

**AFR**  
**Court No. 1**  
**Reserved Judgment**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW**

**Original Application No. 298 of 2016**

**Tuesday this the 08th day of May, 2018**

**Hon'ble Mr. Justice S.V.S.Rathore, Member (J)**  
**Hon'ble Air Marshal B.B.P. Sinha, Member (A)**

Ex Maj Nagendra Singh Mamik,  
S/o Late Shri Mohinder Singh,  
R/0 B-111, Brij Enclave,  
Post Office Sunderpur,  
Varanasi-221005 (UP).

..... **Applicant**

By Legal Practitioner: Brig Anil Srivastava (Retd), Advocate,  
Learned Counsel for the Applicant.

Versus

1. Union of India through the Secretary,  
Ministry of Defence,  
South Block, DHQ PO,  
New Delhi. 110 011.

2. The Chief of Army Staff through Adjutant General,  
Integrated HQ of Ministry of Defence (Army),  
South Block,  
New Delhi 110 011.

3. CGDA (P), Draupadi Ghat,  
Allahabad 211014 (UP).

..... **Respondents**

By Legal Practitioner: Shri RC Shukla, Advocate,  
Learned Counsel for the respondents.

**ORDER**

**Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**

1. By means of this Original Application, the applicant has made the following prayers :

*“(a) To direct the respondent to release the gratuity as admissible to the applicant for having rendered 17 years of unblemished service as applicable to similarly circumstanced officer as on date or to pay interest @12% on the arrears of the aforesaid benefits.*

*(b) To grant the leave encashment due to the applicant, as admissible.*

*(c) To grant the Respondents to treat the Applicant to be deemed in service until he completes a pensionable service in the rank of Lt Col. Where after he be treated as discharged with all pensionary benefit.*

*(d) To grant a reasonable amount of compensation of Rs.10 Lakh to the Applicant for causing extreme mental agony, financial hardship and extreme trauma caused to the Applicant and his family for under taking forced litigation.*

*(e) That the Applicant be awarded cost of the litigation @ Rs.1 lakh.*

*(f) To pass any such other and further order or orders as this Hon'ble Tribunal may deem fit and proper in the interest of justice and in the facts and circumstances of the case.”*

2. Delay of more than 35 years in filing this O.A. was condoned by a coordinate bench of this Tribunal vide order dated 21.11.2016.

3. In brief the facts necessary for the instant O.A. may be summed up as under :

The applicant was commissioned on 11.12.1962 in the Regt of Artillery. The applicant, on the basis of his outstanding service record, was approved for promotion to the rank of Lt Col (by selection) as a Fresh case vide Army HQ letter dated 30.11.1979. The applicant participated in the Indo-Pak War in Bangladesh in the year 1971. In 1975, the applicant wanted to marry Dr Saundra Kay Hybels, an US National and sought permission from GOI to marry her, which was granted vide Army HQ letter dated 08.12.1976 under the provisions of Army Order 695 of 73. Thereafter, the applicant married the said lady on 27.07.1977, but his wife could not get Citizenship of India within the

prescribed period, therefore, he was released from service on 08.12.1979 on administrative grounds under the provisions of AO 93/77 without granting any terminal service benefit. The applicant made representation for grant of terminal benefit/DCRG (gratuity), but despite furnishing all documents to that effect to the authorities concerned, no decision was taken. The applicant moved various representations to the Defence Ministry from time to time, requesting for grant of terminal benefits, but no action was taken. It has also been stated that the applicant has put in 17 years of unblemished service. The last representation dated 15.09.2015 sent by the application to the PMO office, also met with the same fate. Aggrieved by the inaction of the respondents for not granting terminal service benefits, the applicant has preferred this O.A. for the aforesaid reliefs.

4. It has also been stated that in the year 1971, the applicant participated in Indo-Pak War in Bangladesh. He was approved for promotion to the post of Lt Col, but before his promotion, he was released from the Army w.e.f. 08.12.1979.

5. Learned counsel for the applicant has submitted that his release from service on the ground that his wife could not obtain citizenship of India within the stipulated period of one year and without getting any opportunity to explain the reasons for such default on the part of his wife, he was released from service, which is against the principle of natural justice and the action of the respondents in not granting the post retiral dues was not in accordance with law.

