RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 322 of 2016

Thursday, the 4th day of January, 2018

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

IC-18053F Colonel Hari Shankar Tripathi (Retd), S/O Pandit Rameshwar Tripathi R/O 479, Civil Lines Unnao, PS Kotwali, Distt-Unnao (U.P.).

…. Applicant (in person)

Verses

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

2. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.

…Respondents

Dr. Shailendra Sharma Atal, learned counsel for the respondents, assisted by Maj Salen Xaxa, OIC Legal Cell.

ORDER

"Per Hon'ble Mr. Justice Devi Prasad Singh, Member (J)"

1. The applicant, a retired Colonel of Indian Army, has preferred the present O.A. under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved with the withdrawal of weightage of six years given to him at the time of superannuation.

2. We have heard the applicant in person and perused the written arguments submitted on his behalf by his wife on 28.11.2017. The applicant is said to be admitted in Command Hospital at Kanpur for treatment of his serious physical ailment.

3. We have also heard Dr. Shailendra Sharma Atal, learned counsel appearing on behalf of the respondents, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

4. The factual matrix of the case is that the applicant joined the Indian Army (Bihar Regiment) on 30.06.1963. After rendering 27 years of service in the rank of Colonel (Selection Grade), he retired on 30.06.1990. Admittedly, his services are governed by the Defence Service Regulations. Pension is payable to a commissioned officer in terms of Qualifying Service as defined in Regulation 5 of the Pension Regulations, 1961, which is reproduced as under:

"5. ***Qualifying Service:***

(a) The term 'Qualifying Service' (QS) shall mean-

Category	*Qualifying Service reckonable for*			
	Pension	*Death-cum-Retirement Gratuity*		*Retiring/ Service/ Invalid/ Terminal Gratuity*
		Retirement Gratuity	*Death Gratuity*	
Officers	*Actual qualifying service rendered by the officer plus a weightage (in years) appropriate to the rank last held as*	*Actual qualifying service plus a weightage of 5 years subject to the total qualifying service including weightage not*	*Actual qualifying service rendered plus a weightage of 5 years subject to total qualifying service not exceeding 33 years. In case actual service is less than 5 years no weightage shall be given.*	*Actual qualifying service rendered.*

Personnel below officer rank (including NCs (E) and Honorary Commissioned officers	*indicated in (b) below subject to the total qualifying service including weightage not exceeding 33 years. Actual qualifying service rendered by the individual of 5 years subject to the total qualifying service including weightage not exceeding 33 yrs.*	*exceeding 33 years.* *Same as above*	*Same as above*	*Same as above*

(b) Weightage for the purpose of calculation of pension of Commissioned officers will be as given below:-

(i) Service Officers (other than MNS)

Rank			
Army	*Navy*	*Air Force*	*Weightage in years*
Subaltern	*Sub Lt*	*Plt/Flg Offr*	*9*
Captain	*Lt*	*Flt Lt*	*9*
Major	*Lt Cdr*	*Sqn Ldr*	*8*
Lt Col (TS)	*Cdr (TS)*	*Wg Cdr (TS)*	*5*
Lt Col (S)	*Cdr (S)*	*Wg Cdr (S)*	*7*
Col	*Captain (with less than 3 years 10 months service)*	*Gp Capt*	*7*
Brig	*Capt (with 3 years 10 months service & more)*	*Air Cmde*	*5*
Maj Gen	*Rear Admiral*	*AVM*	*3*
Lt Gen	*Vice Admiral*	*Air Marshal*	*3*
Lt Gen/Army Commander/VCOAS	*Vice Admiral/Fos-in-C/VCNS*	*Air Marshal/AOs-in-C)/VCAS*	*3*
COAS	*CNS*	*CAS*	*3*

5. In view of Regulation 5 of Pension Regulations (supra), the applicant was granted weightage of six years, making his total pensionable service as 33 years. The aforesaid Regulation 5 has got statutory force; accordingly, the weightage of six years granted to the applicant in addition to his qualifying service of 27 years apparently extends statutory benefits to him.

6. After grant of weightage of six years (supra), pension of the applicant was fixed treating his qualifying service for 33 years (inclusive of weightage) under Pension Payment Order (PPO), a copy of which has been filed as Annexure A-3 to the O.A. The last pay drawn by the applicant was Rs. 5,100/- in the rank of Colonel plus Rs. 1,000/- added to it as rank pay, total Rs. 6,100/- per month and pension sanctioned to him was Rs. 3,050/- (50% of Rs. 6,100/-). After Fifth Central Pay Commission (CPC), his pension was enhanced to Rs. 8,550/- with 33 years of service (including weightage of six years given to him at the time of retirement). A copy of revised PPO has been filed as Annexure A-4 to the OA.

7. It may be noted that grant of maximum weightage in accordance to Annexure A-4 may be of seven years of service but the applicant was granted weightage of six years to make his qualifying service as 33 years since full pension is granted for maximum 33 years of service including weightage.

8. The applicant’s pension was further revised in pursuance to Sixth CPC vide MoD letter/order dated 11.11.2008, a copy of

which has been filed as Annexure A-5 to the O.A., inclusive of six years' weightage. Again, his pension was revised vide MoD letter dated 17.01.2013 fixing it at Rs. 27,795/-. A copy of the said MoD letter/order has been annexed with the O.A. as Annexure A-6.

