RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
(Circuit Bench at Nainital)

ORIGINAL APPLICATION No. 557 of 2020

Tuesday, this the 06th day of April, 2021

"Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)"

No. 12898763-P, Mahesh Chandra Joshi, S/o Sri Chandra Dutt Joshi, R/o Haldikhal, Jawahar Jyoti, Damuadhunga, Haldwani, District – Nainital.

….. Applicant

Ld. Counsel for the Applicant : **Shri Tarun PS Takuli, Advocate**,

Versus

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

2. Addl Dte Gen of Territorial Army, General Staff Branch, Integrated HQ of MoD (Army), L Block, Church Road, New Delhi-110001.

3. Record Officer, Controller of Defence Accounts (Army), Belvedere Complex, Ayudh Path, Meerut Cantt- 250001.

4. Deputy Controller of Defence Account, Pay Account Officer (Other Rank), The Kumaon Regt, Ranikhet- 263645.

5. Lt Col, Senior Records Officer, Record The Kumaon Regt, PIN- 900473, C/O 56 APO.

6. 130 Inf Bn (TA), Eco KUMAON, C/O 56 APO.

.....Respondents

Ld. Counsel for the Respondents. : **Shri Rajesh Sharma, Central Govt. Counsel**

ORDER

"Per Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)"

1. The instant Original Application has been filed by the applicant with the prayer to quash the impugned orders passed by the respondents and to release the terminal gratuity to the applicant.

2. Briefly stated, applicant served in the Indian Army for 17 years and after his retirement he joined Territorial Army (Ecological Kumaon) 130 Inf Bn (TA) ECO KUMAON on 04.08.2011 and retired from service of Territorial Army on 23.07.2019 after completing 05 years of service. As per Section 189 (a) of Pension Regulations for the Army, Part 1 (2008) "Terminal gratuity shall be granted to an individual who has completed a minimum of 5 years of aggregate embodied service in Territorial Army". Army Headquarters letter dated 01.02.2007, also provides that individual who has put in more than five years of embodied service is eligible for terminal gratuity. Individual was denied terminal gratuity, credit amount and FSA and TAGIF by the respondents. Being aggrieved applicant has filed the present O.A.

3. Learned Counsel for the applicant pleaded that after retirement from army, the applicant joined Territorial Army (Ecological Kumaon) 130 Inf Bn (TA) ECO KUMAON and retired after completing 05 years of service. As per Section 189 (a) of

Pension Regulations for the Army, Part -1 (2008) and Govt of India letter dated 01.02.2007, the applicant is eligible for grant of terminal gratuity as the other similarly situated employees, who have retired just prior to the applicant were granted terminal gratuity but the applicant has been denied the same. He pleaded that applicant was denied terminal gratuity in view of Govt of India letter dated 30.10.2018. Prior to issuance of this letter, individuals in the Territorial Army were being granted terminal gratuity. Since the applicant joined the Territorial Army prior to 30.10.2018, therefore, he is entitled to get terminal gratuity as in his case his services shall be governed by the old rules and previous conditions. His claim for grant of terminal benefits was wrongly rejected by the respondents vide letters dated 24.10.2018, 31.10.2018, 02.03,2019, 22.04.2019 and 09.07.2019.

4. On the other hand, Ld. Counsel for the respondents contended that applicant was discharged from T.A. after rendering 05 years of embodied service under T.A Rule 14 (A). At the time of enrolment, he was explained about terms of engagement as applicable to a person enrolled in Ecological Battalion as laid down in TA Enrolment Form and applicant was apprised that terminal gratuity shall not be granted to him. This was accepted and signed by the applicant. As per Govt of India letter dated 30.10.2018, no gratuity will be admissible to ex-servicemen and ex-women employees (including premature retiree) of MoEF & CC and State

Forest Department in Ecological Bn (TA) irrespective of length of service in the rank held in TA. PAO (OR) has intimated that in accordance with the said letter terminal gratuity is not admissible and also directed recovery of the Gratuity amount erroneously paid to few TA (Ecological) personnel before June 2018. As per paragraph 189 (b) of Pension Regulations for the Army, Part 1 (2008), the terminal gratuity shall be admissible only when the individual has not rendered the minimum qualifying service (including former military service) required for earning retiring/ service pension. In the instant case the applicant is already getting service pension for the previous 17 years of service. Accordingly his claim for grant of terminal gratuity was denied by the respondents. In view of the facts and rule position, the present O.A. is liable to be dismissed being devoid of merits.

