and the said penalty be set aside. The appellant should be exonerated. They advise

accordingly.

(Emphasis Supplied)

26. Based on the above advice received from UPSC, vide order dated June 11, 2007, the Appellate Authority i.e. the President exonerated Sharma.

27. On August 14, 2007, DOT issued an order withdrawing the show cause notice dated May 25, 2005 issued to Sharma and directed MTNL to take a decision regarding the period which formed the subject-matter of said show cause notice i.e. the period from August 19, 2001 to March 30, 2004.

28. On April 09, 2008 Sharma submitted a (non-statutory) representation to the Secretary, DOT seeking permission to submit his (revised) option for absorption in BSNL/MTNL or retention in DOT in terms of the circulars dated August 29 and September 04, 2003 and regularization of the period which formed the subject-matter of said show cause notice i.e. the period from August 19, 2001 to March 30, 2004.

29. Vide order dated April 29, 2008 the competent authority rejected the aforesaid representation submitted by Sharma in the following terms:-

I am directed to refer to your representation dated 9.4.2008 on the subject mentioned above and to say that necessary action for regularization of your service for the period from 19.8.2001 to 30.3.2004 has to be taken by the MTNL as you were in the strength of MTNL during that period. Your request for exercising fresh option has also been considered in all its details and a decision has been taken to treat the option already exercised by you as final.

30. On May 09, 2008, Sharma filed 2 applications u/s 19 of the Central Administrative Tribunals Act, 1985, registered as OA No. 1014/2008 & OA No. 1015/2008. In OA No. 1014/2008, Sharma challenged the order dated June 13, 2005 permanently absorbing him in MTNL and order dated April 29, 2008 to the extent it rejected the representation submitted by him seeking permission to submit a (revised) option for absorption in BSNL/MTNL or retention in DOT in terms of the circulars dated August 29 and September 04, 2003. In OA No. 1015/2008, Sharma challenged the order dated April 29, 2008 to the extent it prescribed that MTNL shall take necessary action regarding regularization of his service for the period from August 19, 2001 to March 30, 2004 on the basis that he would be treated on the strength of MTNL during that period.

31. On May 06, 2008 DOT issued an order directing Sharma to report for duty at MTNL.

32. In OA No. 1015/2008, Sharma brought the fact of issue of the order dated May 06, 2008 to the notice of the Tribunal. Vide order dated May 27, 2008 the Tribunal directed that "status-quo as of today shall be maintained with regard to the posting of the applicant".

33. During the pendency of OA Nos. 1014 & 1015/2008, on August 14, 2008, the

General Manager, MTNL issued an order regarding regularization of the service of Sharma during the period from August 19, 2011 to March 30, 2004 and the same reads as under:-

1. Sh. N.K. Sharma, Asstt. Dir. (Staff No. 19135) was transferred from MTNL to BSNL vide DOT Order No. 3-11/200-STG-II (Pt) dated 23.07.2001. Sh. N.K. Sharma was relieved from MTNL on 18.08.2001. Instead of joining his duties in BSNL, as per orders of DOT, Sh. N.K. Sharma remained absent from duty w.e.f. 19.08.2001 to 30.03.2004.

2. Taking into consideration the facts and circumstances of the case, the entire period of absence w.e.f. 19.08.2001 to 30.03.2004 in respect of Sh. N.K. Sharma may be treated as Extraordinary Leave after adjusting the Earned Leave in the credit of Sh. N.K. Sharma in terms of provisions contained in Rule 32(2)(a) of CCS (Leave) 1972 and Rule 40(5) of CCS (Leave) Rules, 1972.

3. The receipt of this letter may be acknowledged.

34. On December 12, 2008 Sharma amended OA No. 1014/2008, clarifying the pleadings in the original application.

35. Vide a common judgment dated April 16, 2009, the Tribunal dismissed the aforesaid OAs Nos. 1014 & 1015/2008 filed by Sharma.

