Court No. 1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 427 of 2017

Friday, this the 8th day of October, 2021

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

Prem Kumar Yadav
S/o Shri R.S. Yadav,
R/o House No. 87/183, Kazi Khera, Lal Bangla,
Harjinder Nagar, Kanpur – 208007

…….. Applicant

Ld. Counsel for the Applicant: **Shri Vinay Pandey** &
Shri Sharad Kumar Shukla, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence (Air Force), New Delhi-110011.
2. The Chief of Air Staff, Air Headquarters, Directorate of Air Veterans, Subroto Park, New Delhi.
3. The Officer-in-Charge and Chief Record Officer, Air Force Record Office, Subroto Park, New Delhi.
4. Air officer Commanding, 406 Air Force Station Bidar (Karnataka).
5. officer-in-Charge, Air Force Pension & Welfare (SP) Air Force Record Office, Subroto Park, New Delhi.

..... Respondents

Ld. Counsel for the Respondents : **Shri Rajiv Pandey,**
Central Govt Counsel.

ORDER

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

"(a) Issue/pass an order or directions of appropriate nature to the opposite parties to grant him pensionary benefits w.e.f. 22.07.2011.

(b) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(c) Allow this application with costs."

2. Briefly stated facts are that applicant was enrolled in Indian Air Force on 15.07.1996 and discharged from service w.e.f. 21.07.2009 voluntarily on selection of civil post at his own request before fulfilling the conditions of enrolment with two years Reserve Liability after rendering 13 years and 07 days of qualifying regular service. Accordingly, he was paid Rs. 2,57,231/- on account of service gratuity and Rs. 12,861/- on account of Death-cum-Retirement Gratuity. The applicant was not granted any kind of pension at the time of his discharge from service in terms of Regulation 121 & 136 (a) of Pension Regulations for the Air Force, 1961 (Part-1). Applicant submitted a legal notice dated nil for grant of reservist pension and after examining the case according to rules, it was rejected by the respondents vide letter dated 06.04.2016. Being aggrieved the applicant has filed the present Original Application.

3. It is submitted by learned counsel for the applicant that applicant was discharged from service after rendering 13 years and 7 days of service on 21.07.2009 and thereafter, the applicant was on the strength of reserve service of Air Force for statutory period of 2 years. Thus, the applicant had completed 15 years and 7 days of exemplary service. The matter related to reservist pension has already been settled by the Armed Forces Tribunal (Principal Bench), New Delhi in the case of OA No. 541 of 2011, ***Ex Corporal, Preetam Singh vs. Union of India*** & ors, decided on 14.03.2014. In similar case in ***Ex Cpl Dinesh Kumar Rana vs. Union of India and others***, decided on 08.08.2014, AFT (PB) considering the factual and rule

position has granted the pensionary benefits to the applicant with interest.

4. Learned counsel for the applicant placed reliance on the judgment of the Hon'ble Delhi High Court in ***Brijal Kumar and others vs. Union of India and others***, W.P. (C) No. 98 of 2020 (2020 SCC Online Del 1477), decided on 24.11.2020 and pleaded that applicant's case is squarely covered with the judgment and accordingly, he should be granted service pension. The relevant Paras from 43 to 49 of the judgment read as under :-