9. According to Para 5 (b) (i) of the letter of the Ministry of Defence dated 11.02.1998 referred to and reproduced in para 4.11 of the O.A., the maximum weightage that can be given to the officers of the rank of Colonel is of seven years. It is categorically stated in paras 4.12 and 4.13 of the O.A. that the weightage of service for Qualifying Service was never abolished or withdrawn in respect of the officers who retired before 01.01.2006 and keeping in view the fact that the recommendations of Sixth CPC were implemented with effect from 01.01.2006, the same could not have been given a retrospective effect.

10. The respondents have not filed a detailed counter affidavit containing parawise reply to the O.A. However, an affidavit dated 27.10.2017 has been filed by them containing their counter versions. It appears that the respondents have avoided to file reply to the categorical pleadings made in the O.A., hence we may safely infer that the provisions with regard to grant of weightage for Qualifying Years, as exist in the Service/Pension Regulations have not yet been abolished, as averred by the applicant and the CPC 2006 has been given effect to from

01.01.2006 without affecting the applicant's service career to the extent of grant of weightage.

11. A dispute arose from March 2016 when the applicant received the pension slip along with a copy of calculation sheet (***Annexure A-7 to the O.A.***) with regard to arrears of pension paid to him. Immediately on receipt of aforesaid calculation sheet, the applicant represented his case to the Branch Manager, State Bank of India; vide Annexure A-8 to the O. A. The Branch Manager, State Bank of India informed that the applicant has been paid pension under One Rank One Pension (OROP) scheme for 27 years of his service and payment of arrears has accordingly been made. A copy of the statement issued by Branch Manager, State Bank of India dated 16.01.2016 has been filed as Annexure A-9 to the O.A.. The applicant submitted another application (Annexure A-10 to the O.A.) and also went to meet opposite party No. 2 Senior Account Officer on 11.04.2016. It is submitted that Shri R.V. Sharma, Senior Account Officer came down to Ground Floor to meet the applicant, a handicapped Army veteran, who lacked capacity to go upstairs. After great efforts, the applicant's representation (Annexure A-10) was received by Niranjan Kumar and which has been replied by the impugned order dated 16.06.2016 (Annexure A-15) reiterating that the respondents have right to calculate pension in pursuance to OROP and weightage given to the applicant shall not be counted, as was done at the initial stages.

12. The applicant has vehemently argued that the impugned deduction of pension and withdrawal of weightage given to him in pursuance to statutory provisions (supra) is substantially illegal for the reason that the weightage has been given to him in pursuance to statutory mandates which could not have been withdrawn since the said provisions still survive under the Pension/Service Regulations (supra) and secondly, pension is a property and it could not be withdrawn in violation of principles of natural justice. According to the applicant, *audi alteram partem* is the pulse-beat of Indian Constitution and decision taken by the respondents *ex parte* suffers from the vice of arbitrariness.

13. The other limb of the arguments advanced by the applicant is that the Principal Controller of Defence Accounts (Pension) (PCDA(P) in short) has no authority to lay down any policy or guide-line (vide Annexures A-1 and A-2), which has been relied upon for withdrawal of weightage. In the absence of such authority, that too under the teeth of Service Regulations, the Circular issued by PCDA (P) not only suffers from the vice of arbitrariness, but is also without jurisdiction, hence withdrawal of weightage given to the applicant and deduction of pension is not sustainable and the clarificatory order issued by the PCDA (P) is without jurisdiction.

14. In response to the arguments advanced by the applicant, Dr. Shailendra Sharma Atal, Ld. Counsel for the respondents does not dispute that the applicant was granted weightage of 5

years initially under Service Regulations. He, however, submits that the stoppage of weightage was introduced during Fourth CPC by the Government of India, Ministry of Personnel Public Grievance and Pension Welfare Resolution No. 2/13/87/PIC. It has been argued as well as pleaded by the respondents in paras 4, 5 and 6 of the counter affidavit that the Sixth CPC is applicable with effect from 01.01.2006 and the benefit of addition of years of qualifying service (rank weightage) in respect of commissioned officers retired/retiring/invalided out on or after 02.09.2008, was withdrawn with effect from 01.09.2008 for the purpose of computation of pension by the GoI, MoD letter dated 12.11.2008. Later, the date of linkage of full pension with 33 years Qualifying Service has been dispensed with from 01.01.2006 through Pension Policy dated 30.10.2009 (Annexure SCA-1 and 2 to the Counter Affidavit). It has been argued that weightage in Qualifying Service became infructuous after 01.01.2006. It shall be appropriate to reproduce the averments made by the respondents in paras 5 and 6 of the Counter affidavit as under:

> "5. *That after the introduction of 6th CPC applicable w.e.f 01/01/2006, the benefit of addition of years of qualifying service (rank weightage) in respect of Commissioned Officers retired/retiring/invalided out on or after 2/9/2008, was withdrawn with effect from 1/9/2008 for the purpose of computation of pension vide para 5.1.3 of GoI, Mod letter no. 17(4)/2008(2)/D (Pen)/Policy) dated 12.11.2008. Later, the date of linkage of full pension with 33 years of Qualifying Service has been dispensed with from 01.01.2006 instead of from 1/9/2008 vide 17(4)/2008(2)/D (Pen)/Policy) dated 30/10/2009.* ***(A copy of GoI, Mod letter dated 12/11/2008 and 30/10/2009 is annexed as Annexure SCA-1 & 2).***

> 6. *That it is important to bring into the notice of the Hon'ble court that the following weightage in Qualifying Service became infructuous after 01/01/2006 as pension of all the retirees have been fixed at 50% of last emolument, delinking the years of Qualifying for the grant of Full Pension."*

15. Thus, it is not disputed by the respondents that the Sixth CPC has been made applicable from 01.01.2006 and the weightage in Qualifying Service has been withdrawn from 01.09.2008 (supra) with regard to commissioned officers retiring/invalided out on or after 02.11.2008. Nothing has been brought on record to show as to how the weightage given to the applicant prior to 01.09.2008 under statutory provisions could have been withdrawn by the respondents without amending the Regulations.