36. In dismissing OA No. 1014/2008 filed by Sharma, it has been held by the Tribunal that:-

(i) OA No. 1014/2008 is barred by limitation for the reason the record of the case shows that Sharma claimed to have sent a letter to DOT in the month of October, 2003 seeking permission to submit a revised option but he received no response from the department in respect thereof. Assuming that the case set up by Sharma is correct, he ought to have approached the Tribunal within a period of one and half years from the date when he sent the letter seeking revised option; in view of the provisions contained in Section 21(1)(b) of the Administrative Tribunals Act, 1985 i.e. in the month of April, 2005. The Tribunal noted that Sharma had filed said original application only in the month of May, 2008 i.e. after a delay of more than 3 years;

(ii) Likewise, the relief relating to quashing the order dated June 13, 2005 is also barred by limitation since the original application challenging the same was filed after a delay of 3 years since the order in question was passed in the year 2005 and the original application was filed by Sharma in the year 2008;

(iii) Apart from the fact that the original application laying challenge to the order dated June 13, 2005 is barred by limitation, Sharma has not been able to demonstrate as to how said order is not sustainable;

(iv) The plea advanced by Sharma that the option submitted by him earlier in the year 2000 is non est since BSNL was not in existence at that time is not tenable for the reason the option exercised by Sharma was for permanent absorption in

MTNL;

(v) The original application is not maintainable for the reason the cause of action relating to reliefs of exercise of fresh option and regularization of his service for the period from August 19, 2001 to March 30, 2004 are distinct and separate. A common original application cannot be maintained for multiple reliefs;

(vi) In view of the stand taken by Sharma in earlier OA No. 2116/2001 filed by him and various communications sent by him to DOT that he is an employee of MTNL pursuant to the option exercised by him in terms of circular dated May 08, 2000 and his conduct of continuing in MTNL and not joining DOT even after being relieved from MTNL, he was estopped from questioning the authority of MTNL to take action regarding regularization of his services for the period from August 19, 2001 to March 30, 2004;

(vii) In view of the fact that Sharma stood permanently absorbed in MTNL with effect from October 01, 2000, vide order dated June 13, 2005 MTNL was fully competent to take a decision regarding regularization of his services for the period from August 19, 2001 to March 30, 2004;

(viii) Order dated June 11, 2007 passed by the President exonerating Sharma of the charge relating to his absence from duty for the period from August 19, 2001 to August 27, 2003 has no application in the present case for the reason said order related to absence of Sharma in BSNL and not MTNL while the present case relates to the absence of Sharma from MTNL; and

(ix) Having not challenged the order dated August 14, 2008 whereby MTNL has directed that the period from August 19, 2001 to March 30, 2004 shall not be treated as "period spent on duty", Sharma cannot find fault with the action of DOT of directing MTNL to take action regarding regularization of his services during the period in question.

37. Aggrieved by the order dated April 16, 2009 passed by the Tribunal, Sharma has filed W.P. (C) Nos. 10057/2009 and 10084/2009. Vide W.P. (C) No. 10057/2009 Sharma has challenged the order dated April 16, 2009 passed by the Tribunal insofar it had dismissed OA No. 1014/2008. Vide W.P. (C) No. 10084/2009 Sharma has challenged the order dated April 16, 2009 passed by the Tribunal insofar it had dismissed OA No. 1015/2008.

38. In the month of February 2010, Sharma filed an application, registered as C.M. No. 2441/2010, in W.P. (C) No. 10084/2009 praying therein that interim orders be passed directing DOT to release his unpaid salary from May 06, 2008 i.e. the date when the order posting Sharma to MTNL was issued till the date of filing of application in question inasmuch as he has been working in DOT during said period. Vide order dated February 24, 2010 this Court dismissed said application filed by Sharma, the relevant portion whereof reads as under:-

1. Vide this application the petitioner/applicant is seeking a direction to the respondent to release his salary with effect from 06.05.2008 on the allegations

that since July 2004 he had been working as an Assistant Director, WTO (World Trade Organization) Sanchar Bhawan, Delhi and is an employee of Department of Telecommunications (DoT). He has only received salary up to 06.05.2008. However, he has now come to know that he stands relieved from the Department even though no such order has been served upon him. As such, he continues to be in service and is, thus, entitled to his salary.