6. Learned counsel for the respondents has argued that it is an admitted fact that the applicant has solemnised marriage with a foreign National with prior permission of the competent authority. However, as per the policy, the wife of the applicant was required to obtain the citizenship of India within a period of one year, but she had not even applied for the Indian Citizenship and, therefore, the respondents were justified in view of the policy covering the field to order for his release

from service. Our attention has been drawn towards Para 4 of the counter affidavit, which reads as under :

*“4. That the wife of the officer did not acquire Indian Citizenship, his application for release from service was processed by MS Branch. Accordingly, vide letter dated 06 Dec 79, the officer was released from Army w.e.f. 08 Dec 1979 as per para 3 of AO 695/73 without terminal benefits after approval of the Government. Para 4 of letter dated 06 Dec 1979 clearly mentions that the officer is not eligible for any leave pending release. Typed copy of letter dated 06 Dec 1979 annexed with the OA does not reflect para 2 correctly. It varies from the original letter. Subsequently amendments of MS Branch letter dated 06 Dec 79 was informed to Ex Maj N.S.Mamik vide letter dated 01 May 1980 wherein para 2 of letter was amended as*

*For : Para 3 of AO 695/73*

*Read : Para 3 of AO 695/73 as superseded by AO 93/77.*

*As the officer was released from service on 1979, AO 93/77 was in vogue at that time. Para 3 of AO 93/77 stipulates that an application will be accompanied by the following documents :-*

- (a) An application from the individual for release from the Army for personal reasons, as per Appendix 'B' to this order.*
- (b) A written undertaking from the foreign National to the effect that she will renounce the original Nationality and accept Indian Citizenship Appendix 'C' to this order.*
- (c) An undertaking from the service person as per Annendix 'D' to this order to the effect that his/her case for release/retirement from service may be processed automatically as per application for release submitted vide para 3(a) above wilfully delays acquisition of Indian Citizenship.*

*As per para 3(c) clearly stipulates that if his/her spouse refuse to acquire Indian Citizenship or wilfully delays acquiring Indian Citizenship, his case for release/retirement from service may be processed automatically.”*

7. It is submitted by the learned counsel for the respondents that as per policy in vogue, the respondents were not required to give any show cause notice to the applicant before his release from service.

8. The main submission of the learned counsel for the applicant is that the respondents ought to have granted post retiral benefits as order of his release from service was passed without giving him an opportunity to show cause, which is not in accordance with the principle of natural justice.

9. On behalf of the respondents, it is submitted by the learned counsel for the respondents that there are two Army Orders covering the subject of marriage of an Army Officer with a foreign National. The first Army Order is Army Order No.659 of 1973 and the other Army Order is 93 of 1977. Since the controversy involved in this requires due consideration of the two Army Orders, therefore, we would like to reproduce the same:

**Army Order 659 of 1973**

*AO 695/73 Marriage with Foreign Nationals.*

- 1. Army personnel desirous of marrying foreign nationals, except the nationals of Sikkim and Bhutan, are required to obtain prior Government sanction for such marriages. The provisions of this AO do not apply to Gorkhas whether Nepalese or of Indian subjects.*
- 2. Applications for obtaining Government permission will be made on the form given at Appx 'A' to this order and forwarded through proper channels to Army Headquarters, General Staff Branch, GSI (b) so as to reach at least four months prior to the proposed date of marriage.*
- 3. Applications will be accompanied by the following :-*
  - (a) An application from the individual for release from the Army for personal reasons.*
  - (b) A written undertaking from the foreign national to the effect that she will renounce the original nationality and accept Indian citizenship as soon as the Indian Citizenship Act 1955 permits to do so.*
- 4. In addition to the above, an advance copy of the application with the recommendations of the officer Commanding, together with the documents vide para 3 above and two copies of the latest passport size photograph of the foreign national, will be sent direct by the unit to Army Headquarters, General Staff Branch, GSI (b).*
- 5. The application for release vide para 3(a) above will not be treated as automatically accepted. The disposal of such application will be regarded as a separate issue and each case decided on its merits.*
- 6. The Government decision on the application will be conveyed by Army Headquarters, General Branch, GSI (b) to Headquarters Command concerned with a copy to the applicant's unit and Army Headquarters, Adjutant General's Branch PS I and Org 9.*
- 7. Whether Government permission is accorded, the applicant's unit will notify the casualty regarding marriage as soon as it takes place.*
- 8. In accordance with Rule 4 of the Citizenship Rules 1956, an application for registration as a citizen of India under section 5(I) (c) of the Citizenship Act 1955 shall not lie unless for one year immediately before the date of application, she:-*
  - (a) Has resided in India, or*
  - (b) Has been in service of a government in India.*