> "43. We, at the outset clarify that though we are bound by the judgments of the Co-ordinate Bench in ***Govind Kumar Srivastava, Mohammad Israr Khan*** and ***Rakesh Kumar*** supra but proceeded to hear the counsels at length, only to consider whether post the order of the AFT in Ex. Corporal Mohitosh Kumar Sharma and on the contentions of the counsels now appearing for the respondents IAF, any different view from the said judgments emerge, for the matter to be referred to a larger Bench for consideration.
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> 44. We are afraid, the counsels for the respondents IAF have failed to persuade us to form a view any different from that of the Co-ordinate Bench of this Court in ***Govind Kumar Srivastava, Mohammad Israr Khan*** and ***Rakesh Kumar*** supra. We say so for the following reasons:-
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> > A. We first proceed to deal with the contention of the counsels for the respondents IAF as to the very maintainability of the writ petitions before this Court, on the ground of alternative remedy available before the AFT.
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> > B. The counsels for the respondents IAF in this regard have themselves informed that the aforesaid question, vide order dated 5th December, 2019 in **Squadron Leader Neelam Chahar** supra, has been referred to the larger Bench of this Court. We have thus, only considered the matter qua the arguments of the counsels for the respondents that these petitions be also clubbed with reference to the larger Bench in ***Squadron Leader Neelam Chahar***.
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> > C. The well settled law with respect to exercise of writ jurisdiction, in the face of availability of alternative remedy under a statute is, that though the same does not affect the jurisdiction of the High Court to entertain a petition under Article 226 of the Constitution of India but the High Court, in exercise of its inherent discretion in exercise of powers under Article 226, should refrain from exercising jurisdiction under Article 226. The rule of alternative remedy is a rule of discretion and not a rule of jurisdiction. It is not that by provision of alternative remedy in a statute, the jurisdiction of the High Court is ousted. Reference in this context may only be made to the most recent decision of the Supreme Court in ***Balkrishna Ram supra and Rojer Mathew Vs. South Indian Bank Limited*** (2020) 6 SCC 1.
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> > D. We have considered whether we should, in the facts and circumstances aforesaid, refuse to exercise jurisdiction and transfer these matters to the AFT or club these petitions with Squadron Leader Neelam Chahar supra and have decided against following either of the said courses of action, for the reasons hereafter appearing.
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> > E. The petitioner/s in all these petitions are members of the Armed Forces who are the only ones required under the Constitution of India and under the laws, to take an oath, of abiding by the command issued to them by the President of India or by any officer set over them, even to the peril of

their life. The oath required to be taken, neither by the President of India or by the Vice President of India or by the Governors of the States or by the Judges of the Supreme Court and the High Court requires them to lay down their lives in the service of the country. Supreme Court, in Confederation of ***Ex-Servicemen Associations Vs. Union of India*** (2006) 8 SCC 399 held that those who serve in the Army, Air Force and Navy during the cream period of their youth, put their lives to high risk and improbabilities and render extremely useful and indispensible services and the country owes respect and gratitude to them. We have recently in judgment dated 10th November, 2020 in W.P.(C) No.8889/2020 titled ***Sergeant Ajit Kumar Shukla Vs. Union of India*** dealt in detail in this respect and need to elaborate further is thus not felt. Members of a force, who take oath of laying down their lives for the country, form a distinct class and deserve a special treatment. They are not to be harassed unnecessarily and made ping pong of, by sending them from one forum of adjudication to another.

F. The larger Bench is not concerned with the issue of pro rata pension which is for adjudication in these cases. The reference which is made to the larger Bench is only on the aspect of maintainability of the challenge to policy/circulars/subordinate legislation before the AFT. The said objection, opposing these petitions is raised by the respondents IAF, only after the respondents have allowed the judgments in ***Govind Kumar Srivastava, Mohammad Israr Khan*** and ***Rakesh Kumar*** supra to attain finality and in all of which cases, orders for grant of pro rata pension were made in exercise of writ jurisdiction.

G. The question before us is, that after orders for grant of pro rata pension in writ jurisdiction, in favour of the to peers of the petitioners have attained finality, should this Court, when faced with an identical claim of others, refuse to exercise jurisdiction and shunt the petitioners either to the larger Bench first, after decision whereof the decision qua grant of pro rata pension shall remain to be taken, or to shunt them before the AFT which in ***Ex. Corporal Mohitosh Kumar Sharma*** supra has already expressed its opinion. The answer obviously has to be no.