16. The other limb of arguments and pleading on record made by the respondents is that the Government of India MoD letter/Policy dated 03.02.2016 in respect of OROP has been made applicable on the basis of maximum terms of engagement for each rank. In this regard, the averments made in Para 11 of the counter affidavit are relevant. For convenience sake, the same are reproduced as under:

> *"11.* ***<u>One Rank One Pension (OROP)</u>****. That the OROP implies that uniform pension be paid to the Defence Forces Personnel retiring in the same rank with the same length of service, regardless of their date of retirement, which, implies bridging the gap between the rates of pension of current and past pensioners at periodic intervals. The provision made by the GoI for implementation of OROP notified vide GoI, MoD, letter No 12(1)/2014/D(Pen/Policy)-Part II dated 03/02/2016.*

*"**The existing pension of all pre 1.7.2014 pensioners/family pensioners shall be enhanced with reference to applicable table for the rank (and group in case of JCOs/Ors) in which pension with reference to the actual qualifying service as shown in Column-1 of the tables subject to maximum term of engagement for each rank as applicable from time to time**". The rate of pension of pensioners/family pensioners drawing pension more than the rate of revised pension/family pension indicated in annexed tables, shall remain unchanged.*

Salient features of the OROP are as follows:-

(i) To begin with, pension of the past pensioners would be re-fixed on the basis of pension of actual retirees of calendar year 2013 and the benefit will be effective with effect from 01/07/2014.

(ii) Pension will be re-fixed for all pensioners on the basis of the average of minimum and maximum pension of personnel retired in 2013 in the same rank and with the same length of service.

(iii) Pension for those drawing above the average shall be protected.

(iv) Arrears will be paid in four equal half yearly instalments. However, all the family pensioners including those in receipt of Special/Liberalised family pension and Gallantry award winners shall be paid arrears in one instalment.

(A copy of GoI, MoD, letter No 12(1)/2014/D(Pen/Policy)-Part II dated 03/02/2016 is annexed as Annexure SCA-7).

The rates of retiring pension under OROP scheme for regular commissioned officer of Army and equivalent rank is appended below:-

Actual Qualifying Service	*Colonel*
0.5	*17673*
1	*17942*
1.5	*18219*
2	*18496*
2.5	*18782*
3	*19068*
3.5	*19363*
.....	*.....*
25	*34485*

25.5	*34485*
26	*34485*
26.5	*34485*
27	***34835***
27.5	*34835*
28	*35230*
28.5	*35230*
29	*35235*
29.5	*36130*
30	*36130*
30.5	*36130*
31	*36130*
31.5	*36130*
32	*36130*
32.5	*36130*
33 & above	*36130*

17. From the own pleadings of the respondents (supra), there appears to be no dispute that OROP has been implemented on the basis of maximum term of engagement for each rank. In this situation, whether the term of engagement shall exclude the weightage granted to an army personnel earlier in pursuance to Service Regulations (supra) at the time of retirement, is a question which requires to be adjudicated upon in the present case. It is also to be seen as to whether under fiction of law, the meaning of weightage is the same as is given to a person who rendered service of the maximum period for the purposes of payment of pensionary benefits and what shall be the actual qualifying service for payment of pension? Dr. Shailendra Sharma Atal, learned counsel for the respondents further argues that the actual qualifying service in the present case is 27 years i.e. minus 6 years of weightage, hence revised pension of the applicant was worked out on the basis of OROP as per MoD Letter dated 03.02.2016. The calculation of pension done in

respect of the applicant has been indicated in Para 17 of the counter affidavit, which is reproduced as under:

"17. The pension fixation and revision is tabulated as under:-

	Date of effect of pension	*Method of calculation Pay Scale/Last Pay*
1	*01/07/1990*	*Basic pension- Average of Last ten months basic pay and rank pay* (27+7 restricted to 33 years)/2*33 =6100/2 =3050/- PM*
2	*01/01/1996*	*(Minimum pay in the corresponding pay scale i.e. 15100-400-18300 + Rank Pay)* (27+7 restricted to 33 years)/2*33 =(15100+2000)/2 =Rs.8550/- P.M.*
3	*01/01/2006*	*(Minimum pay in the corresponding pay band i.e. 37400-67000+Grade Pay+MS Pay)*(27+7 restricted to 33 years)/2*33 =(37400+8700+6000)/2 =Rs. 26050/- P.M.*
4	*after issuance of circular no. 548 dated 11.09.2015, the pension revised w.e.f. 01/01/2006*	*Rs. 27795/- PM*
5	*01/07/2014* ***(OROP Pension)***	*Rs. 34835/- P.M.*
6	*01/01/2016*	*Rs. 34835 x 2.57 = 89,526/-*

Present Pension =Rs.89526 + Dearness Relief as applicable"

18. Subject to the aforesaid arguments advanced by learned counsel for both the parties and the pleadings on record, the controversy requires consideration on following issues.

WEIGHTAGE AND FICTION OF LAW

19. Weightage has been given to the applicant in pursuance to Regulation 5 of Pension Regulations, 1961. It has not been disputed that the Pension Regulation has not been amended, keeping in view the OROP scheme and still continues. The applicant has been paid pension till recent past, keeping in view the weightage given to him at the time of superannuation from service.

20. On account of grant of weightage of six years of service based on applicant's service record, the applicant's pension was calculated on the basis of 33 years of service which has been continuing for the last 27 years.