9. In completing the period of one year, broken periods of residence and service under clauses (a) and (b) above may be taken into account.
10. Immediately on completion of the prescribed period vide para 9 above, under Rule 7 of the Citizenship Rules 1956, an application by a foreign national (Married to an Indian citizen) for registration as an Indian Citizen under section 5(I) (c) of the Citizenship act 1955 is to be submitted to the Collector within whose jurisdiction the applicant is ordinarily resident. The application is forwarded by the Collector to the State Government concerned who in turn forward it to the Central Government (Ministry of Home Affairs) which is the Registering authority as per Form II of the Citizenship Act 1955 which is published as Appendix 'B' to this order. The application is required to be signed by the applicant in the presence of the Collector, Deputy Commissioner or the District Magistrate concerned.
11. As soon as the Government sanction is accorded, the casualty regarding change of nationality together with original copy of sanction will be forwarded by the unit to Army Headquarters, Adjutant General's Branch Org.9.
12. Army Headquarters, Adjutant General's Branch Org 9 will maintain a record of cases required notification of the change in nationality and watch progress in this direction. Names of personnel whose foreign spouses fail to acquire Indian Citizenship or who contact marriage with a foreign national without Government permission will be reported by units to Army Headquarters, Adjutant General's Branch PS I for necessary action.
13. Marriage with a foreign national without Government permission will be deemed to be sufficient ground for removal from service.
14. AO 223/69 as amended vide AO 366/72 is **HEREBY CANCELLED**.

19248/A GSI(b) (ii)"

### **Army Order 93 of 1977**

*"AO 93/77 Marriage with Foreign Nationals.*

1. Army personnel desirous of marrying foreign nationals, except the nationals of Bhutan, are required to obtain prior Government sanction for such marriages. The provisions of this AO do not apply to Gorkhas, whether of Nepalese origin or of Indian domicile, desirous of marrying Nepalese or Indian subjects.
2. Applications for obtaining Government permission will be made on the form given at Appendix 'A' to this order and for-warded through proper channels, to Army Headquarters, General Staff Branch, Military Intelligence Directorate, GSI(b) so as to reach at least four months prior to the proposed date of marriage.
3. Application will be accompanied by the following documents:-
  - (a) An application from the service person for release from the Army for personal reasons, as per Appendix 'B' to this order.
  - (b) A written undertaking from the foreign nationals to the effect that she/he will renounce her/his original nationality and accept Indian Citizenship as soon as the Indian Citizenship Act 1955 permits her/him to do so, as per Appendix 'C' to this order.