5. We have heard Shri Tarun PS Takuli, Ld. Counsel for the applicant as also Shri Rajesh Sharma, Ld. Counsel for the respondents. We have also gone through the rule position and we find that the question which needs to be answered is whether “a rule made under Article 309 of the Constitution of India can be set at naught by an executive fiat’ and whether the applicant is entitled for grant of terminal gratuity?

6. In the instant case applicant has been denied terminal gratuity on the basis of Govt of India, Min of Defence letter dated

30.10.2018. Section 4 of Payment of Gratuity Act, 1972 reads as under:-

Section: 4, Payment of Gratuity.

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, - (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease: Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement: Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation. : For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he, was capable of performing before the accident or disease resulting in such disablement. (2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned: Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account.: Provided further that in the case of [an employee who is employed in a seasonal establishment and who is riot so employed throughout the year], the employer shall pay the gratuity at the rate of seven days wages for each season. Explanation: In the case of a monthly rated employee, the fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen. (3) The amount of gratuity payable to an employee shall not exceed three lakhs and fifty thousand] rupees. (4) For the purpose of computing the gratuity payable to an employee

who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced. (5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. (6) Notwithstanding anything contained in sub-section (1), - (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. (b) the gratuity payable to an employee may be wholly or partially forfeited] - (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

7. Section 189 (a) of Pension Regulations for the Army, Part-1, (2008) which deals with the conditions for grant of Terminal Gratuity reads as under :-

(a) Conditions for grant of Terminal Gratuity:- *Terminal gratuity shall be granted to an individual who has completed a minimum of 5 years of aggregate embodied service in Territorial Army or 10 years engagement in Territorial Army (combined embodied and non- embodied) and who dies during the period of disembodiment or who retires in the following circumstances:-*

(i) In the case of Officer or Junior Commissioned Officer:

(1) On disbandment/re-organisation/inter- zonal transfer of Units, provided there is no other Unit to which the individual can be transferred, or his consent to a transfer is necessary under the rules and he refuses to consent thereto.

(2) On reaching the prescribed retiring age;

(3) On being declared medically unfit for further service due to causes neither attributable to nor aggravated by military service;

(4) On completion of tenure of appointment or service limits; or

(5) When services are no longer required otherwise than on disciplinary grounds;

(ii) In the case of Other Ranks:

(1) On becoming entitled to receive his discharge under the Territorial Army Act/Rules;

(2) On being declared medically unfit for further service due to causes neither attributable to nor aggravated by military service,

Or

(3) When services are no longer required otherwise than on disciplinary grounds.

8. In view of the above, 'Terminal gratuity shall be granted to an individual who has completed a minimum of 5 years of aggregate embodied service in Territorial Army" and (in this case) on becoming entitled to receive discharge under the TA Act/Rules as per para (a) (i) and (ii) (1) quoted above. Pension Regulation 2008 is Statutory Rule and Govt of India letter dated 30.10.2018 cannot super cede and cannot have retrospective application over it.

9. The executive letter cannot super cede para 189 of Pension Regulations as the latter are considered as rules having force of law and are therefore of overriding effect. As far as question 'whether a rule made under Article 309 of the Constitution of India

can be set at naught by an executive fiat' is concerned, it is settled law that executive fiat cannot override the statutory provisions. Hon'ble Allahabad High Court in full Bench judgment in a similar matter in ***Special Appeal No 1143 of 2001*** decided on 28.07.2004, in the case of ***Vijay Singh and Others vs State of UP and Others*** has held as under:

> *It is settled legal proposition that executive instructions cannot override the statutory provisions. Executive instructions cannot amend or supersede the statutory Rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law, while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. In Union of India v. Sri Somasundaram Vishwanath, the Hon'ble Apex Court observed that if there is a conflict between the executive instruction and the rules framed under the proviso to Article 309 of the Constitution, the rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and law, the law will prevail. Statutory rules create enforceable rights which cannot be taken away by issuing executive instruction. In the case of Ram Ganesh Tripathi v. State of UP, the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/ order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law. The Hon'ble Court observed as under:-*
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> > *"They (respondents) relied upon the order passed by the State. This order also deserves to be quashed as it is not consistent with the statutory rules."*