21. In Black's Law Dictionary the word 'weight' has been defined as under:-

> *"A measure of heaviness; a measure of the quantity of matter."*

22. The literal meaning of 'weight' or 'weightage' means addition of something to enhance quantity or importance of facts in issue. Accordingly, after addition of weightage of six years in applicant's service career, the total service period shall be deemed to be 33 years and having been done so in pursuance to

statutory provision, which is welfare legislation; it could not have been annulled or withdrawn at later stage, that too after about 30 or 40 years. Addition of weightage under Regulation (supra) is not an interim arrangement but an incident of service based on beneficial legislation (supra).

23. Calculation in payment of pension after addition of weightage of six years (unserved period of service) is done in pursuance to welfare provision creating fiction of law. Fiction of law means a supposition, that a thing is true, without enquiring whether it be so or not, that it may have the effect of truth so far as is consistent with equity. It is allowed in several cases; but it must be framed, according to the rules of law; not what is imaginable in the conception of man: and there ought to be equity and possibility in every legal fiction. (Tomlin). A legal assumption that a thing is true which is either not true, or which is as probably false as true; an allegation in legal proceedings, that does not accord with the actual facts of the case; and which may be contradicted for every purpose, except to defeat the beneficial end for which the fiction is invented and allowed. (Vide New Hampshire Stafford Bank v. Cornell, 2 N.H. 324, 327).

> "*A fiction law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." (Lord MANSFIELD, Mostyn v. Fabrigas, (1775) Cowp, 161).*
>
> "*Fiction are allowed against all the king's subjects for the furtherance, but never for the hindrance, of justice." Lord MANSFIELD, Lane v. Wheat (1780) 1 Doug 314).*

> *A supposition of law that a thing is bad without inquiring whether it be so or not that it may have the effect of truth so far as is consistent with justice e.g. ejectment fine, trover etc.*

24. Thus, fiction of law constitutes legal fiction to do something which does not exist as welfare activity or on equitable ground. Legal fictions are also the sources of law which a statutory provision provides. It is legally enforceable, constituting legal rights. Legal fiction has been defined in ADVANCED LAW LEXICON 4th Edition, Volume 3, page-2748 as below:-

> "*Legal Fiction is defined as a legal assumption that a thing is true which is neither not true, or which is as probably false as true; an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place; an allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for the very purpose except to defeat the beneficial end for which the fiction is invented and allowed. Thus fiction in the realm of law has a defined role to play but it cannot be stretched to a point where it loses the every purpose for which it is used and in no case should it be allowed to perpetrate injustice; fiction of law shall not be permitted to work any wrong, but shall be used 'ut res magis valeat quam pereat'* ***Brijnandan Singh vs. Jamuna Prasad Sahu,*** *MLJ: QD (1956-1960) Vol IV C2979:1958 BLJR 122: AIR 1958 Pat 589: ILR 37 Pat 339.*
>
> *"I……..employed the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified…..It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present."* ***HENRY S. MAINE****, Ancient Law, 21-22 (17th ed. 1901).*
>
> *"LEGAL FICTION is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal*

*treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." **MORRIS R. COHEN**, Law and the Social Order, 126 (1933).*

*A legal fiction presupposes the correctness of the state of facts on which it is based and all the consequences which flow from the state of facts have got to be worked out to their logical extent. If the purpose of legal fiction is for a specified purpose, one cannot travel beyond the scope of that purpose. **Bengal Immunity Co. vs. State of Bihar**, AIR 1955 SC 661, 709 (Constitution of India, Art. 286(2).*

*A legal fiction has to be strictly confined to the area in which it operates. The legal fiction must be limited to the purposes indicated by the context and cannot be given a larger effect. The context is vital. It should be carried to its logical conclusion. (**Rahas Bihari Das vs. State,** AIR 1995 Ori 23 at 30)."*

25. In view of above, pension calculated after grant of weightage in accordance to statutory provisions (supra), it is not open for withdrawn, that too after decades in pursuance to executive instructions. Once weightage is given, it becomes inseparable part of pension and it is not open to review it by administrative actions. Otherwise also grant of weightage under Statutory Regulations cannot be interpreted in a manner which may result into reduction of weightage by withdrawal of benefit through executive instruction issued in pursuance to Pay Commission Report. Hon'ble Supreme Court in a case reported in 1992 (4) SCC 245 ***Cochin Shipping Co. Etc. Etc. vs. E.S.I. Corporation*** held that as far as possible the endeavour of Court should be to place a liberal construction on such beneficial or social welfare legislation so as to promote its objects to benefit those employees for whose benefit it has been made than to deny the benefit of the provisions. Same principle has been

reiterated in the case reported in 2005 (4) SCC 468 ***Shantha vs. Shivananjappa,*** 2010 (2) SCC 44 ***Allahabad Bank vs. All India Allahabad Bank Retired Employees Association***, 1985 (4) SCC 71, ***Workmen of American Express vs. Management of American Express International Banking Corporation***. In view of above proposition of law, it is not permissible for the respondents to withdraw the benefit made available to the applicant at the time of retirement by addition of weightage, at later stage without amending the regulation, acquiring power for the purpose and applicant's service shall be deemed to have been increased by the period granted through the weightage given.

PENSION IS A PROPERTY

26. Now it is trite law that pension is a property and it cannot be reduced by government through executive fiat, that too without opportunity of hearing, vide AIR 1971 Supreme Court 1409 ***Deokinandan Prasd 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.

