AFR
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 145 of 2013

Friday, the 19th day of January, 2018

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No. 6926539 H Ex Sep/Skt Satendra Singh Pal, son of late Pati Ram Pal, resident of Bewar Road, Bholepur, near Mosque Nale Ke Paas, Post Bholepur, District Farrukhabad, U.P.

….Applicant

Ld. Counsel for the Applicant: **Shri P.K.Shukla,** Advocate

Verses

1. Union of India through the Secretary, Ministry of Defence, South Block, New Delhi.

2. Director General of Ordinance Service, master General of Ordinance Bench (OS-8B) IHQ of MoD (Army), New Delhi.

3. Additional Director General, personnel Service AG's Branch, Army Head Quarter, IHQ of MoD (Army), DHQ PO New Delhi-110011

4. O.I.C Records, AOC Records Secunderabad-900453 C/o 56 A.P.O.

5. P.C.D.A. (Pension), Draupadi Ghat, Allahabad.

.....Respondents

Ld. Counsel for the Respondents: Shri Namit Sharma**,** Central Govt Standing Counsel assisted by Maj Salen Xaxa, OIC, Legal Cell**.**

ORDER (Oral)

1. We have heard Shri P.K.Shukla, learned counsel for the applicant and Sri Namit Sharma, learned counsel for the respondents, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

2. The instant petition has been preferred challenging the constitutional validity of Para 74 of the Pension Regulations for the Army 1961 Part-II being *ultra vires* and hit by Articles 14, 21, 31 and 300-A of the Constitution. The applicant has claimed restoration of his service pension and gratuity with arrears with effect from 30.06.2004.

3. Vide order dated 17.01.2018, we had framed the following questions to be adjudicated at the time of final hearing:

> (1) Pension is property under Article 300A of the Constitution of India; it is not a bounty, hence whether the respondents have a right to stop regular pension merely after conviction in some criminal case not related to Army service?
>
> (2) Whether payment of provisional pension may be treated as constituting regular pension after conviction by criminal court in a matter which has no concern with the Armed Forces?
>
> (3) Whether after retirement, the relationship of 'master and servant' between the Armed forces and its members continues by passing some punitive order in the form of denial of regular pension, that too in violation of principles of natural justice?

4. Factual matrix and our findings on aforesaid questions of law are as hereinunder:

The applicant was enrolled in the Indian Army on 26.12.1986. During the course of service, an FIR was lodged against him under Section 306 IPC at P.S. Sadar, Jalandhar, Punjab and he was sent to jail on 12.05.1989 and later on released on bail and resumed duty on 16.09.1989 with salary and all benefits. After due trial in the aforesaid case, the applicant was convicted under Section 304 Part-I IPC and sentenced to undergo rigorous imprisonment for seven years with a fine of Rs.1000/-. He was sent to jail to serve out the sentence. The applicant filed a criminal appeal bearing No. 443 (S/B) of 1996 wherein he was released on bail and he resumed duty on 02.08.1996 with all benefits, perks and salary. It may be noted that under Para 423 of the Defence Service Regulations 1987 (Revised Edition), option has been given to the authorities that the conviction of a WO or OR will be reported to the brigade/sub-area commander to look into the matter and take a decision with regard to his dismissal, discharge or reduction, as may be desirable. For convenience, Para 423 of the DSR (supra) is reproduced as under:

> ***"423. Conviction of Officers, JCOs, WOs and OR by The Civil Power-*** *The conviction of an officer by the Civil Power will be reported to the Central Government and that of a JCO to the Chief of the Ar my Staff for such action as these authorities see fit to take. The conviction of a WO or OR will be reported to the brigade/sub-area commander who will decide whether dismissal, discharge or reduction is desirable.*

> *The disciplinary authority may, if it comes to the conclusion that an order with a view to imposing a penalty on a Government servant on the ground of conduct which had led to his conviction on a criminal charge should be issued, issue such an order without waiting for the period of filing an appeal or, if an appeal has been filed without waiting for the decision in the first court of appeal."*

5. The Legislature has conferred power on the Central Government, the Chief of Army Staff, the brigade or sub-area commander to exercise discretion for taking punitive action after conviction. The Legislation, to its wisdom, has used the word *"whether"*, import of which is that keeping in view the facts and circumstances as well as material on record, it is not mandatory in every case even after conviction of an army personnel to pass an order of dismissal, discharge or reduction for the left over period by the competent authorities, particularly when an incumbent has retired from service. All depends upon the facts of each case and option is open to the authorities either to take or not to take action after conviction depending upon the facts and circumstances of the case.

6. In the present case, the applicant was convicted in a criminal case and sent to jail to serve out the sentence. He filed a criminal appeal and later on he was released on bail. In spite of the matter being reported to the authority concerned, no action was taken under Para 423 of the DSR (supra), hence an inference may be drawn that the authorities concerned were satisfied that the commission of an

act for which the applicant was convicted, does not require a punitive action under the said provision.

7. The aforesaid fact that the applicant was retained in service even after conviction has been admitted in Para 4 of the counter affidavit. It is also an admitted fact on record that even after filing of criminal appeal, the applicant continued in service. During pendency of appeal and after rendering service for 17 years and 06 months, the applicant moved an application for voluntary retirement, which was allowed without any rider or adverse observation. As per his request, the applicant was discharged from service in pursuance to provisions contained in Army Rule 13(3)(III)(iv). After discharge from service and keeping in view the fact that after 15 years of service, the applicant was entitled for payment of pension because of service rendered for 17 years 06 months, he sent a legal notice dated 10.02.2006 to the respondents for grant of provisional service pension during pendency of criminal appeal in pursuance to provisions contained in Pension Regulations.

8. In response to the applicant's statutory representation, the respondents took a decision to grant provisional service pension to him in pursuance to Pension Regulations and accordingly issued a provisional service pension order vide PPO No. S/051088/2006 dated 19.01.2007 and he is getting the same till date without any stoppage, as pleaded in Para –k of the Supplementary Affidavit dated 12.09.2007. The applicant has been paid the provisional

service pension after retirement from service during pendency of criminal appeal.

9. However, Criminal Appeal No. 443 (S/B) of 1996 was dismissed on 21.04.2010 with modification in order of sentence reducing it from 07 years to 03 years under Section 304 Part-I of IPC, in pursuance to which the applicant was sent to jail and he has served the sentence from 07.06.2010 to 06.04.2012 for the remainder period. Thereafter, on release from jail, the applicant sent a representation dated 22.06.2012 to the respondents for restoration of his service pension and gratuity alongwith arrears with effect from 30.06.2004 and when his grievance was not heeded to, he preferred the present OA for the said relief. Later on, by amendment, the applicant has also challenged the constitutional validity of Para 74 of the Pension Regulations for Army 1961 Part-II for declaring it *ultra vires* to the Constitution.