2. This application has been filed in the aforesaid writ petition preferred by the petitioner under Article 226 of the Constitution of India whereby he seeks quashing and setting aside of the order dated 16.04.2009 passed by the Central Administrative Tribunal in OA No. 1015/2008 with a further prayer to direct the respondents to regularize the period with effect from 19.08.2001 to 30.03.2004 treated as spent on duty for all purposes including pay and allowances.

3. A perusal of the order passed by the Tribunal in OA No. 1015/2008 goes to show that the Tribunal has dismissed the Original Application filed by the petitioners. Some of the relevant observations made by the Tribunal are as under:

x x x

4. The petitioner now admits that he stands relieved from the services which appears to be on account of his remaining absent and not exercising the revised option which makes him an employee of MTNL during the relevant period when he was absent. When he stands relieved and know about the order of relieving it was for him to have joined the other Department which he has not done. He is only trying to justify his absence which probably has not been found favor by the respondents. His entire claim is based upon success in relation to matters which are pending in this Tribunal in the form of writ petitions which he has filed. As quoted above, petitioner was fully aware of his relieving from MTNL. He admittedly has not joined BSNL by respecting the transfer order. Thus, the question of directing the respondents to pay the salary and allowances for the period for which he has neither worked in MTNL nor has joined BSNL cannot be ordered as an interim measure as sought for by the petitioner in this application.

5. The application is, therefore, dismissed. However, nothing stated therein will have any reflection on the merits of his writ petition.

(Emphasis Supplied)

39. Sometime thereafter Sharma filed 2 more applications, being C.M. Nos. 8459/2008 and 8460/2008, praying therein that interim orders be passed restraining DOT requiring it to maintain status quo with regard to the post held by him and directing DOT to release his unpaid salary from May, 2008 till date of filing of application in question. Vide order dated August 12, 2010 this Court dismissed said applications on the ground that (interim) prayers made in said applications goes beyond the scope of dispute in the writ petition.

40. In the year 2011, Sharma filed OA No. 1174/2011 before the Tribunal laying a challenge to the order dated May 06, 2008 posting Sharma to MTNL. He also

sought directions against DOT to release his unpaid salary for the period from May 06, 2008 till the date of filing of said original application alleging that he had worked in DOT during said period.

41. After noting its earlier order dated April 16, 2009 dismissing OA Nos. 1014 & 1015/2008 filed by Sharma, vide order dated May 05, 2011, the Tribunal partly allowed OA No. 1174/2011 and directed DOT to release the salary of Sharma for the period from May 06, 2008 to April 16, 2009, the relevant portion whereof reads as under:-

4. The learned counsel for the Applicant informed that the order dated 19.04.2008 of this Tribunal in OA 1014 and 1015 of 2008 had been challenged before the Honourable Delhi High Court. It was still before the High Court and High Court had not stayed the order of the Tribunal.

5. It is thus clear that the issue regarding the Applicant being an employee of MTNL has already been decided in the OAs 1014 and 1015 of 2008. The Applicant, therefore, has to comply with the directions given in the impugned order dated 06.05.2008. However, since the above order had been stayed by the Tribunal by order dated 21.05.2008, the Applicant would be eligible for payment of salary from 06.05.2008 up to 16.04.2009, when OAs 1014 and 1015 of 2008 were dismissed. Since stay had not been granted by the Honourable Delhi High Court in the Writ Petition filed against the order dated 16.04.2009, the Applicant cannot justify his not joining MTNL after the dismissal of his OA.

6. In the light of the above discussion the OA is allowed to the limited extent of release of salary to him from 06.05.2008 to 16.04.2009. This direction would be complied with within one month of the receipt of a certified copy of this order. No costs.

42. Aggrieved by the order dated May 05, 2011 DOT had filed W.P. (C) No. 4663/2011.

43. Vide order dated August 23, 2011 this Court disposed of W.P. (C) No. 4663/2011 filed by DOT in the following terms:-

In our considered opinion, the grant of salary should have been gone into in OA No. 1015/2008. If the same has not been adverted to, it is open to the respondent to raise the said issue in the writ petition he has preferred. We may hasten to add, any other finding with regard to the non-payment of salary in this order shall not weigh against the respondent. The entitlement thereof shall be gone into in the writ petition wherein the challenge is to the order passed in OA No. 1015/2008.