H. Rather, we are faced with a situation where the respondents IAF, inspite of the decisions of this Court holding the circular/letter dated 19th February, 1987 to be discriminatory and directing that thereunder the Airmen/PsBOR/NCOs who fulfill the conditions as prescribed for Commissioned Officers for entitlement to pro rata pension are also entitled to pro rata pension, in violation of the law laid down in ***Arvind Kumar Srivastava*** supra holding that such orders are of general application and in rem and though may have been passed in the case of some of the servicemen, are to be applied to all, are in a sheer act of harassment of ex-servicemen, forgetting the oath given to them and while demanding fulfillment of such oath, compelling the petitioners to approach this Court and wanting to repeatedly contest the same issue.

I. Such action of the respondents IAF, we find to be in abuse of the process of the Court. Once an issue of law has attained finality, neither party thereto is entitled to re-agitate the same and this is precisely what the respondents IAF are found to have done before the AFT. Supreme Court in ***D.K. Yadav Vs. J.M.A Industries Limited*** (1993) 3 SCC 259 held it to be settled law that an authoritative law laid after considering all the relevant provisions, it is no longer open to be re-canvassed on new grounds or reasons unless the Court deems it appropriate to refer to a larger Bench.

J. We are rather surprised that the AFT, though bound by the law laid down by this Court, has at the asking of the respondents IAF refused to be bound by the judgment and law laid down by this Court and ventured to take a contrary view and which was not open to the AFT. Though owing to Article 227 (4) of the Constitution of India, the powers of superintendence vested in this Court under Article 227 do not extend to Armed Forces Tribunal but the power of judicial review vested in this

Court under Article 226 of the Constitution of India, in Major General Shri Kant Sharma supra also has been held to be unaffected by the provisions of the Armed Forces Tribunal Act and Supreme Court, recently in Rojer Mathew supra has held that the writ jurisdiction under Article 226 does not limit the powers of this Court, expressly or by implication, against Military or Armed Forces disputes and the limited ouster made by Article 227 (4) only operates qua administrative supervision by the High Court and not judicial review. Once the orders of the AFT are subject to judicial review by this Court, if AFT were to continue to pass orders disregarding the law laid down by the High Courts, the same would result in chaos, with petitions under Article 226 being filed in the High Courts terming such orders of the AFT as patently illegal and would defeat the principle of stare decisis and purpose of tribunalisation i.e. of expeditious disposal of disputes of personnel of the Armed Forces.

K. The reason given by AFT for indulging in such adventurism, is also fallacious. Merely because the Supreme Court, while dismissing the SLP preferred against the judgment of this Court in ***Govind Kumar Srivastava*** supra kept the question of law open, without specifying whether it was the question of law qua maintainability of the writ petition vis-a-vis jurisdiction of AFT or the question of law qua the circular/letter dated 19th February, 1987 being discriminatory, did not make the judgment of this Court in ***Govind Kumar Srivastava*** any less binding on the AFT. The observation that the question of law was so left open, entitled only the Supreme Court to consider the said question of law when faced with a similar challenge and did not entitle the AFT, orders whereof are subject to judicial review of the High Court, to take a view contrary to that taken by this Court. A Division Bench of this Court in judgment dated 25th July, 2008 in FAO(OS) No.403/2002 titled ***International Development Research Centre Vs. Ramesh Mehta*** held that once the question of law is left open by the Supreme Court, the implication thereof would be that in so far as the Supreme Court is concerned, it has not so far put its seal of approval or disapproval on the view taken by this Court; however, as far as this Court is concerned, the judgment would still hold good. SLP (C) No.4394/2018 preferred to the Supreme Court against the said judgment was dismissed on 12th March, 2018. To the same effect is ***National Highways Authority of India Vs. BBEL - MIPL (JV)*** 2017 SCC OnLine Del 10189 (DB). Once a judgment of a Division Bench of this Court, SLP whereagainst is dismissed leaving the question of law open, is binding on the Co-ordinate Benches of this Court, the question of AFT being not bound by it, does not arise.