10. In support of his submissions, learned counsel for the applicant has relied upon the cases reported in *(1971) 2 SCC 330* **Devki Nandan Prasad versus The State of Bihar and others** and *(1973) 1 SCC 120* **State of Punjab versus K.R.Erry and Sobhag Rai Mehta** as well as two earlier decisions of this Tribunal rendered in *OA No. 26 of 2015* **Satyapal Singh versus Union of India and others** and *OA No. 205 of 2012*, **Ran Bahadur Gurug versus Union of India and others.**

11. It is also submitted by learned counsel for the applicant that principle of doctrine of washing off shall apply in the present case and no action may be taken by the respondents on account of conviction and sentence since the respondents have retired the applicant honourably and paid provisional service pension. It is also argued that the doctrine of merger shall apply since the appeal is continuation of original trial and all earlier judgments/orders shall merge in the order of appellate court dated 06.04.2012 whereby sentence of 07 years' R.I was reduced to 03 years. He emphasized that this order (dated 06.04.2012) being delivered almost after six years of his retirement, under deeming fiction, conviction and sentence shall be deemed to have been awarded to the applicant after his retirement. It is also argued that the offence for which the applicant has been convicted and sentenced has got no relation with his service career.

12. On the other hand, learned counsel for the respondents submits that since the offence was committed during the course of employment and even if the offence has been committed after retirement, the respondents can divest the applicant of pension by its reduction or total stoppage in pursuance to the regulation in question, which has got statutory force and such reduction or stoppage of pension is neither unconstitutional nor the same is based on arbitrary decision of the respondents. It is also argued by learned counsel for the respondents that the in view of Paras 7, 8

and 9 of the Defence Service Regulations (Pension Regulations for the Army), Part-I, 2008, published on 30.06.2008, the respondents were well within their rights to take action against the applicant and deprive him of his service pension.

13. We have considered the arguments advanced by learned counsel for the parties. To arrive at a conclusion on the controversy raised, it would be relevant to quote Paras 7, 8 and 9 of the Pension Regulations for the Army, Part-I (2008) as well as the impugned Para 74 of the Pension Regulations for the Army 1961 Part-II, which are reproduced as under:

> ***"GRANT OF PROVISIONAL PENSION***
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> *7. (a)(i) An individual against whom any disciplinary proceedings under the Army Act, 1950 or judicial proceedings are pending / instituted may, on his retirement/release/discharge /invalidment, be authorized by the Principal Controller of Defence Accounts (Pensions), a provisional pension not exceeding the maximum pension which would have been admissible to him on the basis of the qualifying service upto the date of retirement/release/discharge /invalidment, or if he was under suspension on the date of retirement /release/discharge/ invalidment, upto the date immediately preceding the date on which he was placed under suspension.*
>
> *(ii) The provisional pension shall be authorised during the period commencing from the date following the date of retirement/release/discharge/invalidment upto and including the date on which, after the conclusion of the disciplinary or judicial proceedings, final orders are passed by the competent authority.*
>
> *(iii) No gratuity (including retirement gratuity) shall be authorised until the conclusion of such proceedings and issue of final orders thereon.*

(iv) No commutation of the provisional pension shall be permitted. (b) Payment of provisional pension as mentioned in clause (a) (i) above, shall be adjusted against the final retirement benefits that may be sanctioned to such service personnel upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or where final pension is reduced or withheld either permanently or for a specified period.

PENSION SUBJECT TO FUTURE GOOD CONDUCT

8. (a) Future good conduct shall be an implied condition for every grant of pension or allowance and its continuance under these Regulations.

(b) The competent authority may, by an order in writing, withhold or withdraw a pension or a part thereof whether permanently or for a specified period, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct. Provided that where only a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of minimum pension fixed by Government from time to time.

(c) Where a pensioner is convicted of a serious crime by a court of law or by court martial or is found guilty of grave misconduct, action under clause (b) above shall be taken in the light of the judgment of the court relating to such conviction.

(d) In a case not falling under clause (c) above, as well as other cases where the competent authority considers that the pensioner is prima facie guilty of grave misconduct, the competent authority before passing an order under clause (b) above;

> *(i) serve upon the pensioner a notice specifying the action proposed to be taken against him and the ground on which it is proposed to be taken against him and calling upon him to submit, within 15 days of the receipt of the notice or such further time not exceeding 15 days as may be allowed by the competent authority, such representation as he may wish to make against the proposal, and*

(ii) take into consideration the representation, if any, submitted by the pensioner under sub clause (i) above.

Notes: 1. The expression 'serious crime' means an offence under the Indian Penal Code 1860 or Official Secrets Act, 1923 or any other law for the time being in force in the country for which the maximum punishment prescribed under the law is imprisonment for a period of 3 years or more with or without a fine.

2. The expression 'grave misconduct' includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) (which was obtained while holding office under the Government) so as to prejudicially affect the interest of the general public or the security of the State.

RIGHT TO WITHHOLD OR SUSPEND OR DISCONTINUE PENSION

9. (a) In circumstances to be determined by the competent authority or as may be specified in these Regulations, the pension including the commuted value thereof which has not been paid or gratuity to be granted to an individual, or any portion of it, may be withheld, suspended or discontinued. In exceptional cases payment of part or whole of the pension, allowance or gratuity withheld or suspended may, by an order of the competent authority be made to the wife or other dependant(s) of the pensioner.

(b) This Regulation may be invoked under the following circumstances –

(i) Offences against the State during the period of service, including service rendered upon re-employment after retirement, as listed in Chapter-VI of the Indian Penal Code. Relevant provisions of the Indian Penal Code are reproduced below –

(1) Waging or attempting to wage war or abetting waging of war against the Government of India;

(2) Conspiracy to commit offence punishable by section 121 I.P.C.

(3) Collecting arms etc. with intention of waging war against the Government of India.

(4) Concealing with intent to facilitate design to wage war.

(5) Assaulting President, Governor etc. with intent to compel or restrain the exercise of any lawful power.

(6) Sedition.

(7) Waging war against any Asiatic power in alliance with the Government of India.

(8) Committing depredation on territories of powers at peace with the Government of India.

(9) Receiving property taken by war or depredation mentioned in sections 125 and 126 Indian Penal Code.

(10) Public servant voluntarily allowing prisoner of State of war to escape.

(11) Public servant negligently allowing such prisoner to escape.

(12) Aiding escape of, rescuing or harbouring such prisoner.

(ii) Other serious crimes under Indian Penal Code, Official Secrets Act or any other special law of the land and grave misconduct; as defined in Notes to Regulation 8 of these Regulations.

(iii) To recover the whole or part of any pecuniary loss caused to the Government in cases where in any departmental or judicial proceedings, the pensioner/individual is found guilty of misconduct or negligence committed during the period of service including service rendered on re-employment after retirement/discharge, leading to the said loss;

(iv)Unauthorized by continuing to occupy the residential accommodation including hired one provided by the Government;

(v) When a report is received after sanctioning the pension, that departmental or judicial proceedings (for the offences committed while in service or during the period of re-employment) are in progress against the individual;

(vi)When an individual obtains re-employment after retirement without obtaining prior permission of the competent authority where required; and,

(vii) Any other circumstances considered special by the Central Government."