In view of the aforesaid premised reasons, the order of the tribunal is set aside with the liberty to the applicant, the respondent-employee to raise the said issue in the said writ petition. That will be in propriety of things.

The writ petition is allowed to the extent indicated above without any order as to

costs.

44. Thereafter, Sharma filed an application, being CM No. 16177/2011, in W.P. (C) No. 4663/2011 seeking recall of the order dated August 23, 2011. Vide order dated December 09, 2011 this Court allowed said application and recalled order dated August 23, 2011, the relevant portion whereof reads as under:-

The respondent has stated in the application that the said respondent had earlier filed an application being CM No. 8460/2009 in WP (C) No. 10084/2009 but the said application was dismissed vide order dated 12.8.2011 on the ground that the question unpaid salary from April, 2008 cannot be decided in the said writ petition.

In view of the aforesaid position we recall the order dated 23.8.2011, as this fact was not pointed out by the counsel for the parties on the said date.

The writ petition is restored to its original position.

45. The aforesaid 3 writ petitions were listed for final hearing on March 22, 2013. Due to constant interruption by learned counsel for the respondents who repeatedly interjected learned counsel for Sharma and within half an hour hearing kept on interjecting 8 times, oral hearing was curtailed requiring parties to file written submissions.

46. Order dated March 22, 2013 passed by this Court reads as under:-

1. As learned counsel for Nand Kishore Sharma was arguing there has been repeated interjection by learned counsel for the DOT and MTNL. It has happened at least eight times during half an hour proceedings. Repeated caution to learned counsel for the respondent has had no desired effect. It is impossible to take notes in the manner in which the proceedings are being conducted. The only way out is to require learned counsel for the parties to submit written submissions.

2. Ordered accordingly.

3. Reserved for judgment.

4. Written submissions be filed by the petitioner within two weeks from today. Reply submissions to be filed with a week thereof.

(Emphasis Supplied)

47. Despite directions passed by us regarding filing written submissions in the matter, we have not received written submissions by MTNL and DOT till date. Written submissions have been received from Sharma on April 05, 2013. The same bear acknowledgement by learned counsels from the opposite parties who have not bothered to file written submissions in response compelling us to dictate the judgment.

48. A conjunctive reading of the pleadings of Sharma in OA Nos. 1014 & 1015 of 2008 go to show that following 3 reliefs were claimed by Sharma in said original

applications:-

(a) DOT should be directed to permit Sharma to submit his revised option for permanent absorption in MTNL/BSNL or DOT in view of the circulars dated August 29, 1983 and September 04, 1983;

(b) DOT should be directed to treat Sharma as its employee and not MTNL's;

(c) The decision taken by the MTNL regarding regularization of services of Sharma for the period from August 19, 2001 to March 30, 2004 should be quashed for the reason MTNL had no concern with Sharma as he was an employee of DOT.

Relief (a)

49. A perusal of the pleadings of DOT and MTNL before the Tribunal shows that the stand taken by them regarding relief (a) claimed by Sharma was that the same was barred by limitation, which stand has been accepted by the Tribunal.