27. Undisputedly, payment of pension was decided after adding of weightage in accordance with rules. In case weightage is reduced it shall also reduce total pension admissible to the applicant, even after applying 'OROP'. A Constitution Bench of Hon'ble Supreme Court in a case reported in 1997 (6) SCC 623 ***Chairman, Railway Board vs. C.R. Rangadhamaiah*** held that pension permissible under rule at the time of retirement cannot be reduced retrospectively at later stage as it shall be unreasonable and arbitrary and shall be violative of Articles 14 and 16 of the Constitution. For convenience Paras- 24, 25, 32 and 33 of the aforesaid judgment are reproduced as under:-

> *"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the*

Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (supra), B.S. Yadav (supra) and Raman Lal Keshav Lal Soni & Ors., (supra).

25. In these cases we are concerned with the pension payable to the employees after their retirement. The respondents were no longer in service on the date of issuance of the impugned notifications. The amendments in the rules are not restricted in their application in futuro. The amendments apply to employees who had already retired and were no longer in service on the date the impugned notifications were issued.

32. It is no doubt true that on December 5, 1988 when the impugned notifications were issued, the rights guaranteed under Articles 31(1) and 19(l)(f) were not available since the said provisions in the Constitution stood omitted with effect from June 20, 1979 by virtue of the Constitution (Forty-fourth Amendment) Act, 1978. But the notifications G.S.R. 1143 (E) and G.S.R. 1144 (E) have been made operative with effect from January 1, 1973 and April 1, 1979 respectively on which dates the rights guaranteed under Articles 31(1) and 19(l)(f) were available. Both the notifications in so far as they have been given retrospective operation are, therefore, violative of the rights then guaranteed under Articles 19(1) and 31(1) of the Constitution.

33. Apart from being violative of the rights then available under Articles 31(1) and 19(l)(f), the impugned amendments, in so far as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement. ”

In another case reported in (2001) 9 SCC 369 ***Chandreshwar Prasad Sinha vs. State of Bihar and another*s,** Hon’ble Supreme Court reiterated the aforesaid principle of law.

28. Aforesaid proposition of law was followed in another case reported in (2006) 9 SCC 630 ***U.P. Raghavendra Acharya and others vs. State of Karnataka and others***. Hon'ble Supreme Court held that a power cannot be exercised in such a manner which may deprive the employees of their vested or accrued right (supra), even through the notification issued in pursuance of recommendation of Pay Revision Committee. For convenience Paras- 21, 22 and 28 of the aforesaid judgment of **U.P. Raghavendra Acharya and others vs. State of Karnataka and others** (supra) are reproduced as under :-

> *"21. It is one thing to say that the State can fix a cut-off date unless and until the same is held to be arbitrary or discriminatory in nature, the same would be given effect for carrying out the purpose for which it was fixed. In this case, the cut-off date for all intent and purport had been fixed as 1.1.1996. It is, thus, not a case where cut-off date was fixed as 1.4.1998 as the State merely intended to confer only same benefits. It is, thus, also not a case like Transmission Corporation, A.P. Ltd. vs. P. Ramachandra Rao, where a section of the employees were excluded from being given the benefit of revised pension as they had retired prior to the cut-off date.*
>
> *22. The State while implementing the new scheme for payment of grant of pensionary benefits to its employees, may deny the same to a class of retired employees who were governed by a different set of rules. The extension of the benefits can also be denied to a class of employees if the same is permissible in law. The case of the appellants, however, stands absolutely on a different footing. They had been enjoying the benefit of the revised scales of pay. Recommendations have been made by the Central Government as also the University Grant Commission to the State of Karnataka to extend the benefits of the Pay Revision Committee in their favour. The pay in their case had been revised in 1986 whereas the pay of the employees of the State of Karnataka was revised in 1993. The benefits of the recommendations of the Pay Revision Committee w.e.f. 1.1.1996, thus could not have been denied to the appellants.*

> *28. The impugned orders furthermore is opposed to the basic principles of law inasmuch as by reason of executive instructions an employee cannot be deprived of a vested or accrued right. Such a right to draw pension to the extent of 50% of the emoluments, computed in terms of the rules, w.e.f. 1.1.1996, vested to the appellants in terms of Government notification read with Rule 296 of the Rules."*

29. Undisputedly, Pension Regulations (supra) have not yet been amended, acquiring power to deprive a member of Armed Forces from the weightage given to him. In such a situation by executive fiat or order passed by the PCDA (P), Allahabad applicant cannot be deprived from pensionary benefits, bonafidely given to him by addition of weightage in pursuance to statutory regulations.

30. Undisputedly, Pension Regulations have not been rescinded or modified empowering the respondents to reduce or withdraw the weightage granted to the applicant. Regulation being statutory in nature, it is not open to withdraw such right issued in pursuance of recommendation of Pay Commission. Perhaps this proposition of law has been kept in mind by the respondents while issuing the order dated 03.09.2015, dealt with herein after, which provides that pension higher than existing pension, calculated on the basis of one rank one pension shall not be reduced.

AUDI ALTERAM PARTEM

31. It has been vehemently argued by the applicant, who appeared in person and pleaded in the O.A. that the pension

could not have been reduced almost after 3 decades under the garb of OROP without providing opportunity of hearing and show cause. In ***Union of India vs. Tulsiram Patel***, AIR 1985 SC 1416 the Hon'ble Supreme Court held:-

> *"Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible."*

32. It is equally well settled that the principles of natural justice must not be stretched too far and in this connection reference may be made to the decisions of the Supreme Court in ***Sohan Lal Gupta & Ors vs. Asha Devi Gupta & Ors***, (2003) 7 SCC 492; ***Mardia Chemicals Ltd vs. Union of India***, AIR 2004 SC 2371 and ***Canara Bank vs. Debasis Das***, AIR 2003 SC 2041.