- (c) *An undertaking from the service person as per Appendix ('D' to this order to the effect that his/her case for release/retirement from service may be processed automatically as per application for release submitted vide para 3(a) above if his/her spouse refuse to acquire Indian Citizenship or wilfully delays acquisition of Indian Citizenship.*
4. *In addition, an advance copy of the application with the recommendations of the Officer Commanding, together with the documents mentioned in para 3 above and two copies of the latest passport size photograph of the foreign national, will be sent direct by the unit to Army Headquarters, General Staff Branch, Military Intelligent Directorate, GSI (b).*
  5. *The application for release vide para 3(a) above will not be treated as automatically accepted. The disposal of such applications will be regarded as a separate issue and each case decided on its own merits.*
  6. *The Government decision on the application will be conveyed by Army Headquarters, General Staff Branch, Military Intelligence, Directorate, GSI (b) to Headquarters command concerned, with a copy to the following:-*
    - (a) *Army Headquarters – Adjutant General's Branch –*
      - (i) *MPRS (O) ... For medical/Dental/MNS Officers*
      - (ii) *PS-I*
      - (iii) *Org 9 ... For all Army Officers other than Medical/Dental/MNS officers.*
      - (iv) *(b) Record Offices concerned – FOR JCOs and OR.*
      - (v) *(c) Applicant's unit- For all ranks.*
  7. *Where Government permission is accorded, the applicant's unit will notify the casualty regarding marriage as soon as it takes place to all concerned as in para 6 above.*
  8. *In accordance with Rule 4 of the Citizenship Rule 1956, an application for registration as a citizen of India under section 5(i)(c) of the Citizenship Act 1955 shall not lie unless for one year immediately before the date of application, the foreign national –*
    - (a) *has resided in India, or*
    - (b) *has been in service of a Government in India.*
  9. *In calculating the period of one year, broken periods of residence and service under clauses (a) and (b) above may be taken into account.*
  10. *Immediately on completion of the prescribed period (vide para 9 above) under Rule 7 of the Citizenship Rule 1956, an application by a foreign national (married to an Indian Citizen) for registration as an Indian Citizen under section 5(i)(c) of the Citizenship Act 1955 is to be submitted to the Collector within whose jurisdiction the applicant is ordinarily resident. The application will be forwarded by the Collector to the State Government concerned, who in turn will forward it to the Central government Ministry of Home Affairs) which is the Registering Authority in such cases. The application will be on the prescribed form and manner as per form II of the Citizenship Act 1955 which is published as Appendix 'É' to this order. The application is required to be signed by*

*the applicant in the presence of the Collector, Deputy Commissioner or the District Magistrate concerned.*

11. *As soon as Government sanction is accorded for Indian Citizenship, the casualty regarding the change of nationality together with original copy of sanction will be forwarded by the unit to the following authorities :-*

(a) *Army Headquarters, - For Medical/Dental/MNS Officers  
Adjutant General's Branch (MPRS (O))*

(b) *Army Headquarters - For all Army Officers other than  
Adjutant General's Branch Medical/Dental/MNS Officers.  
Org 9)*

(c) *Record Officers concerned For JCOs and OR.*

(d) *Army Headquarters, In all cases-only copy of casualty  
Military Intelligent  
Directorate, GSI (b).*

12. *A list of Army personnel granted permission to marry foreign nationals will be furnished by General Staff Branch, GSI (b) in triplicate in January each year, converting all cases which are more than three year's old to the following"-*

(a) *Army Headquarters, - For Medical/Dental/MNS Officers  
Adjutant General's Branch (MPRS (O))*

(b) *Army Headquarters - For Army Officers other than  
Adjutant General's Branch Medical/Dental/MNS Officers.  
Org 9)*

(c) *Record Officers concerned For JCOs and OR.*

*Personal section/Record Office concerned will check the latest position with regard to change of nationality and process the compulsory release/retirement of the individual affected.*

13. *Names of personnel, who contract marriage with a foreign national without Government permission will be reported by the units through proper staff channels, to Army Headquarters, Adjutant General's Branch, MPRS (O)/Military Intelligent Directorate GSI (b)/PSI/Record office concerned as the case may be. Thereafter Administrative action to terminate the services of such personnel will be initiated.*

*Action on refusal to change Nationality.*

14. *In case of failure/refusal by the spouse to change her/his nationality action as per para 3(c) shall be processed with a view to release/retire the individual from service by the GS/MS Branch for officers and the concerned Record Offices in respect of JCOs/OR.*