L. If the petitions were to be transferred to the AFT, now or after the decision of the larger Bench, if holding AFT to have jurisdiction to entertain challenge to the vires of policies of the Armed Forces or to the subordinate legislation, would only lead to AFT taking the same opinion as taken in ***Ex. Corporal Mohitosh Kumar Sharma*** and which in our opinion, for the reason of being in the teeth of dicta of this Court, is violative of the principles of stare decisis and nonest.

M. Thus we are not inclined, to either transfer the lis raised in these petitions to the AFT or to tag these petitions with ***Squadron Leader Neelam Chahar*** supra for consideration of the legal question only qua the jurisdiction of the AFT to be considered by the larger Bench.

N. The counsels for the petitioners are also correct in contending that though the plethora of counsels appearing for the respondents IAF in this batch of petitions have argued that ***Govind Kumar Srivastava*** supra was not properly argued on behalf of the respondents IAF and requisite material not placed before the Court at the time of hearing, but have chosen not to still plead or argue any justification for the provision for pro rata pension vide letter/circular dated 19th February, 1987 being made only for Commissioned Officers and not for PsBOR/NCOs save for reading portions of the order of the AFT. We may also add that a Constitution Bench, as far back as in ***Ambika Prasad Mishra Vs. State of U.P.*** (1980) 3 SCC 719 held that "fatal flaws silenced by earlier rulings

cannot survive after death because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned"". Again, in ***Ravinder Singh Vs. Sukhbir Singh*** (2013) 9 SCC 245 it was held that even if a particular issue has not been agitated earlier or a particular argument was advanced but was not considered, the judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. To the same effect is State of Gujarat Vs. Justice R.A. Mehta (2013) 3 SCC 1.

O. Though the order of the AFT in ***Ex. Corporal Mohitosh Kumar Sharma*** supra being contrary to the dicta of this Court in ***Govind Kumar Srivastava, Mohammad Israr Khan*** and ***Rakesh Kumar*** supra deserves no weightage but for the sake of completeness, we proceed to deal therewith.

P. The AFT, in paragraph 22 of ***Ex. Corporal Mohitosh Kumar Sharma*** supra framed the following five questions:-

> "(1) Whether the discharge of applicants from Air Force under the provisions of AFO No.14/2008 after selection in a CPE, is akin to absorption into the CPE for the purpose of grant of pro-rata pension?
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> (2) Whether the applicants are entitled for pro-
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> rata pension on similar lines on which the Government had granted pro-rata pension to Ex-Cpl R.D. Sharma and 21 others and Ex- Sgt Swarup Singh Kalan, as a special case?
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> (3) Whether the commissioned officers and Airmen of Air Force form one class for the purpose of Article 14? If so, whether the grant of pro-rata pension to commissioned officers of Air Force and not to its Airmen violates Article 14?
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> (4) Whether the Rules and the Policy on pro-rata pension for civilian Government employees can be applied suo motu on airmen of the Air Force?
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> (5) Whether the intent of legislation on pro-rata pension conform to the pro-rata pension to Airmen discharged under the provisions of AFO 14/2008?"

Required to be answered for adjudication of the applications before it and proceeded to reason that, (i) 'absorption in a CPE' is a fundamental pre-requisite for claiming eligibility to pro rata pension; (ii) earlier system of lending and borrowing of Government employees was through deputation, followed by absorption, if required; this old system was replaced with a new system in 1985, whereby the act of lending and borrowing was permitted only through immediate absorption in the borrowing organization; (iii) the fundamental question that arose was, whether the discharge of the applicants under the provisions of AFO No.14/2008 for joining a Central Public Enterprise (CPE) was same as absorption in a CPE; (iv) there was no communication between the borrowing CPE and the Air Force to lend its manpower to them for permanent absorption; (v) the discharge under AFO No.14/2008 is always at own request and the same reason has been annotated in the official discharge book of all the applicants at the time of their discharge from the Air Force; (vi) thus discharge under AFO No.14/2008 is akin to a technical resignation by a civilian Government employee and to hold that their joining in CPEs, after initiation of selection process by advertisement in Employment News, followed by a written test and interview, is akin to an absorption in a CPE, is a hyper-technical argument and does not match the ground realities of discharge; (vii) discharge of airmen under the provisions of AFO No.14/2008 is specific to Air Force and is related to the peculiarities of military service conditions and cannot be compared with any other conditions of discharge or technical resignation of a civilian Government employee; (viii) such discharge is a discharge on welfare grounds and there is no element of public interest involved in this whole