10. In this regard, relevant paras 20 to 23 of the judgment passed by Hon'ble Principal Bench, New Delhi in ***O.A. NO 77 of 2015 with M.A. No 1279 of 2018, Sgmn Khaja Mohiddin Bhasha***

Shaik vs Union of India and Others decided on 30.08.2018 being relevant are reproduced as under:-

> *"20. As for as the legal validity of the Regulations for the Army 1987 is concerned, there is no doubt that it has been issued under the authorities of Army Act Section 192 to clarify & supplement the statute. The employer, Government of India is well within its right to issue these regulations giving clarity on a host of issues like discipline, dress, clothing, terms of service etc. These have the force of law. Reliance is placed on Civil Appeal No 3846 of 2010, Pepsu Road Transport Corporation Vs Jagroop decided on 12.05.2011, wherein the Apex Court had observed:-*
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> > *"16) It is well settled law that the Regulations made under the statute laying down the terms and conditions of service of employees, including the grant of retirement benefits, has the force of law. The Regulations validly made under statutory powers are as binding and effective as the enactment of the competent legislature. The statutory bodies as well as general public are bound to comply with the terms and conditions laid down in the Regulations as a legal compulsion. Any action or order in breach of the terms and conditions of the Regulations shall amount to violation of Regulations which are in the nature of statutory provisions and shall render such action or order illegal and invalid."*
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> > *17. In Sukhdev Singh Vs Bhagatram Sardar Singh Raghuwanshi, (1975) 1 SCC 421, the Apex Court had observed:-*
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> > > *30. In this view a Regulation is not an agreement or contract but a law binding the corporation, its officers, servants and the members of the public who come within the sphere of its operations. The doctrine of ultra vires as applied to statutes, rules and orders should equally apply to the Regulations and any other subordinate legislation. The Regulations made under power conferred by the statute are subordinate legislation and have the force and*

effect, if validly made, as the Act passed by the competent legislature.

33. There is no substantial difference between a rule and a Regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A Regulation framed under a statute applies uniform treatment to everyone or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame Regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These Regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and Regulations. The existence of rules and Regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory Regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and the employee with no option to vary the conditions. An ordinary individual in the case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of stator bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and Regulations."

21. Further in Vidyadhar Pande Vs Vidyut Grih Siksha Samiti, (1988) 4SCC 734, the Apex Court observed:-

> *"10. There is, therefore, no escape from the conclusion that Regulations have force of law. The order of the High Court must, therefore, be reversed on this point unhesitatingly".*

22. Even in the case of non-statutory Regulations like the Pension Regulations of the Army 1962, the Apex Court while elaborately discussing the nature and effect of the Regulations in Major (Retd) Hari Chand Pahwa Vs UOI & Ors 1995 Supp (1) SCC 221, had observed:-

> *"We do not agree even with the second contention advanced by the learned counsel. The provisions of Regulation 16 (a) are clear. Even if it is assumed that the Pension Regulations have no statutory force, we fail to understand how the provisions of the said Regulations are contrary to the statutory provisions under the Act or the Rules. The pension has been provided under these Regulations. It is not disputed by the learned counsel that the pension was granted to the Corporation under the said Regulations. The Regulations which provided for the grant of pension can also provide for taking it away on justifiable grounds."*

23. In view of the forgoing, there is no escape from the conclusion that Regulations of the Army (1987) have the force of law and we have no hesitation in rejecting the contention of the learned counsel for the applicant.

11. It is evident that executive instructions cannot be issued in contravention of the rules framed under the proviso to Article 309 of the Constitution and statutory rules cannot be set at naught by the executive fiat. It is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is but one. In case of ***UoI v. Sri Somasundaram Vishwanath,*** the Hon'ble Apex Court observed

that if there is a conflict between the executive instruction and the rules framed under the proviso to Article 309 of the constitution, the rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail. Moreover, if an individual can be granted double pension for services rendered in the army, then terminal gratuity can also be granted.

12. In view of the above, the O.A. deserves to be partly allowed, hence partly allowed. The impugned orders passed by the respondents rejecting the claim of the applicant for grant of terminal gratuity are set aside. The applicant is entitled for grant of terminal benefits for his services rendered in the Territorial Army as per pension regulations. Respondents are directed to give effect to the order within four months from the date of receipt of a certified copy of this order failing which the respondents shall have to pay interest @ 8% per annum till the date of actual payment.

No order as to costs.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 06 April, 2021
Ukt/-