The impugned Para 74 of the Pension Regulations for the Army 1961 Part-II is reproduced as under:

"74. *If a pensioner is convicted of a crime by a court of law or is guilty of grave misconduct, which is not of a political nature (see regulation 108, Part I of these Regulations), the following procedure shall be followed :—*

(a) If a pensioner is sentenced to imprisonment for a criminal offence his pension shall be suspended from the date of his imprisonment and the case reported by the Controller of Defence Accounts (Pensions) for the orders of the competent authority. In a case where a pensioner is kept in police or jail custody as an under-trial prisoner and is eventually sentenced to a term of imprisonment for a criminal offence, the suspension of pension shall take effect from the date of imprisonment only.

(b) The competent authority shall decide in consultation with the Controller of Defence Accounts (Pensions) and if necessary, with the civil authorities also, whether the offence is a serious one and if so, he shall order the removal of the pensioner's name from the pension list, from the date of the commencement of his imprisonment Pension thereupon shall cease to be payable from that date.

(c) If the competent authority decides that the offence is not so serious as to justify the removal of the pensioner's name from the pension list, it shall not be removed; the payment of arrears of pension due from date of last payment before imprisonment shall be made on release from prison.

(d) If a pensioner is sentenced to imprisonment for a criminal offence by a lower court but is acquitted, on appeal, by a higher court, the pension withheld shall be restored.

(e) If a pensioner is imprisoned for debt, pension shall continue to be paid.

(f) If a pensioner is guilty of grave misconduct not falling under the preceding clauses, it shall at once be reported to the competent authority who may, if he considers it justifiable, order the suspension of his pension from a date to be specified. The competent authority shall subsequently investigate the case in consultation with the Controller of Defence Accounts (Pensions) and if necessary the civil authorities, and—

(i) either authorise the withholding of pension in whole or in part from a date to be specified by him not earlier than the date of original suspension ; or

(ii) authorise continuance in full."

14. A plain reading of the aforesaid Regulation shows that after retirement, a member of armed force loses his service link with the Army except the reservist. A perusal of this regulation further indicates that it was not placed before the Parliament followed by notification, hence it seems to be a government instruction or instruction by the Chief of Army Staff to provide a service condition.

15. From the aforesaid facts, it is also apparent that the Parliament has not curtailed the right of army personnel to receive

full pension, which is a fundamental right, by exercising powers conferred under Article 33 of the Constitution of India. For convenience Article 33 of the Constitution is reproduced as under:

> ***"33. Power of Parliament to modify the rights conferred by this Part in their application etc.-*** *Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-*
>
> *(a) the members of the Armed Forces; or*
> *(b) the members of the Forces charged with the maintenance of public order; or*
> *(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or*
> *(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),*
>
> *be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."*

16. Apart from above, Section 21 of the Army Act deals with specific items where certain fundamental rights may be modified in their application. For convenience, Section 21 of the Army Act is reproduced as under:

> ***"21. Power to modify certain fundamental rights in their application to persons subject to this Act.-*** *Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act-*
>
> *(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society,*

institution or association, or any class of societies, institutions or associations

(b) to attend or address any meeting or to take part in any demonstration organised by any body of persons for any political or other purposes

(c) to communicate with the press or to publish or cause to be published any book, letter or other document."

17. From the provisions contained in Section 21 of the Army Act, it is apparent that fundamental rights with regard to only three items may be curtailed and these three items do not include pensionary benefits. The retirement, release or discharge is covered by Section 22 of the Army Act. For convenience, Section 22 of the Army Act is reproduced as under:

"22. Retirement, release or discharge.- *Any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed."*

18. While dealing with service privileges under Chapter V of the Army Act, the Legislature has provided under Section 25 of the Army Act as to when deduction from salary may be made. For convenience, Section 25 of the Army Act is reproduced as under:

"25. Authorised deductions only to be made from pay.- *The pay of every person subject to this Act due to him as such under any regulation for the time being in force shall be paid without any deduction other than the deductions authorised by or under this or any other Act."*

19. The Legislature, to its wisdom, has used the word 'only' in the aforesaid provision, providing that salary of every army personnel

shall be paid without any deduction other than the deductions authorized by or under the Army Act or any other Act. Thus, so far as the salary is concerned, the same has been protected by statutory provisions contained in the Army Act.

20. However, Section 31 of the Army Act extends certain privileges to reservists. It may be noted that under Chapter V of the Army Act, there is no provision conferring power on the respondents to reduce or deny pension for any reason whatsoever, hence any decision or order passed by the respondents for reduction or stoppage of pension does not seem to be permissible in view of settled law and if the State wants to do certain things, it shall be done in the manner provided by the Act or statute and not otherwise. (vide **Chandra Kishore Jha Vs. Mahavir Prasad and others,***(1999) 8 SCC 266*; **Delhi Administration Vs. Gurdip Singh Uvan and others**, *(2000) 7 SCC 296*; **Dhananjay Reddy Vs. State of Karnataka***, AIR 2001 SC 1512*; **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others,** *(2002) 1 SCC 633*; **Prabhashankar Dubey Vs. State of M.P**., *AIR 2004 SC 486*; **Ramphal Kundu Vs. Kamal Sharma**, *AIR 2004 SC 1657*, *AIR 1979 SC 1573;***State of Bihar and others Vs. J.A.C. Saldanna and others**, *AIR 1980 SC 326*; **A.K.Roy and another Vs. State of Punjab and others**, *AIR 1986 SC 2160***and State of Mizoram Vs. Biakchhawna**, *(1995) 1 SCC 156*.)

21. Undoubtedly, reduction or stoppage of pension is a punitive action. Chapter VI of the Army Act deals with the offences. Sections 34 to 70 under this Chapter specify various misconducts, but they do not include conviction after retirement as an offence like a serving army personnel. Penal deductions have been provided under Chapter VIII of the Army Act from Sections 90 to 100, which for convenience are reproduced as under:

> ***"90. Deductions from pay and allowances of officers.—****The following penal deductions may be made from the pay and allowances of an officer, that is to say,—*
>
> *(a) all pay and allowances due to an officer for every day he absents himself without leave, unless a satisfactory explanation has been given to his commanding officer and has been approved by the Central Government;*
>
> *(b) all pay and allowances for every day while he is in custody or under suspension from duty on a charge for an offence for which he is afterwards convicted by a criminal court or a court-martial or by an officer exercising authority under section 83 or section 84;*
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> *(c) any sum required to make good the pay of any person subject to this Act which he has unlawfully retained or unlawfully refused to pay;*
>
> *(d) any sum required to make good such compensation for any expenses, loss, damage or destruction occasioned by the commission of an offence as may be determined by the court- martial by whom he is convicted of such offence, or by an officer exercising authority under section 83 or section 84;*
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> *(e) all pay and allowances ordered by a court-martial to be forfeited or stopped;*
>
> *(f) any sum required to pay a fine awarded by a criminal court or a court-martial exercising jurisdiction under section 69;*

(g) any sum required to make good any loss, damage, or destruction of public or regimental property which, after due investigation, appears to the Central Government to have been occasioned by the wrongful act or negligence on the part of the officer;

(h) all pay and allowances forfeited by order of the Central Government if the officer is found by a court of inquiry constituted by the Chief of the Army Staff in this behalf, to have deserted to the enemy, or while in enemy hands, to have served with, or under the orders of, the enemy, or in any manner to have aided the enemy, or to have allowed himself to be taken prisoner by the enemy, through want of due precaution or through disobedience of orders or wilful neglect of duty, or having been taken prisoner by the enemy, to have failed to rejoin his service when it was possible to do so;

(i) any sum required by order of the Central Government or any prescribed officers to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the cost of any relief given by the said Government to the said wife or child.