33. In ***Hira Nath Mishra & Ors vs The Principal, Rajendra Medical College, Ranchi & Anr***, AIR 1973 SC 1260, the Hon'ble Supreme Court held that principles of natural justice are not inflexible and may differ in different circumstances. Rules of natural justice cannot remain the same applying to all conditions.

34. The Constitution Bench of the Supreme Court in ***Managing Director ECIL, Hyderabad vs. B Karunakar***, AIR 1994 SC 1074 made reference to its earlier decisions and observed:-

> *"In **A.K. Kraipak & Ors vs. Union of India & Ors**, AIR 1970 SC 150, it was held that the rules of natural justice operate in areas not converted by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why, they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice."* *(Emphasis added)*

35. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. The expression "natural justice" and "Legal Justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of natural justice. Natural justice relieves legal justice from unnecessary

technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to execute the presentation of a litigant's defence….***Canara Bank vs. V.K. Awasthy,*** AIR 2005 SC 2090.

36. In another case, reported in "(2007) 6 SCC 130 ***D. Dwarakanath Reddy Versus Chaitanya Bharathi Educational Society and others***", their Lordships of the Apex Court held that the principle of natural justice requires the issuance of notice calling for an explanation and affording reasonable opportunity of being heard. In the case of ***Allwyn Housing Colony Welfare Association vs. Government of Andhra Pradesh & Ors***, 2009 (27) LCD 1258 also it was held that no order adverse to a party may be passed without providing opportunity of hearing.

37. 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.

ONE RANK ONE PENSION

38. The sole contention of the respondents' counsel is that because of implementation of OROP applicant's pension has been reduced for the reason that his actual service of 27 years has been counted for the purpose of OROP. It is also pleaded and submitted that grant of weightage, which was introduced in pursuance to VI Pay Commission after 01.01.2006 seems to have become infructuous. How the weightage granted by statutory provision became infructuous is not understandable. A right conferred by statutory provision (Pension Regulations), continuing since June, 1990 if treated to have become infructuous in 2016, that too without statutory mandate, it shall be fraud with the Constitution. A person cannot be deprived from his civil rights in contravention of principles of natural justice by executive instructions. Regulations (supra) stand at higher pedestal, over and above the executive instructions and right conferred by such a regulation can be taken away only by equivalent or higher statutory provision, which seems to be missing in the present case.

39. Respondents have relied upon in their counter affidavit upon an order of Ministry of Defence dated 03.09.2015 (Annexure No.6), followed by order dated 03.02.2016 (Annexure No.7). A careful reading of the order of Ministry of Defence dated 03.02.2016 indicates that it has been made applicable from 1st of July, 2014. It also provides that the rate of pension of pensioners/family pensioners drawing more than the revised pension/family pension shall remain unchanged. It means in case pension revised under OROP scheme is lesser than what has already been paid to an incumbent before 1st of July, 2014, it shall remain unchanged. The relevant portion from the order dated 03.02.2016 of the Ministry of Defence as contained in Annexure No.7 to the counter affidavit is reproduced as under :-

> *"The undersigned is directed to say that in order to quicken the process of revision of pension/family pension, total 101 pension tables indicating rates of pension/family pension under OROP scheme notified vide this Ministry's order dated 7th Nov, 2015, are appended to this order. The appended tables indicate revised rates of Retiring/Service/Special/Disability/Invalid/Liberalized disability/War Injury pension including disability/war injury element and ordinary/special/liberalized family pension of Commissioned Officers, Honorary Commissioned Officers, JCOs/Ors and non-combatants (Enrolled) of Army, Navy, Air Force, Defence Security Corps and Territorial Army retired/discharged/Invalided out from service/died in service or after retirement. The existing pension of all pre-1.7.2014 pensioners/family pensioners shall be enhanced with reference to applicable table for the rank (and group in case of JCOs/Ors) in which pension with reference to the actual qualifying service as shown in Column-I of the tables subject to maximum term of engagement for each rank as applicable from time to time. The rate of pension of pensioners/family pensioners drawing pension more than the rate of revised pension/family pension indicated in annexed tables, shall remain unchanged."*

40. Same principle flows from the order of Government of India, Ministry of Defence dated 03.09.2015. A copy of which has been filed as Annexure No-6 to the counter affidavit. A plain reading of Paras-1, 2, 3 and 4 of it shows the same thing, which emerges from subsequent order of the Government of India dated 03.02.2016 (supra). The relevant portions of the order of Ministry of Defence dated 03.09.2015 relied upon by the respondents in their counter affidavit are reproduced as under:-