15. *This AO will be given wide publicity.*

16. *AO 695/73 is HEREBY CANCELLED.*

*19248/P/PSI(b) (ii)."*



10. Learned counsel for the applicant has vehemently argued that in the instant case, the applicant himself was not required to file any undertaking to the effect that he shall get the Indian Citizenship of his wife within one year, but as per the Army order No.93 of 1977, it was the foreign National who had to file such an undertaking. The submission of the learned counsel for the applicant is that the applicant by no means could have compelled the foreign National, to whom he proposed to marry, to file such an undertaking or even if she has filed such an undertaking to compel her to comply with the undertaking given by her. Therefore, by no stretch of imagination, the applicant could have been held responsible for non complying with the said undertaking. He has also argued that Army Order No.695 of 1973, Para 13 provides that marriage with a foreign National without getting permission, will be deemed to be a sufficient ground for removal from service. His submission is that it was only the marriage without permission with a foreign National, which could have been a ground for removal from service, but in the instant case, the applicant, admittedly, has married with a foreign National with the prior permission of the competent authority. Therefore, his release from service was not justified because his wife, who was a foreign National, had not applied for getting the Indian Citizenship within the stipulated period. It has also been argued that in Para 14 of the Army Order 93 of 1977 under the Heading “Action on refusal to change Nationality”, the following provisions have been made :

*“14. In case of failure/refusal by the spouse to change her/his nationality actions as per para 3(c) shall be processed with a view to release/retire the individual from service by the GS/MS Branch for officers and the concerned Record Office in respect of JCOs/OR.”*

11. In this case, on the date of first hearing, Brig Anil Srivastava, learned counsel for the applicant has vehemently argued that the applicant, who, at present is about 80 years of age, is not contesting for monetary gains, but he is contesting only for his self esteem. His

submission was that to call him an Army Officer released from service without pensionary benefits, is stigmatic, while the applicant has rendered 17 years of unblemished service and for no fault of his own, he has been released from service without terminal benefits. On the second date of hearing, Col MC Sharma, holding brief of Brig. A.K.Sriwastws, counsel for the applicant has argued the case on behalf of the applicant and has argued on the point of disproportionate punishment awarded to the applicant and has placed reliance on the pronouncement of a Co-ordinate Bench of Armed Forces Tribunal, Regional Bench, Mumbai in the case of **Lijo Stephen Chacko vs Union of India & Ors** (O.A.No. 117 of 2014) decided on 28<sup>th</sup> April 2017. The judgment was reserved after hearing both the parties, but at the time of preparing the judgment, when the said ruling was perused, then we found that the facts of that case were entirely different and the issue involved in the case in hand, was not covered directly or impliedly in that case. Therefore, this case was listed again for further hearing.

12. On the third date of hearing, Brig Anil Srivastava has argued that the action of the respondents without giving an opportunity to explain the circumstances and ordering release from service without pensionary benefits, was absolutely unwarranted, uncalled for and, therefore, it deserves to be set aside.

13. On behalf of the respondents, it has been argued that in this case, the applicant has come up before the Tribunal after a long lapse of 37 years and all the original records pertaining to this case, have been weeded out after expiry of the period of retention. It has been argued on behalf of the respondents that as per policy, the applicant could have been removed from service, therefore, his removal from service cannot be said to be against law or against the policy. Before proceeding further in this matter, we would like to consider the legal position on the point of disproportionate punishment. On the point of adequate punishment, we would like to refer the pronouncements of Hon'ble Apex Court in the case of reported in AIR 1992 SC (417) **Ex Naik Sardar Singh vs.**

**Union of India & Ors** their Lordship of the Supreme Court have held as under :-

*“This principle was followed in Ranjit Thakur v. Union of India, (1987) 4 SCC 611: (AIR 1987 SC 2386) where this court considered the question of doctrine of proportionality and it was observed thus (at p.2392 of AIR): “The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the conclusive province of the court-martial, if the decision of the court even as to sentence is outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.*

*(Emphasis supplied)*

14. The submission of the learned counsel for the applicant is that the applicant was released from Army and his retiral benefits have been withheld by the Army, so it was a very harsh punishment. It is submitted that before passing order of release, no show cause notice was given to him nor he was given any opportunity of hearing. It has also been argued that there was nothing in the order passed by the competent authority, whereby the permission to marry foreign National was given to him that in case any of the conditions are not fulfilled, then action should be processed with a view to release/retire the individual from service. Admittedly, in this case, no show cause notice was given to the applicant before passing the order of release from service. The applicant has not completed minimum 20 years of qualifying service, therefore, he was held not entitled for retiral benefits. A perusal of the policy makes it abundantly clear that the removal from service was contemplated as per Army Order 695 of 1973 only in case where an Army officer has solemnised marriage with a foreign National without prior permission of the competent authority and that is not the position in the case of the present applicant. While Army Order 93 of 1977 shows that in case any of the conditions is violated, then action as per Para 3-C should be processed with a view to release/ retire from service by the GS/MS Branch for officers and the concerned Record Office in respect of