91. Deductions from pay and allowances of persons other than officers.—*Subject to the provisions of section 94 the following penal deductions may be made from the pay and allowances of a person subject to this Act other than an officer, that is to say,—*

(a) all pay and allowances for every day of absence either on desertion or without leave, or as a prisoner of war, and for every day of transportation or imprisonment awarded by a criminal court, a court-martial or an officer exercising authority under section 80,

(b) all pay and allowances for every day while he is in custody on a charge for an offence of which he is afterwards convicted by a criminal court or a court-martial, or on a charge of absence without leave for which he is afterwards awarded imprisonment by an officer exercising authority under section 80;

(c) all pay and allowances for every day on which he is in hospital on account of sickness certified by

the medical officer attending on him to have been caused by an offence under this Act committed by him;

(d) for every day on which he is in hospital on account of sickness certified by the medical officer attending on him to have been caused by his own misconduct or imprudence, such sum as may be specified by order of the Central Government or such officer as may be specified by that Government;

(e) all pay and allowances ordered by a court-martial or by an officer exercising authority under any of the sections 80, 83, 84 and 85, to be forfeited or stopped;

(f) all pay and allowances for every day between his being recovered from the enemy and his dismissal from the service in consequence of his conduct when being taken prisoner by, or while in the hands of, the enemy;

(g) any sum required to make good such compensation for any expenses, loss, damage or destruction caused by him to the Central Government or to any building or property as may be awarded by his commanding officer;

(h) any sum required to, pay a fine awarded by a criminal court, a court-martial exercising jurisdiction under section 69, or an officer exercising authority under any of the sections 80 and 89;

(i) any sum required by order of the Central Government or any prescribed officer to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the cost of any relief given by the said Government to the said wife or child.

92. Computation of time of absence or custody.—*For the purposes of clauses (a) and (b) of section 91,—*

(a) no person shall be treated as absent or in custody for a day unless the absence or custody has lasted, whether wholly in one day, or partly in one day and partly in another, for six consecutive hours or upwards;

(b) any absence or custody for less than a day may be reckoned as absence or custody for a day if such absence or custody prevented the absentee from fulfilling any military duty which was thereby thrown upon some other person;

(c) absence or custody for twelve consecutive hours or upwards may be reckoned as absence or custody for the whole of each day during any portion of which the person was absent or in custody;

(d) a period of absence, or imprisonment, which commences before, and ends after, midnight may be reckoned as a day.

93. Pay and allowances during trial.—*In the case of any person subject to this Act who is in custody or under suspension from duty on a charge for an offence, the prescribed officer may direct that the whole or any part of the pay and allowances of such person shall be withheld, pending the result of his trial on the charge against him, in order to give effect to the provisions of clause (b) of sections 90 and 91.*

94. Limit of certain deductions.—*The total deductions from the pay and allowances of a person made under clauses (e), (g) to (i) of section 91 shall not, except where he is sentenced to dismissal, exceed in any one month one-half of his pay and allowances for that month.*

95. Deduction from public money due to a person.—*Any sum authorised by this Act to be deducted from the pay and allowances of any person may, without prejudice to any other mode of recovering the same, be deducted from any public money due to him other than a pension.*

96. Pay and allowances of prisoner of war during inquiry into his conduct.*—Where the conduct of any person subject to this Act when being taken prisoner by, or while in the hands of, the enemy, is to be inquired into under this Act or any other law, the Chief of the Army Staff or any officer authorised by him may order that the whole or any part of the pay and allowances of such person shall be withheld pending the result of such inquiry.*

> ***97. Remission of deductions.***—*Any deduction from pay and allowances authorised by this Act may be remitted in such manner and to such extent, and by such authority, as may from time to time be prescribed.*
>
> ***98. Provision for dependants of prisoner of war from remitted deductions.***—*In the case of all persons subject to this Act, being prisoners of war, whose pay and allowances have been forfeited under clause (h) of section 90 or clause (a) of section 91, but in respect of whom a remission has been made under section 97, it shall be lawful for proper provision to be made by the prescribed authorities out of such pay and allowances for any dependants of such persons, and any such remission shall in that case be deemed to apply only to the balance thereafter remaining of such pay and allowances.*
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> ***99. Provision for dependants of prisoner of war from his pay and allowances.—****It shall be lawful for proper provision to be made by the prescribed authorities for any dependants of any person subject to this Act who is a prisoner of war or is missing, out of his pay and allowances.*
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> ***100. Period during which a person is deemed to be a prisoner of war.***—*For the purposes of sections 98 and 99, a person shall be deemed to continue to be a prisoner of war until the conclusion of any inquiry into his conduct such as is referred to in section 96, and if he is cashiered or dismissed from the service in consequence of such conduct, until the date of such cashiering or dismissal."*

22. The aforesaid provisions do not empower the authority to make deduction from pension or permanent stoppage of pension of the applicant, that too under the teeth of the fact that conviction of the applicant does not correlate to misconduct committed during the tenure of his service. Since the Army Act does not provide for deduction or stoppage of pension on account of conviction in a private dispute, in the absence of any provision under the Act it

cannot be done under executive instructions or regulations which are not placed before the Parliament.

23. Sections 191, 192, 193 and 193-A of the Army Act require the that the rules and regulations for the purpose of carrying into effect the provisions of the Act should be placed by the Central Government before the Parliament, followed by publication of such rules or regulation in Official Gazette. The respondents have failed to establish the fact that the impugned regulation was placed before the Parliament, followed by its publication in Official Gazette, hence the same appears to be in contravention of the Army Act.

24. It is a basic principle of rule of law that there must be some source to exercise power for purpose of framing of certain rules or regulations or issue executive instructions. The Hon'ble Supreme Court while defining the rule of law in the case of

> *"338. This Court said in Jaisinghani v. Union of India that the rule of law from one point of view means that decisions should be made by the application of known principles and rules, and, in general, such decisions should be predictable and the citizen should know where he is.*
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> *339. This exposition of the rule of law is only the aspiration for an ideal and it is not based on any down-to-earth analysis of practical problems with which a modern Government is confronted. In the world of action, this ideal cannot be worked out and that is the reason why this exposition has been rejected by all practical men.*
>
> *340. If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then there is no rule of law in any modern State. A judge who passes a sentence has*

no other guidance except a statute which says that the person may be sentenced to imprisonment for a term which may extend to, say, a period of ten years. He must exercise considerable discretion. The High Courts and the Supreme court overrule their precedents. What previously announced rules guide them in laying down the new precedents ? A court of law decides a case of first impression; no statute governs, no precedent is applicable. It is precisely because a judge cannot find a previously announced rule that he becomes a legislator to a limited extent. All these would show that it is impossible to enunciate the rule of law which has as its basis that no decision can be made unless there is a certain rule to govern the decision.