50. Sharma joined DOT in the year 1977. MTNL was created in the year 1986 by hiving off a wing of DOT. On May 08, 2000 options were called from the officers of DOT to seek permanent absorption in MTNL or to remain under DOT. On August 04, 2000 Sharma opted for permanent absorption in MTNL. Before a decision could be taken on the option submitted by Sharma, on October 01, 2000 BSNL was created by hiving off another wing of DOT. When BSNL was created on October 01, 2000 the matter regarding permanent absorption of employees of DOT in MTNL was nebulous, in that, no final decision had been taken by the department regarding the employees who had opted for permanent absorption in MTNL. In view of creation of BSNL, on December 28, 2001 options were again called from the employees of DOT for submitting an option to be absorbed either in MTNL or to remain in DOT. The circular dated December 28, 2001 prescribes that the services of the employees who chose to remain in DOT would be utilized in BSNL or DOT and that they would be required to choose between BSNL and DOT at a subsequent stage. On August 06, 2003 the Tribunal passed an order directing DOT to clarify the conditions of service of the employees on their permanent absorption in BSNL if they chose to do so. Pursuant thereto, DOT issued circulars dated August 29, 2003 and September 04, 2003 seeking options from its employees for being absorbed either in BSNL or MTNL or to remain its employees. The last date for submission of said option was October 20, 2003. The last date for submission of option i.e. October 20, 2003 came and went by, but Sharma was not permitted to submit an option. Sharma did nothing in the matter and remained silent for the period from October 21, 2003 to April 04, 2008. Finally, on April 09, 2008, Sharma submitted a non-statutory representation to the Telecom Secretary, DOT seeking permission to submit an option in terms of the circulars dated August 29, 2003 and September 04, 2003. Vide order dated April 29, 2008 the aforesaid representation submitted by Sharma was rejected, which order was challenged by Sharma by filing OA Nos. 1014 & 1015 of 2008 on May 09, 2008.

51. Sections 20 and 21 of the Administrative Tribunals Act, 1985 prescribe limitation period for filing an application before the Tribunal. They read as under:-

20. Applications not be admitted unless other remedies exhausted-

(1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.

(2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances,-

(a) if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or

(b) where no final order has been made by the Government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired.

(3) For the purposes of sub-sections (1) and (2), any remedy available to an applicant by way of submission of a memorial to the President or to the Governor of a State or to any other functionary shall not be deemed to be one of the remedies which are available unless the applicant had elected to submit such memorial.

21. Limitation-

(1) A Tribunal shall not admit an application,-

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where-

(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and.

(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court, the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period.

52. Section 3(r) of the Act defines the expression "service rules as to redressal of grievances" occurring in Section 20 as follows:-

Service rules as to redressal of grievances", in relation to any matter, means the rules, regulations, orders or other instruments or arrangements as in force for the time being with respect to redressal otherwise than under this Act, or any grievance in relation to such matters.

53. By virtue of provisions contained in Section 21, limitation of one year has been prescribed to approach the Tribunal in connection with a grievance by an employee from the date when a final order, as mentioned in clause (a) of sub-section (2) of Section 20, is passed. The period of limitation would be one and a half year in a case where appeal or representation such as mentioned in clause (a) of sub-section (2) of Section 20 has been made, and there is no final order passed thereon. The period of limitation and terminus a quo for the same, as provided u/s 21, would be attracted only when an employee makes statutory representations or appeals pertaining to statutory orders passed. If the order is non-statutory order, per force the representation would obviously be a non-statutory representation and in said kind of situation Section 21 would not be strictly applicable.

54. In the opinion reported as S.S. Rathore Vs. State of Madhya Pradesh, the Supreme Court observed as under:-

20. We are of the view that the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months, period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. We, however, make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle.

21. It is appropriate to notice the provision regarding limitation under S. 21 of

the Administrative Tribunals Act. Sub-section (1) has prescribed a period of one year for making of the application and power of condonation of delay of a total period of six months has been vested under sub-section (3). The Civil Courts jurisdiction has been taken away by the Act and, therefore, as far as Government servants are concerned, Article 58 may not be invocable in view of the special limitation. Yet, suits outside the purview of the Administrative Tribunals Act shall continue to be governed by Article 58.

22. It is proper that the position in such cases should be uniform. Therefore, in every such case until the appeal or representation provided by a law is disposed of, accrual of cause of action for cause of action shall first arise only when the higher authority makes its order on appeal or representation and where such order is not made on the expiry of six months from the date when the appeal was filed or representation was made. Submission of just a memorial or representation to the Head of the establishment shall not be taken into consideration in the matter of fixing limitation.

55. From the aforesaid observations made by the Supreme Court it is manifest that only when appeal or representation, as may be provided under the rules, is decided or not decided, as the case may be, the limitation envisaged u/s 21 of the Act would apply.