process; (ix) on the contrary, having selected an individual for military duties, having trained him at high Government cost and thereafter discharging him from service half way through his term of engagement i.e. during his most productive phase of military career, is a huge loss to the fighting force and also to the public exchequer; (x) however, this loss is being accepted only on the larger grounds of welfare of an airman who had joined at a young age; (xi) Ex.Cpl R.D. Sharma was granted pro rata pension as a special case because he and 21 other airmen were working in an Aircraft Manufacturing Department (AMD) under the Air Force; in a rare decision of its kind the Government took a decision to merge the AMD under the control of Air Force with HAL, in public interest and Ex-Cpl R.D Sharma and 21 other airmen volunteered to get absorbed in HAL; (xii) they were different case because they were absorbed in HAL and in public interest, pro rata pension was granted to them; (xiii) as far as the case of Ex-Sgt Swarup Singh Kalan is concerned, there was no adjudication over the claim for pro rata pension but the Government decided to extend the pro rata retirement benefits, as made available to Ex-Cpl R.D Sharma and 21others to Ex-Sgt Swarup Singh Kalan also though his case was entirely different; (xiv) no clear reason could be found as to why the Government decided to treat the case of Ex-Sgt Kalan as a special case for grant of pro rata pension; (xv) else it had been laid down in order dated 4th July, 2008 in W.P. (C) No. 13433/2006 titled Munshi Singh Vs. Union of India by the Division Bench of the Delhi High Court that under Regulation 132 of the Pension Regulations for the Army, which is pari materia to Regulation 121 of the Air Force Pension Regulations, the claim for pro rata pension was not tenable; (xv) though in ***Govind Kumar Srivastva***, ***Ram Singh Yadav***, on the same lines as ***Munshi Singh*** supra was considered, but distinguished; (xvi) Commissioned Officers, on whom vide letter/circular dated 19th February, 1987 benefit of pro rata pension was conferred, formed a different class from airmen and there was a reasonable classification between them; (xvii) the purpose for introducing pro rata pension for Commissioned Officers was to motivate them to get absorbed in CPEs, in public interest and fill up the large number of vacant posts in CPEs; (xviii) the same was in pursuance to the demand for absorption for Commissioned Officers with technical qualifications; (xix) the Commissioned Officers were reluctant to get absorbed in CPEs because of forfeiting their pension and poor career progression possibilities; (xx) from demand and supply point of view, the Government issued the policy circular/letter dated 19th February,1987 granting pro rata pension to Commissioned Officers to motivate them to get absorbed in CPEs, in public interest; (xxi) there are absolutely no provisions for a Commissioned Officer on lines of AFO No.14/2008 for Airmen, to apply for any job in civil employment except two years before his scheduled retirement or scheduled release; (xxii) the only way a Commissioned Officer can apply for absorption is, in response to departmental notifications by its service Head Quarters asking volunteers for absorption through departmental channels; (xxiii) such departmental notifications by service Head Quarters are normally driven in public interest; (xxiv) it is in this backdrop that the policy circular/letter dated 19th February,1987, meant only for Commissioned Officers, has to be viewed; (xxv) per contra there has rarely been any demand for absorption of Airmen, primarily because of low entry level qualifications and limited exposure; (xxvi) the circular/letter dated 19th February, 1987 was linked to public interest and was not discriminatory; (xxvii) else, the Rules and Policy and pro rata pension for civil Government employees cannot be applied to Airmen; (xxvii) pro rata pension was initiated in 1967, to motivate Government servants to join CPEs which had large number of vacancies which were not getting filled; (xxviii) in 1967, most of the CPEs had no provision for pension and the system of pension after retirement in CPEs started from early 1990s; (xxix) in 2004, the Government changed over to Contributory Pension Fund (CPF) Scheme for all Government employees except Armed Forces; (xxx) all CPEs also gradually changed over to CPF; (xxxi) thus effectively the Government had stopped pro rata pension, post 2004 entrants onwards; (xxxii) however since the present pension in Defence service has a similarity to pre-2004 pattern of civil pension, therefore, technically, pro rata pension has become an issue in