341. Leaving aside these extravagant versions of rule of law, there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. May be, the other articles referred to do the same duty

342. Das, C.J. said that Article 14 combines the English doctrine of the rule of law and the equal protection clause of the Fourteenth Amendment to the American Federal Constitution. In State of Bengal v. Anwar Ali Sarkar, Patanjali Sastri, C.J. observed that the first part of the article which has been adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus

> *enshrines what American judges regard as the "basic principle of republicanism" and that the second part which is a corollary of the first is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution. So, the concept of equality which is basic to rule of law and that which is regarded as the most fundamental postulate of republicanism are both embodied in Article 14."*

In view of above, we do feel that the impugned pension regulation of the Army is not in conformity with law.

25. **Pension** being Property, granted by following a due procedure of law may not be deprived without due process of law without compliance of principles of natural justice. Hon'ble Supreme Court long back in ***Wazir Chand v. State of Himachal Pradesh*** vide AIR 1954 SC 415 held that State cannot interfere with the right of others unless it can point some specific rule of law which authorises its actions. In another case reported in (2014) 1 SCALE 514 ***Biswanath Bhattacharya v. Union of India*** Hon'ble Supreme Court reiterated that a person cannot be deprived from property except by following the requirement of Articles 330A and 14 of the Constitution, which prevent the State from arbitrarily depriving a subject of his property. In the present case, admittedly, applicant's pension was reduced and he has been deprived from weightage granted to him long back in utter disregard of principles of natural justice, hence the same is not sustainable. The reduction of pension or withdrawal of weightage suffers from arbitrary exercise of power, hit by Article 14.

26. It is settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised even at a belated stage. The findings of a Court or Tribunal or authority become irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (vide: ***United Commercial Bank Ltd. v. Their Workmen***, AIR 1951 SC 230: 1951 SCJ 334: 1951 SCR 380; ***Nai Bahu v. Lala Ramnarayan***, AIR 1978 SC 22: (1978) 1 SCC 58: (1978) 1 SCR 723;***Natraj Studios Pvt Ltd v. Navrang Studios***, AIR 1981 SC 537: (1981) 2 SCR 466; and ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar***, AIR 1999 SC 2213: 1999 AIR SCW 2240: (1999) 3 SCC 722.

27. In ***Sushil Kumar Mehta v. Gobind Ram Bohra***, (1990) 1 SCC 193: (1990) 1 Rent LR 428: 1989 Sup (2) SCR 149, the apex Court, later placing reliance on large number of its earlier judgments particularly in ***Premier Automobiles Ltd v. Kamlakar Shantaram Wadke***, AIR 1975 SC 2238: (1976) 1 SCC 496: (1976) 1 SCR 427;

Kiran Singh v. Chaman Paswan, AIR 1954 SC 340: 1954 SCJ 514: 1955 SCR 117; and ***Chandrika Misir v. Bhaiyalal***, AIR 1973 SC 2391: (1973) 2 SCC 474: 1973 SCD 793 held, that a decree without jurisdiction is a nullity. It is a coram non judice; when a special statute gives a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the Common Law Court has no jurisdiction; where an Act creates an obligation, and enforces the performance in specified manner, "performance cannot be forced in any other manner."

28. Law does not permit any court/ tribunal/ authority/ forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject matter. For the reason that it is not an objection as to the place of suing, "it is an objection going to the nullity of the order on the ground of want of jurisdiction." Thus, for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide on the adjudicatory facts or facts in issue. (Vide ***Setrucharla Ramabhadra Raju Bahadur v. Maharaja of Jeypore,*** AIR 1919 PC 150: 42 Mad 813: 46 Ind App 151, ***State of Gujrat v. Rajesh Kumar Chimanlal Barot***, (1996) 5 SCC 477: AIR 1996 SC 2664: 1996 AIR SCW 3327, ***Harshad Chiman Lal Modi v. D.L.F. Universal Ltd***, AIR 2005 SC 4446: 2005 AIR SCW 5369: (2005) 7 SCC 791, ***Carona Ltd v. Parvathy Swaminathan***, AIR 2008 SC

187: 2007 AIR SCW 6546: (2007) 8 SCC 559, and ***Jagmittar Sain Bhagat v. Dir Health Services, Haryana***, AIR 2013 SC 3060: 2013 Lab IC 3412: 2013 AIR SCW 4387.

29. It is well settled law that what cannot be done directly, it cannot be done indirectly, vide***Jagir Singh Vs. Ranbir Singh and another***, reported in AIR 1979 SC 381 and the case of ***District Collector, Chittor and Others Vs. Chittoor District Groundunt Traders" Association, Chittoor and Others,*** reported in AIR 1989 SC 989. In **Jagir Singh**'s case Hon'ble Supreme Court has held that what cannot be done directly, cannot be allowed to be done indirectly as that would be an evasion of the statute. The Supreme Court has held that it is a well known principle of law that the provisions of law cannot be evaded by shift or contrivance. The Supreme Court has held that in an indirector circuitous manner the objects of a statute cannot be defeated. In the **District Collector**'s case a circular was issued under the Commodities Act purporting to impose restriction on movement of edible oil and oil seeds and to impose compulsory levy for supply of oil to State Government at a fixed price. The Supreme Court held that there was no power to impose levies and what could not be done directly couldnot be done indirectly**,** by using the regulatory powers given to that Authority. Reduction of pension is not permissible under law and it is not open to the respondents to reduce the pension of the applicant by withdrawing the weightage granted to the applicant at the time of

retirement, that too under the teeth of violation of principles of natural justice.

30. Reliance placed by the learned counsel for the applicant on the judgment of Apex Court in the case of **Devki Nandan Prasad** (supra) fortifies our opinion. For convenience the relevant parts of the said judgment is reproduced as under:

> *"15. The questions that arise for consideration are whether the orders dated August 5, 1966 and June 12, 1968 are legal and valid. Before we consider that aspect, it is necessary to state that in order to sustain this petition under Article 32, the petitioner will have to establish that either the order dated August 5, 1966 or June 12, 1968, or both of them affect his fundamental rights guaranteed to him. The order of August 5, 1966, according to the petitioner, is one removing him from service and it has been passed in violation of Article 311. That the said order is one removing the petitioner from service is also admitted by the respondents in paragraph 11 of the counter-affidavit filed on their behalf by the Assistant Director of Education. Assuming that the said order has been passed in violation of Article 311, the said circumstance will not give a right to the petitioner to approach this Court under Article 32. The stand taken by the petitioner is that his right to get 41-1 S.C. India/71 pension is property and it does not cease to be property on the mere denial or cancellation by the respondents. The order dated June 12, 1968 is one withholding the payment of pension or at any rate amounts to a denial by the respondents to his right to get pension. Either way, his rights to property are affected under Articles 19(1)(f) and 31(1) of the Constitution. His right to pension cannot be taken away by an executive order. In the counter affidavit, the respondents do not dispute the rights of the petitioner to get pension, but they take the stand that the order dated June 12, 1968 is justified by r. 46 of the Pension Rules. This aspect will be dealt with by us later. There is only a bald averment in the*

counter-affidavit that there is no question of any fundamental right and therefore this petition is not maintainable. As to on what basis this plea is taken, has not been further clarified in the counter- affidavit. But before us Mr. B. P. Jha, learned counsel for the respondents, urged that by withholding the payment of pension by the State, no fundamental rights of the petitioner have been affected."