56. But this is not the end of matter. We pause here for a minute. No limitation period is prescribed for filing a writ petition under Article 226 of the Constitution of India, yet writ petitions are liable to be dismissed if they are not filed within a reasonable time of accrual of cause of action. In the decision reported as *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, it was held by the Supreme Court that the limitation period fixed by the legislature as the time within which the relief in a suit before a civil court must be brought may ordinarily be taken to be a reasonable standard to determine the period within which a writ court should be approached. It was further held that the Court may consider delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy, but where delay is more than said period, it will almost always be proper for the court to hold that it is unreasonable.

57. Applying the same analogy, it can safely be held in the instant case that even though no limitation period is prescribed in the Act in respect of the situation which has arisen in the instant case, the fact of the matter is that Sharma ought to have filed application before the Tribunal within a "reasonable time" of accrual of cause of action.

58. In the instant case, the cause of action in respect of relief (a) accrued on October 21, 2003 i.e. when the period for submitting option in terms of circulars dated August 29, 2003 and September 04, 2003 expired and Sharma was not allowed to give his option. Sharma kept sleeping for nearly 4 years and 6 months and woke up from his deep slumber only on April 09, 2008 by submitting a representation seeking permission to submit his option. In that view of the

matter, we thus hold that relief (a) claimed by Sharma was barred by delay and laches.

Relief (b):

59. To decide the issue of limitation with respect to relief (b), it is required to be noted that on June 13, 2005 DOT issued an order stating therein that Sharma stood permanently absorbed in MTNL with effect from October 01, 2000. At that time, the appeal filed by Sharma against the penalty order dated February 09, 2005 was pending adjudication before the Appellate Authority of DOT i.e. the President. On June 24, 2005 DOT issued a letter to MTNL requiring MTNL to adjudicate upon the appeal filed by Sharma. However, MTNL did not decide the appeal filed by Sharma and returned the same to DOT for adjudication. Finally, vide order dated June 11, 2007 the President allowed the appeal filed by Sharma and exonerated him of the charge levied against him. In view of the conduct of MTNL of returning the appeal filed by Sharma to DOT for adjudication and the same then being adjudicated by DOT, Sharma had every reason to believe that the order dated June 13, 2005 issued by DOT permanently absorbing Sharma in MTNL with effect from October 01, 2000 has not been accepted by MTNL and thus he was justified in not taking legal recourse in respect of the order dated June 13, 2005. On April 09, 2008 Sharma submitted a representation to Secretary, DOT seeking regularization of his services for the period from August 19, 2001 to March 30, 2004. While rejecting said representation, vide order dated April 29, 2008 DOT informed Sharma that he had become an employee of MTNL with effect from October 01, 2000, in view of the option of permanent absorption in MTNL exercised by him in terms of the circular dated May 08, 2000. Almost 1 year thereafter, on May 09, 2008, Sharma filed OA No. 1014/2008 in the Tribunal challenging the order dated June 13, 2005. Such being the factual position, relief (b) claimed by Sharma cannot be denied to him on ground of delay and laches.

60. In dealing with merits of relief (b) claimed by Sharma, we again note that after creation of MTNL, on May 08, 2000 options were called from the employees of DOT for getting absorbed in MTNL or to remain in DOT. On August 04, 2000 Sharma opted for permanent absorption in MTNL. Before a final decision could be taken by the concerned authorities, on October 01, 2000 BSNL was created. On July 12, 2001 Sharma who was working on deemed deputation in MTNL was transferred from MTNL to BSNL, which transfer was challenged by him by filing OA No. 2116/2001. Vide order dated July 23, 2001 the Tribunal disposed of OA No. 2116/2001 filed by Sharma. While disposing of said OA, the Tribunal repelled the stand taken by Sharma in said OA that he became an employee of MTNL on having opted for permanent absorption in MTNL on the ground that the option for his permanent absorption in MTNL submitted by him was not accepted by the concerned authorities and Sharma does not cease to be an employee of DOT merely on submission of option for permanent absorption in MTNL. Thereafter in the year 2003 fresh options were called from employees of DOT for getting