JCOs/OR. The submission of the learned counsel for the applicant is that in the instant case, his wife herself had not even applied for getting the Indian Citizenship because of certain personal reasons

15. Admittedly, it is not disputed that the applicant had 17 years of unblemished service in the Army before such an order was passed against him. He had participated in the Bangladesh war and was recommended for promotion to the post of Lt. Colonel also.

16. Learned counsel for the applicant has placed reliance on the pronouncement of Hon'ble apex Court in the case of **State of Jharkhand & ors vs. Jitendra Kumar Srivastava** (Civil Appeal No. 6770 of 2013) decided on 14<sup>th</sup> August 2013 and has drawn towards following portion of the judgment as under :

*35. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by Sub-article (5) of Article 19. Therefore, it follows that the order dated June 12, 1968 denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of a Writ of Mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law”.*

*13. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum--*

*Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.*

*Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in “property”.*

*14. Article 300 A of the Constitution of India reads as under:*

*“300A Persons not to be deprived of property save by authority of law.  
- No person shall be deprived of his property save by authority of law.”*

On the strength of this pronouncement, it has been argued that pension is a property, therefore, the same ought not to have been withheld without giving an opportunity of hearing.

17. Admittedly, in this case the respondents have nowhere stated in their counter affidavit that any show cause notice was issued to the applicant before passing the order of his release from service and withholding the terminal benefits.

18. Keeping in view the facts in the instant case and the two policies on the subject, quoted above, it is very much clear that the applicant had solemnised marriage with a foreign National with the prior permission of the competent authority and it was mentioned in the order granting permission that in case the wife of the applicant does not obtain Indian Citizenship within the period of one year, then the same would entail action against him. However, this aspect of the matter was covered by the Army Order, quoted above, but the removal from service, was contemplated only in case when the marriage was solemnised without prior permission of the competent authority. While action as per Para 3-C was to be initiated against the applicant in case of refusal/failure to change the Nationality. At this juncture, we would like to quote Para 3 (c), which reads as under :

*“3(c) An undertaking from the service person as per Appendix (D to this order to the effect that his/her case for release/retirement from service may be processed automatically as per application for release submitted vide para 3(a) above if his/her spouse refuse to acquire Indian Citizenship or wilfully delays acquisition of Indian Citizenship.”*

19. Perusal of two Army Orders on the subject shows that while applying for permission to marry a foreign national is moved, then alongwith the said application an application from the Army officer for his release/retirement for personal reasons was also to be filed. This condition is common in both the Army Orders. The only different in the

A.O.No.93/77 is that such an application should be as per appendix 'B' to this order. Appendix 'B' reads as under :

**Appendix 'D'**  
(Refer to para 3(c) of AO 93/77)

**UNDERTAKING BY SERVICE PERSON**

*I hereby undertake that on failure or refusal of my wife/husband to acquire Indian Citizenship as per Indian Citizenship Act, 1955, my case for release/retirement from service may be processed automatically as per application for release submitted at the time of seeking permission for marriage with the foreign spouse unless reasonable grounds to the satisfaction of the Government to the contrary are furnished.*

*(emphasis supplied)*

Dated .....