"30. The question whether the pension granted to a public servant is property attracting Article 31(1)came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India (AIR 1962 Punj 503). It was held that such a right constitutes "property" and any interference will be a breach of Article 3 1 (1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in Letters Patent Appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh (2)approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 3 1 (1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K. R. Erry v. The State of Punjab (ILR 1967 Punj & Har 278). The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a Government servant. It was

further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision, on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

32. This Court in State of Madhya Pradesh v. Ranojirao Shinde and another (AIR 1968 SC 1053) had to consider the question whether a "cash grant" is "property" within the meaning of that expression in Arts. 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing "it is obvious that a tight to sum of money is property".

> *33. Having due regard to the above decisions, we are of the opi- nion that the right of the petitioner to receive pension is property under Article 3 1 (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 Art. 19. Therefore, it follows that the order dated June 12, 1968 denying the petitioner fight to receive pension affects the fundamental right of the petitioner under Arts. 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."*

31. In the next judgment referred to by learned counsel for the applicant i.e. **State of Punjab versus K.R.Erry** and **Sobhag Rai Mehta** (supra), the same proposition of law has been laid down. For convenience, the relevant portions of the said report are reproduced as under:

> *"19. In short it must be conceded that though the State Government may have had some material before it for imposing a penalty by way of a cut in the pension it had failed to give a reasonable opportunity to the officers to put forward their defence or facts in extenuation before the cut was imposed. The case of Ridge v. Baldwin([1964] A.C. 40.) comes to mind in this connection. Baldwin who was the Chief Constable of the borough police force was prosecuted on grave charges. Donovan J, the trial Judge made, while acquitting him, some observations about his moral incompetence to afford leadership to the police force. Ac ting on this severe criticism by a Judge of the High Court the Watch Committee. entitled under Section 191. of the Municipal Corporations Act 1882 to dismiss him on a charge of*

unfitness, dismissed him from service. This dismissal practically at the end of his official career had the consequence of depriving him of his pension. The House of Lords held that the order had to be set aside because Baldwin was not afforded an opportunity to defend himself, though the statute itself did not require any such opportunity being given.

20. The question for our consideration now is whether the orders imposing a cut in the pension should be set aside for the reason that the officers were not given reasonable opportunity to show cause. The law on the point is not in doubt. Where a body or authority is judicial or where it has to determine a matter involving rights judicially because of express or implied provision, the principle of natural justice audi ailt eram partem applies. See Province of Bombay v. Kusaldas S. Advani &others (1950 SCR 621 (725)) and Board of High School &Intermediate Education, U.P. Allahabad v. Ghanshyam Das Gupta and others (1962 (S3) SCR 3.). With the proliferation of administrative decisions in the welfare State it is now further recognised by courts both in En-land and in this country, (especially after the decision of House of Lords in Ridge v. Baldwi that where a body or authority is characteristically administrative the principle of natural justice is also liable to be invoked if the decision of that body or authority affects individual rights of interests. and having regard to the particular situation it would be unfair for the body or authority not to have allowed a reasonable opportunity to be heard. See: State of Orissa v. Dr. Binapani Dei &Ors.(1967 (2) SCR 625.) and In re H. K. [An Infant([1967] 2 Q.B.D. 617.)]. In the former case it was observed it page 628 as follows:

> *"An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority. it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom 'in enquiry is held an*

> *opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of Our Constitutional set up that ever), citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made the order is nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."*

These observations were made with reference to an authority which could be described as characteristically administrative. At page 630 it was observed:

> *"It is true that the order is administrative in character, but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence."*

32. Since the pension is personal property, the Hon'ble Supreme Court repeatedly held that while dealing with a matter with regard to pensionary benefits, the action must be just, fair, proper and in

accordance to statutory mandates. Once the Army Act does not provide or make such provision regulating deduction after post-retirement, then it may not be done by executive instructions.

33. Retirement and Resignation of members of the Army have been provided in Section 104 of the Army Act. For convenience, the same is reproduced as under:

> ***"104. Retirement And Resignation.—***
>
> *(a)The President may call upon any officer to retire or resign his commission at any time without assigning any reason.*
>
> *(b) The Central Government may call upon any officer to retire or resign his commission at any time subject to the provisions of the rules in this behalf, as made under the Army Act.*
>
> *(c) No authority other than that specified in sub-paras (a) and (b) above, may call upon an officer to retire or resign his commission or exert any pressure on him to do so.*
>
> *(d) An officer will not be relieved of his duties until receipt of intimation that his application to retire or resign has been accepted. An officer whose application to retire or resign has been accepted may apply to the Central Government for his application to be cancelled. In the case of officers who have once proceeded on leave pending retirement, permission to withdraw such applications will only be granted in exceptional circumstances. The decision of the Central Government on all applications to retire will be final.*
>
> *(e) An officer of the Army who resigns from the service, vacates any civil appointment under the Central Government that he may be holding, unless the Central Government otherwise directs."*

34. Para 52 of the Army Regulations further provides that the command shall be exercised by the senior officer, irrespective of the Branch of service to which he belongs. For convenience, Para 52, clauses (a), (b), (c), (d), (e), (f), (g) and (h) and Paras 54, 55 and 56 of the Army Regulations, relevant for the purposes of this case, are reproduced as under:

> ***"52. Command*** *-(a) Command will be exercised by the senior officer, irrespective of the branch of the service to which he belongs but subject to the conditions specified in sub paras (b) to (1). Exceptions may be made when an officer is specially placed in command.*
>
> *(b) The power of command to be exercised by officers of the President's Body Guard, the Armoured Corps, Regiment of Artillery, Corps of Engineers, Corps of Signals, Infantry, Army Service Corps, Army Ordnance Corps and Electrical and Mechanical Engineers will, save as otherwise provided in sub para (c) and (d) be the power of command over all officers junior in rank or in seniority in such corps over all officers of the corps, referred to in sub paras (c) and (d) and over all other ranks in any corps.*
>
> *(c) The power of command to be exercised by officers [except those referred to in sub para (d)] belonging to the corps other than those mentioned in sub para (b), will extend over all officers junior in rank or in seniority in their own corps, over all officer's referred to in sub para (d) in their own corps and over all other ranks in any corps. It will also extend over such officers of any corps, junior in rank or in seniority, as may be attached for duty to, or specially placed under the command of officers of the Corps included in this sub para. In the case of officers of the Army Medical Corps and the Army Dental Corps, it will further extend over all ranks who are patients in military hospitals, or are on the sick list and are under their professional care in quarters or elsewhere. An officer of the Army Medical Corps will also have power of command over officers of the Military Nursing Service when such officers are engaged in the nursing of patients*

under his professional care or when serving in a unit of which he is in command.

(d) The power of command to be exercised by officers specified below will be power of command over all officers of their own category, junior in rank or in seniority, and over all other ranks in any corps. It will also extend over any such officers of any corps as may be specially placed under their command and as provided in sub para (e): —

(i) Officers of the Special List (e.g. Quartermaster, Record Officers. Technical Officers).