permanently absorbed in MTNL/BSNL or to remain in DOT. Thus, after creation of BSNL, the earlier options submitted by the employees with respect to absorption in MTNL, in respect whereof no final decision was taken by the concerned authorities before creation of BSNL, got wiped out, due to change of circumstances and now instead of 2, 3 options were available to employees of DOT viz. (i) to get permanently absorbed in MTNL; (ii) to get permanently absorbed in BSNL and (iii) to remain in DOT. As already noted hereinabove, Sharma was not allowed to give fresh option. Having not allowed to submit fresh option, Sharma continued to remain an employee of DOT inasmuch as the employer cannot be changed except with the consent of the employee and the earlier option submitted by Sharma for his permanent absorption in MTNL had become non est after the creation of BSNL.

61. The matter can also be looked at from another angle. The circular dated September 04, 2003 prescribed that the officer who would not exercise an option in terms of said circular would be deemed to have opted for DOT. Having not submitted an option in terms of circulars dated August 28 and September 04, 2003 Sharma would be deemed to be an employee of DOT.

62. Thus, looked at from any angle, Sharma would be deemed to be an employee of DOT since he did not submit an option in terms of the circular dated August 28 and September 04, 2003 (being prevented from so doing). Thus, the action of DOT of treating Sharma as an employee of MTNL on the basis of a wiped out option for permanent absorption in MTNL submitted by him is clearly unjustifiable.

63. In view of above discussion, we quash the order June 13, 2005 and hold that Sharma continues to be an employee of DOT.

Relief (c)

64. As a necessary corollary to our decision in respect of relief (b), Sharma has to succeed in respect of relief (c) claimed by him. When Sharma was not an employee of MTNL for the period from August 19, 2001 to March 30, 2004 MTNL had no authority whatsoever to take a decision regarding regularization of his services for that period.

W.P. (C) No. 4663/2011

65. A perusal of the pleadings in W.P. (C) No. 4663/2011 shows that DOT has challenged the order dated May 05, 2011 passed by the Tribunal in OA No. 1174/2011 essentially on the ground that the claim for release of unpaid salary of Sharma for the period from May 06, 2008 onwards was rejected by this Court on 2 occasions i.e. on February 24, 2010 and August 12, 2010. It was highlighted that when higher judicial forum i.e. this Court had rejected the claim for release of unpaid salary of Sharma for the period from May 06, 2008 onwards on 2 occasions it was not open for the Tribunal to have allowed said claim.

66. The aforesaid contention advanced by DOT is devoid of any merit. A perusal

of order dated February 24, 2010 passed by this Court shows that this Court had not examined the merits of the claims raised by Sharma and had simply stated that salary for the period from May 06, 2008 cannot be directed to be released to Sharma as an interim measure. Likewise, a perusal of order dated August 12, 2010 passed by this Court shows that this Court had not examined the merits of the claims raised by Sharma and had rejected the prayer made by Sharma on the ground that said prayer went beyond the scope of the writ petition. Therefore, no reliance whatsoever could be placed by DOT on the orders dated February 24, 2010 and August 12, 2010 to find fault with the order dated May 05, 2011 passed by the Tribunal directing DOT to pay salary to Sharma for the period from May 06, 2008 to April 16, 2009. With respect to this period we note that the controversy arises on account of the fact that on May 06, 2008 DOT issued an order directing Sharma to report for duty at MTNL, which order was put into abeyance by the Tribunal on May 27, 2008 in OA No. 1015/2008 requiring status quo to be maintained and since Sharma had not been relieved by said date, he obviously continued to work under DOT and thus the stand of DOT that having required him to work under MTNL Sharma would not be entitled to any wages is incorrect, more so for the reason Sharma worked and discharged his duties under DOT.

67. In view of above discussion, W.P. (C) Nos. 10057/2009 and 10084/2009 are allowed in terms of paras 59 onwards above. W.P. (C) No. 4663/2011 is dismissed. Parties shall bear their own costs all throughout.