.....  
(Signature of the applicant)

20. Thus, to file an application for release/retirement on personal reasons, is a condition precedent to move an application for permission to marry a foreign national. In the instant case, wife of the applicant has not acquired Indian Citizenship within the stipulated period. Admittedly, she had not even applied for that, therefore, action as per Para 14 of AO 93/77 has been initiated against the applicant. Admittedly, action could have been initiated by the respondents as per Army Order, but the principles of natural justice requires that a show cause notice before passing an order for release from service without terminal benefits, was necessary. Use of words "unless reasonable grounds to the satisfaction of the Government. to the contrary are furnished" in the afore-quoted appendix assumes great importance. Unless and until a show cause notice is given, how such circumstances can be furnished by the applicant. Use of above words in the appendix, makes it virtually obligatory on the respondents to give an opportunity to the applicant to furnish grounds to the contrary. Such an opportunity could have been given by issuing show cause notice by giving an opportunity of personal hearing. Admittedly, nothing of this nature was done in the case of the applicant. Use of the aforementioned words in the appendix clearly establishes that before passing any order for release/retire, the respondents were required to consider the circumstances or conditions furnished by the applicant. Because the applicant only could have

furnished such grounds, which the respondents were required to consider for awarding appropriate order.

21. It is true that in this case, no enquiry was required as the facts that the applicant's wife has not even applied for Citizenship of India, therefore, it was only a question of punishment to be inflicted on the applicant. The submission of the learned counsel for the applicant has substance that keeping in view the principle of natural justice and also the language used in the appendix mentioned above, the respondents were required to consider the conditions and accordingly sentence was to be passed. Therefore, issue a show cause notice was necessary. In support of his submission, learned counsel for the applicant has drawn our attention towards the pronouncement of Hon'ble Apex Court in the case of **Khem Chand vs. Union of India & Ors** (AIR 1958 SC 300) and also on the pronouncement of Hon'ble Calcutta High Court in the case of **M/s Manik Nandi Rice Mill & Anr vs. West Bengal Essential Commodities Supply Corporation Limited & ors** (2016 SCC OnLine Cal 2816).

22. It appears that the respondents taking the shelter of the application of the applicant for his release/retirement has taken action under Para 3C (quoted above) and without issuing any show cause notice or affording an opportunity of personal hearing, the order was passed. We find substance in the submission of the learned counsel for the applicant that he should not have been punished so harshly when even a show cause notice was not issued to him.

23. In view of discussions made above, keeping in view the peculiar facts and circumstances of this case, the order of release from service without giving any opportunity of hearing to the applicant before passing of such an order, has rendered the order of removal from service, unsustainable. The release from service without terminal benefits is a very harsh order for an otherwise upright officer having seventeen years of unblemished service. Admittedly, the applicant has an unblemished service career of 17 years. He has participated in the

Bangladesh War. So, the order of release from service without terminal benefits, that too only because his wife, who was a foreign national with whom marriage was solemnized with the prior permission of the competent authority, had not applied to obtain the Citizenship of India within the stipulated time, therefore, the order of removal from service without terminal benefits, becomes unsustainable being too harsh and against the principle of natural justice. Since the applicant has approached this Tribunal after a very very long delay, therefore, we are not inclined to mould the punishment, however, we are inclined to restrict the relief in view of the pronouncement of the Hon'ble Apex Court in the case of **Shiv Dass Vs Union of India reported in 2007 (3) SLR 445** wherein in Para 9 of the judgment, Hon'ble The Apex Court has observed:-

*“9. In the case of the pension the cause of action actually continues from month to month. That however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits, it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone.”*

24. This O.A. deserves to be allowed and is hereby **allowed**. The applicant shall be treated to be notionally in service in the rank last held by him till the date he acquires pensionable service. He shall be entitled to Gratuity and other post retiral benefits, but so far as the back wages for the period of notional service is concerned, he shall not be entitled to any back wages on the principle of “no work no pay”. The applicant shall be entitled to the arrears of pension from a date three years prior to the date of filing the O.A. Date of filing of O.A. is 08.03.2016. The applicant shall not be entitled to any interest on the total amount due. The respondents are directed to ensure the payment in compliance of this order within a period of four months from the date a copy of this order is produced before them. If the order is not complied within the stipulated



period, then the respondents shall also have to pay interest @ 9% on the total amount from the date of its accrual till the date of actual payment.

Registry is directed to provide a copy of this order to the respondents for onward transmission to ensure compliance.

We hope and trust that the respondents shall take immediate action keeping in view that at present the applicant is more than 80 years of age.

No order as to costs.

(Air Marshal B.B.P. Sinha)  
Member (A)

(Justice S.V.S.Rathore)  
Member (J)

Dated: May , 2018.

PKG