(ii) Officers of the Army Service Corps (Postal).

(iii) Officers employed in posts, not paid from Defence Services Estimates (e.g. Survey). (iv) Officers employed as Military Advisers/Attaches.

(e) Subject to the exceptions mentioned in sub paras (c) and (d), officers referred to there in will not exercise any military command outside their respective services, save only in circumstances of exceptional emergency when exercise of military command by such officers is essential to the safe conduct of military operations. In such cases only, they may be called upon by the senior officers present of the corps referred to in sub para (b). to assume command of troops other than those belonging to their own corps.

(f) Officers of the rank of Colonel and above will retain the power of command pertaining to the corps from which they are promoted.

(g) An officer employed in a civil employment, on the staff of a Governor of a State, under a foreign government or in a special extra regimental employment, will not be entitled by virtue of his military rank, to assume any military command in the regular army unless called out for military duty. He will be liable, in case of necessity, to serve on courts-martial, or to perform such military duties as Army Headquarters may direct.

(h) Military officers will have power of command over such officers and all other ranks of the Territorial Army as may be specialty placed under their orders from time to time by any superior military or Territorial Army authorities. Conversely, officers of the Territorial Army will have power of command over such military officers and soldiers as may be specially placed under their orders

from time to time by any superior military authority. In no case the superior military authority or the superior Territorial Army authority will be of the rank below field rank."

"54. Command During Temporary Absence of An OC Unit. — *When an OC unit becomes sick or is temporarily absent, the conduct of his duties devolves on the Second-in-Command whose appointment as officiating OC will be published in unit orders. His legal powers subject to the limitations of the Army Act, will be the same as those of the unit commanders.*

First Appointment, Grading, Posting and Transfers.

55. Commencement of Service. — *Unless specially provided for otherwise, an officer's service commences from the date of his first commission. All appointments, whether permanent or temporary, transfers, promotions, retirements and removals will be published in the orders of the sanctioning authority and in the absence of any specified date, will take effect from the date of the order in which they appear. The grant of first commission and promotion to substantive rank and conferment of local rank will be notified in the Gazette of India.*

56. Grading.- *Officers will be graded in the gradation list and in the corps in which they are permanently appointed according to the dates of their substantive rank in the Army, or when these are identical according to the dates of their last substantive rank.*

The departmental seniority of an officer in the JAG's Department will be regulated by the date of appointment to the grade he holds in that department."

35. Apart from above, Para 75 of the Army Regulations (supra), on the face of record, shows that the tenure of service of General shall be three years. Army officers are retired on attaining the age of superannuation specified in Para 76 of the Army Regulations. Subsequently, two years‟ service was increased for all Government

functionaries and currently a General retires at the age of 62 years, and over and above, the full tenure of Chief of the Army Staff, as communicated to us is of three years.

36, Para 104 of the Army Regulations (supra) deals with the retirement of an officer. It says that the President may call upon any officer to retire or resign his commission at any time without assigning any reason. Corollary to it, a person shall retire/superannuate from service the moment he completes his tenure of service and notified accordingly.

37. Para 167 of the Army Regulations provides that once a person enrolled under the Army Act is discharged, Part II Order is issued for pensionary purposes. All retired persons including Chief of the Army Staff shall be entitled for pension. The day a person retires from service from the next day he/she shall be entitled to post-retiral benefits according to rules. Retirement itself is indicative of the fact of discharge from all duties assigned to a person during his tenure of service, hence no duty can be cast upon him to discharge obligations like award of ACR entries, etc. to his juniors affecting their service careers.

38. The word “retirement” in Black’s Law Dictionary has been defined as “Termination of one‘s own employment or career, esp. upon reaching a certain age or for health reasons; retirement may be voluntary or involuntary.

39. Similarly, the word "*retirement*" as defined in Major Law Lexicon, means termination of the service of an employee otherwise than on superannuation.

40. The word "*superannuation*" has been defined in the Major Law Lexicon as under: —

> "*Superannuation*" in relation to an employee who is a member of the Pension Scheme, means the attainment, by the said employee, of such age as is fixed in a contract or conditions of service as the age on attainment of which such employee shall vacate the employment."

41. The Hon"ble Supreme Court in a case reported in *(2004) 1 SCC 249* **R.N.Rajanna versus State of Karnataka,** while defining the meaning of "superannuation" held that it means discharge from a post on account of the age fixed for retirement, uniformly for all or a particular class or category of service holders. In another case reported in *(2009) 5 SCC 313*, **Bank of India versus K. Mohandas,** their Lordships of the Supreme Court while defining the word "superannuation pension" held that superannuation pension shall be granted to an employee who has retired on his attaining the age of superannuation specified in service regulations or settlements. In Bank of India versus K. Mohandas (supra), the Hon"ble Supreme Court defined the word "retirement" as cessation from service

42. In a case reported in *AIR 1952 SC 235*, **Lachmandas Kewalram Ahuja versus State of Bombay,** the Hon"ble Supreme held that the master-servant relationship shall continue till subsisting contract of employment.

43. In view of aforesaid propositions, we reiterate that a person retired or superannuated from service shall cease to have control over his subordinates, a power conferred under Para 4 of the Army Regulations (supra).

44. In **Sushil Kumar Mehta versus Gobind Ram Bohra,** *(1990) 1 SCC 193*, the Apex Court after placing reliance on large number of its earlier judgments, particularly in **Premier Automobiles Ltd. Versus Kamlakar Shantaram Wadke,** *AIR 1975 SC 2238; (1976) 1 SCC 496* **Kiran Singh versus Chaman Paswan,** *AIR 1954 SC 340* and **Chandrika Misir versus Bhaiyalal**, *AIR 1973 SC 2391*, held that "a decree without jurisdiction is a nullity. It is a coram non judice; when a special statute gives a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the Common Law Court has no jurisdiction; where an Act creates an obligation and enforces the performance in specified manner, —performance cannot be forced in any other manner.

45. It is settled law that by the executive instructions (in the present case, the Army Order), the statutory provisions contained in the Act, Rules and Regulations cannot be circumvented or overridden. Conferment of jurisdiction to discharge certain statutory duties while holding the post of Chief of the Army Staff or other statutory post under the Army Act, will be as per provisions contained in the Army Act and thereafter, the Rules and then

Regulations. But subordinate legislation should not be contrary to statutory provisions.

46. In view of above, on the same analogy, neither the retired person has got authority to exercise power under the statutory provisions nor can action be taken against retired army personnel having no nexus with the armed forces for an offence committed in private capacity outside the duty or assignment in the Army. Master and servant relationship with a person retired from Army ceases to exist subject to any statutory provision viz provision for reservists.