> *"1. The undersigned is directed to refer to this Ministry's letter No 17(4)/2008(1)/D(Pen/Pol) dated 11.11.2008 as amended, issued in implementation of government decision on the recommendation of the Sixth CPC for revision of pension/family pension in respect of pre-2006 Armed Forces pensioner/family pensioners. As per provisions contained in Para 5 therein, with effect from 01.01.2006 revised pension and revised ordinary family pension of all pre-2006 Armed Forces pensioners/family pensioners determined in terms of fitment formula laid down in para 4.1 above said letter dated 11.11.2008, shall in no case be lower than fifty percent and thirty percent respectively, of the minimum of the pay band plus the Grade pay corresponding to the pre-revised scale from which the pensioner had retired/discharged/invalided out/died including Military Service Pay where applicable.*
>
> *2. The above minimum guaranteed pension was revised vide GOI, MOD letter No 1(11)/2012/D(Pen/Pol) dated 17.01.2013 with effect from 24.09.2012 at the rate of minimum of fitment table for the Rank in the revised pay band as indicated under fitment table annexed with SAI 2/S/2008 and SAI 4/S/2008 as amended, plus Grade pay corresponding to the pre-revised scale from which the pensioner had retired/discharged/invalided out/died including Military Service Pay.*
>
> *3. Now, after issue of GOI, Ministry of Personnel, PG & Pensioners, Department of Pension & Pension Welfare OM No. 38/37/08-P & PW (A) dated 30.07.2015, it has been decided that the pension/family pension of all pre-2006 pensioners/family pensioners may be revised in accordance with Para 2 with effect from 01.01.2006 instead of 24.09.2012.*
>
> *4. In case the consolidated pension/family pension calculated as per para 4.1 of this Ministry's letter No. 17(4)/2008 (1)/O (Pen/Pol) dated 11.11.2008 is higher than the pension/family pension calculated in the manner indicated*

above, the same (higher consolidated pension/family pension) will continue to be treated as basic pension/family pension."

41. There appears to be non-application of mind by the respondents while reducing the pensioner's pension by withdrawing the weightage granted in June, 1990 at the time of superannuation. OROP does not contemplate for reduction of pension in any manner whatsoever. The circular dated 17.01.2013 issued by the Government of India, Ministry of Defence, which is the foundation of OROP scheme uses the words "minimum guaranteed pension and ordinarily family pension". It means the Government of India undertakes to provide minimum guaranteed pension to a retired member of defence services. It does not create any bar for grant of higher pension, which may be payable or paid keeping in view the facts of each case. Direction issued by the Government of India through letter dated 17.01.2013, followed by letters dated 03.09.2015 and 03.02.2016 contained in Annexures No. 5, 6 and 7 respectively, directing the pension disbursing authorities to set up the family pension of pre- 2006 pensioners seems to be misunderstood and appears to be a case of non-application of mind. We could not find any order issued by the Government of India, which may have empowered the PCDA (P) to withdraw the weightage and reduce applicant's pension under OROP. The purpose of OROP shall be frustrated in case pension or family pension of the members of Armed Forces is reduced under the said scheme that is why the Government of India has taken

precaution in its order (supra), instructing not to make any change in case pension granted or paid to the members of Armed Forces is higher than pension calculated under OROP.

PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (PENSION)

42. It has been pleaded by the applicant that the respondent no.2, PCDA (P) lacks jurisdiction to take a decision to withdraw the weightage reducing the pension, ignoring the direction issued by the Government of India. Government of India through Ministry of Defence exercises its power in pursuance of Army Act, Navy Act and Air Force Act while dealing with the matter of Armed Forces Act and issuing circulars with regard to service conditions. PCDA (P) is a subordinate authority and its only duty is to implement the orders passed by the Government of India. It has no right to pass an order which may amount to modifying the order or instruction issued by the Government of India, being subordinate one. The applicant has pleaded that Circular 557, Annexure No. A-2(i) issued by the respondent no.2 is not sustainable for the reason that it contravenes the order passed by the Government of India. The duty of PCDA (P) has been provided in Defence Accounts Department Office Manual Part- IV Principal Controller of Defence Accounts (Pensions).

43. A perusal of Para 4.31 of the manual shows that it contains detailed procedure of work done in the office of PCDA (P) Allahabad for the grant, audit and accounting of pension/ family pension in respect of commissioned officers. Chapter- IV of the

said manual shows that the Government of India/ Ministry of Defence was competent authority for the grant of retiring pension in respect of commissioned officers till 1988 and thereafter the power was delegated to CDA (P), who is supposed to keep permanent record of all pensions, hold Defence Pension Adalats, revise pensionary awards and settle complaints received from various quarters. The manual does not empower PCDA (P) to sanction pension on particular rate or withdraw pension already granted in accordance with the statutory rules. Accordingly, instruction given in Para-3 of Item No. 12 of Circular 557 by PCDA (P), ignoring the already given weightage while extending the benefit given in past cases, seems to be an incident of exceeding jurisdiction.

44. The instructions issued by PCDA (P) Allahabad to deprive an incumbent from a weightage given prior to 01.01.2006 at the face of record is in contravention of order of Government of India (supra), hence is not sustainable and suffers from jurisdictional error. Instruction issued by the PCDA (P), vide Circular 557 as contained in Annexure No. A-2(i) appears to be not sustainable being an instance of exceeding jurisdiction. PCDA (P) does not seem to have got power to deprive from weightage given to a person, hence its action appears to be without jurisdiction.

45. 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.

46. 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."

47. 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.

48. 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 indirect or 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 could not 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.

CONCLUSION

49. In view of what has been discussed above, it is crystal clear that all the orders and instructions issued by the respondents, resulting in withdrawal of the weightage granted to the applicant while calculating pension under OROP are not sustainable in the eyes of law and the O.A. deserves to be allowed along with all consequential benefits. In view of above, the controversy in question is summed up as under :-

(1) Weightage granted to the applicant in pursuance to Regulations of Army on 30.06.1990 for grant of pension may not be withdrawn after three decades under the garb of One Rank One Pension (OROP). In case after applying OROP applicant' s pension is reduced by withdrawal of weightage, it shall be fraud with the Constitution, that too when pension is the property.

(2) The higher pension which the applicant was receiving before OROP on account of addition of weightage, may not be withdrawn or reduced in view of Clause-4 of letter dated 03.09.2015 of the Government of India, referred to herein above.

(3) The respondents have miserably failed to apply mind to the contents of letter dated 03.09.2015 of the Ministry of Defence.