47. Apart from above, the impugned regulations have not been supported by Army Act or Rules framed thereunder. Though in some judgments it has been held that they have statutory force, but so far as fundamental right of a person of armed forces to enjoy pensionary benefits is concerned, the same cannot be taken away by executive instructions or regulation in question. The letter and spirit of a statutory mandate cannot be allowed to circumvent by executive instructions (Army Orders). (Also see **Poonam Verma versus Delhi Development Authority**, *AIR 2008 SC 870*, **State of Uttar Pradesh versus Neeraj Awasthi,** *(2006) 1 SCC 667*, **The Purtabpur Company Ltd versus Cane Commissioner of Bihar**, *AIR 1970 SC 1896* and **Chandrika Jha versus State of Bihar,** *AIR 1984 SC 322.)*. The Hon‟ble Supreme Court in the case of **Veerendra Kumar Dubey** (supra), held, “That is because administrative instructions cannot make inroads into statutory rights of an individual. But if an administrative authority prescribes a certain

procedural safe guard to those affected against arbitrary exercise of powers, such safeguards or procedural equity and fairness will not fall foul of the rule or be dubbed *ultra vires* of the statute.

48. The Hon'ble Supreme Court has held that in case for any misconduct or action, a person is punished, then he or she cannot be punished again for the same action by other authority whether it is civil or military as it will amount to double jeopardy, hit by Article 20(2) of the Constitution of India.

49. The action taken against the applicant is a punitive one since it deprives him of the source of livelihood. A punitive order may be passed against a serving person for an act or offence committed by him in view of statutory provisions contained in the Army Act (supra) and not otherwise. There must be some source to pass a punitive order. It is well settled that a thing, which cannot be done directly, cannot be done indirectly. During British legacy, the respondents have tried to circumvent the fundamental rights of retired members of Army personnel indirectly, which is not permissible under the Army Act or the Rules framed thereunder.

50. The right of life and the right to personal liberty in India have been guaranteed by constitutional provision, which has received the widest possible interpretation. Under the canopy of Article 21 of the Constitution, so many rights have found shelter, growth and nourishment. An intelligent citizen would like to be aware of the

development in this regard, as they have evolved from judicial decisions.

51. Article 21 lays down that no person shall be deprived of lie or personal liberty, except according to procedure established by law. Though the Article appears to be negative in its grammatical form, it has, in reality, been given a positive effect by judicial interpretation. The right is a fundamental right, enforceable against the State; and judicial decision have imposed, on the State, several positive obligations. For example, a person who cannot pay for medical expenses must be given free medical treatment and that too, without delay. A person should not be hand-cuffed (after arrest on a criminal charge) save in certain exceptional situations.

52. A lay man may perhaps ask a simple but basic question, as to why a constitutional provision is needed on the subject. Is the ordinary law not sufficient? Now, it is true that the Indian Penal Code (45 of 1860) (Like the Penal Code in all countries) contain adequate provision to punish a person who takes away or attempts to take away the life of another human being. But the impact of a constitutional provision lies in the fact, that by being elevated to the pedestal of a fundamental right, the right is placed beyond the reach of ordinary legislation inspired by political motives.

53. "Life", in Article 21 is not merely the physical act of breathing. This has been recognized by the courts. In fact, as philosophers, tell us, life is lived at many levels. The Rig Ved {10.177.2}, gives a subtle

description of the mundane activity of speech. The soul (which, in the Rig Veda, is compared to a bird soaring high in the heavens), inspires or fills up the mind with speech. The "*Gandharva"* (the mind) carries it to the heart; and the, the luminous inspired speech takes shape, in words that can be heard. One can pursue this imagery further. While the external mundane activities of life have their own place, they are the manifestations of an inner, unseen, unperceived activity-which, indeed is the real *"life"* that a human being lives. It is true that judicial decisions on Article 21 do not embark upon such an analysis in depth. But they do take not of the width of the right to life. What follows, is a brief narration of this wide approach. It has been recognized that the mere right to life (Article 21) means more than the right to service. (Vide **Samatha v. State of Andhra Pradesh,** *AIR 1997 SC 3297: (1997) 8 SCC 191* (Empowerment of Tribunals), **Maneka Gandhi v. Union of India**, *AIR 1978 SC 597* **Gopalanchari v. Administrator, State of Kerela,** AIR 1981 SC 674, **Francis Coralie Mulin v. Union Territory of Delhi,** *AIR 1981 SC 746* and **Olga Tellis v. Bombay Municipal Corporation,** *AIR 1986 SC 180.* .

54. Since the impugned regulation is not in consonance with the Army Act or Rules framed thereunder and has not been notified after Parliamentary legislative action, it suffers from the vice of arbitrariness affecting the applicant's rights under Articles 14, 16, 300 and 300A read with Article 21 of the Constitution of India, hence

the impugned regulations of 1961 and other Army orders or instructions depriving a retired member of the armed forces from pensionary benefits on account of involvement or conviction in a criminal case have no nexus with the service and duties with the armed forces are held to be *ultra vires* to the Constitution as well as to the Army Act and Rules framed thereunder.

55. Article 300A of the Constitution protects the property which includes source of livelihood. A person cannot be deprived of such constitutional right except in accordance to law. Law means some statutory law framed in pursuance to power conferred under Army Act in the form of rules or regulations duly legislated by the Parliament. In the present case, it is missing. That apart, It is trite law that pension is a property and it cannot be reduced or taken away by government through executive fiat, vide AIR 1971 Supreme Court 1409 **Deokinandan Prasad v. State of Bihar**. Article 300A of the Constitution provides that a person cannot be deprived of property by an authority of law. Law means an Act of Parliament or of State Legislature, Rule or Statutory Order having force of law. It is well settled that pension and gratuity are valuable rights and property and not a bounty. It is not based on discretion of authorities but on statutory provisions (supra). A person may be deprived of the property only by authority of law and not by executive fiat or an order, vide AIR 1995 SC 142 **Jilubhai Nanbhai Khachar v. State of Gujarat.** When a person bonafidely possesses a property or raises a construction over a lawfully allotted land, such possession cannot be

dispossessed except and only by due course of law, vide AIR 1961 SC 1570 **Bishen Das v. State of Punjab.** In this view of the matter, the respondents have no right to deprive the applicant of service pension, which is the source of his livelihood and let him to die of starvation, that too when the master and servant relationship are no more with the employer and the employee.

56. Keeping in view the pleadings on record and our findings as recorded above, we come to the conclusion that the provisions of Paras 7, 8 and 9 of the Pension Regulations for the Army, Part-I (2008) as well as the impugned Para 74 of the Pension Regulations for the Army 1961 Part-II are ultra vires to the Constitution as Army Act and Rules framed thereunder to the extent they confer power on the respondents to deprive a retired army personnel of service benefits including pension on account of an offence which has no nexus with the service element of the Army.

ORDER

Accordingly, the OA is **allowed.** The provisions of Paras 7, 8 and 9 of the Pension Regulations for the Army, Part-I (2008) as well as the impugned Para 74 of the Pension Regulations for the Army 1961 Part-II being *ultra vires* to the Constitution as well as Army Act and Rules framed thereunder to the extent they confer power on the respondents to deprive a retired army personnel of service benefits including pension on account of an offence which has no nexus with the service element of the Army, are set aside. We direct the

respondents to pay full regular pension to the applicant from the date of his discharge with all consequential benefits.

We further direct the respondents that non-statutory rules, regulations or instructions be amended properly keeping in view the observations made in the body of the present judgment/order expeditiously, say, within a period of six months.

Let necessary exercise be done in compliance with this order within a period of six months from today.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Dated: January 19, 2018
LN/-