(4) What is cannot be done directly, it cannot be done indirectly, is well settled proposition of law. Reduction of pension, for any reason whatsoever is constitutionally not permissible, directly or indirectly, vide ***Jagir Singh Vs. Ranbir Singh and another*** and the case of ***District Collector, Chittor and Others Vs. Chittoor District Groundunt Traders" Association, Chittoor and Others*** *(supra)*.

(5) Reduction of pension or withdrawal of pension given to the applicant in 1990 is not permissible to be withdrawn in violation of principles of natural justice and it is hit by Article 14 of the Constitution of India.

(6) The principle of OROP to provide minimum guaranteed pension/ ordinary family pension in no way is to be interpreted or used for the purpose, granted after addition of weightage. OROP does not bar for grant of higher pension (supra).

(7) PCDA (P) Allahabad has no jurisdiction to withdraw the weightage granted to the applicant, which may result to withdrawal of pension, that too under the teeth of order of Ministry of Defence dated 03.09.2015.

(8) Regulation of the Army to grant weightage is a welfare legislation and till it steps in the book, respondents have no right to withdraw the weightage given to the applicant in

pursuance to which he received pension duly calculated and granted for more than two decades.

COST

50. In the present case applicant, who is around 80 years of age, is physically handicapped suffered because of commission and omission of PCDA (P) Allahabad. He suffered mental pain and agony, apart from financial crunch. By way of an interim measure we had provided to keep on paying him the pension along with weightage, which has been continuing. Hon'ble Supreme Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others,*** (2011) 8 SCC 249 has given emphasis to compensate the litigants who have been forced to enter litigation. This view has further been rendered by Hon'ble Supreme Court in the case reported in ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others,*** (2012) 6 SCC 430. In the case of ***A. Shanmugam*** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India,*** *(2011) 8 SCC 161;*
2. ***Ram Krishna Verma V. State of U.P***., (1992) 2 SCC 620;

3. ***Kavita Trehan V. Balsara Hygiene Products Ltd***. (1994) 5 SCC 380;

4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.,*** (1999) 2 SCC 325;

5. ***Padmawati V. Harijan Sewak Sangh,*** (2008) 154 DLT 411;

6. ***South Eastern Coalfields Ltd. V. State of M.P.,*** (2003) 8 SCC 648;

7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;

8. ***Ramrameshwari Devi and others*** (supra).

51. It is worthwhile to mention that on the last date of hearing applicant's wife appeared and submitted the written argument and informed the Tribunal that the applicant is admitted in the Command Hospital, Kanpur under critical condition. In view of above, for the mental pain and agony, which the applicant has suffered due to illegal and arbitrary exercise of powers by the respondents, he deserves for a cost, which is quantified at Rs. 2,00,000/-(rupees two lacs).

ORDER

52. Accordingly, O.A. is allowed along with all consequential benefits and the impugned order/ Circular 557, as contained in Annexure No. A-2(i) is set aside to the extent it relates to the applicant and all the orders and instructions issued to withdraw the weightage granted to the applicant while calculating his pension under OROP are also set aside. The respondents are directed to continue and pay the pension to the applicant with addition of weightage (supra) while revising his pension under

OROP. The applicant is also held entitled for cost from the respondents, which is quantified at Rs. 2,00,000/- (rupees two lacs). The cost shall be deposited by the respondents in the Tribunal within two months from today, which shall be released in favour of the applicant by the Registry through cheque. The order shall be complied with by the respondents within three months from today.

(Justice Devi Prasad Singh)
Member (J)

Dated: 04th January, 2018

53. After pronouncement of judgment, we have been informed that the applicant is no more alive. Keeping in view this fact, we permit applicant's legal heirs and successors to move appropriate substitution application, which shall be considered in accordance with law for appropriate correction/ amendment in the array of parties.

(Air Marshal BBP Sinha)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Dated: 04th January, 2018

54. Since there is difference of opinion among the members of the present Bench over the finding recorded as in Paras- 49, 50 and 51 of the present judgment, we refer the matter to Hon'ble Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi for a reference to other Member in accordance with the rules in pursuance to provisions contained in Section 28 of the Armed

Forces Tribunal Act, 2007. The questions required to be adjudicated upon in pursuance to Section 28 of the Armed Forces Tribunal Act, 2007 amongst others are framed as under:-

(I) Whether weightage granted to the applicant at the time of superannuation in 1990 may be withdrawn while implementing OROP under the provisions contained in letter dated 03.09.2015 of Government of India, as contained in Annexure No.6 to the counter affidavit, with special reference to Clause- 4 of said letter ?

(II) Whether respondents have right to reduce the pension, directly or indirectly or by withdrawal of weightage while implementing OROP, under the Scheme of OROP, keeping in view various letters issued by the Ministry of Defence from time to time ?

(III) Whether conclusions drawn and findings recorded by one of us (Justice D.P. Singh, Member 'J ') in Paras- 49, 50 and 51 of the judgment/ order constitutionally and statutorily are not sustainable ?

(IV) Whether the applicant, who is around 80 years of age and physically handicapped, because of commission and omission of PCDA (P) Allahabad, suffered mental pain and agony, apart from financial crunch, has been forced to enter into litigation and hence is entitled to a compensatory cost of Rs. 2,00,000/- (rupees two lacs) in view of law laid down by Hon'ble Supreme

Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others,*** (2011) 8 SCC 249 and other subsequent judgments, as referred to in Para-50 of the present judgment ?

Questions framed herein above, are referred accordingly.

(Air Marshal BBP Sinha)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Dated: 04th January, 2018

LN/ JPT