perpetuity for Armed Forces; (xxxiii) life in the Armed Forces is demanding, dangerous and difficult and many countries have to resort to compulsory Military service to maintain their manning levels; hence, all Militaries, all over the world, generate motivation for their soldiers to continue in Military service; (xxxiv) minimum qualifying service to earn Military pension is a great motivator; and, (xxxv) it was not the intent of the legislation to reward an Airman who had prematurely left Military service, after 10 years, despite huge investment in his training and grooming, primarily in pursuit of his personal career ambitions for a civilian job and thereafter reward him with two pensions for life, first one from Air Force for his 10 years service and thereafter from Government owned CPE/State Government for the remaining years of service.

Q. We are unable to agree with the aforesaid reasoning of the AFT.

R. The AFT, while relying heavily on 'absorption' in a CPE as a pre-requisite for grant of pro rata pension, completely ignores paragraph 2 (ii) of the circular/letter dated 19th February, 1987 which, besides absorption in a CPE mentioned in paragraph 2

(i), also refers to appointment in Central/State Governments on the basis of own application sent through proper channel in response to advertisements. Though during the hearing we drew attention of the counsels for the respondents IAF to the same and enquired whether not the cases of the petitioners would be covered therein, but no answer was forthcoming.

S. Not only so, neither has the AFT in its order quoted any basis for its reasoning of high demand of Commissioned Officers in CPEs being the basis for the letter/circular dated 19th February, 1987 nor have the counsels for the respondents IAF placed any such documents on record; no attention whatsoever to any document supporting the reasoning of the AFT has been drawn.

T. Moreover AFT has failed to spell out how, what it has observed qua Commissioned Officers, does not apply to Airmen. From other cases being listed before us, particularly those impugning refusal to issue NOC to Airmen for joining elsewhere, pursuant to issuance of NOC for participating in the recruitment process including written examination, interview etc., we have learnt that Airmen, who join the respondents IAF when they are educated till matriculation only, are provided the facility of further education and are issued deemed graduation certificates and further qualifications, even for teaching positions in Universities and are successful in obtaining appointment, particularly in Universities in the State of Haryana. Not only so, we find provision having been made for employment of Ex-Defence personnel in recruitment advertisements for Central/State Governments and Public Sector Undertakings or in CPEs, including of Airmen. All this shows the Scheme of providing avenues for employment elsewhere, not only of Commissioned Officers but also of Airmen and once as per the said Scheme, notwithstanding the Rule of qualifying service for Commissioned Officers and Airmen alike, vide circular/order dated 19th February, 1987 the Commissioned Officers are granted the benefit of pro rata pension, we find no reason why similar benefit is not conferred on Airmen. A case of discrimination indeed is made out.

U. During the hearing, we enquired from the counsels for the respondents IAF, which Article of the Constitution of India empowers the respondents IAF to mete out special treatment to Ex. Corporal Swarup Singh Kalan or a few others out of a large number of others, all similarly placed; no answer was forthcoming. We may however observe that there is no concept of negative equality and merely because Ex. Corporal Swarup Singh Kalan has been granted the benefit of pro rata pension would not entitle others thereto unless a case in law were to be made out by them. The petitioners herein have made out a case, owing to the letter/circular

dated 19th February, 1987 and which, in so far as confers the benefit of pro rata pension only on Commissioned Officers, has rightly been held to be discriminatory of Airmen and Airmen are thus also entitled to the benefit of pro rata pension at par with Commissioned Officers.

V. In this context we may also deal with the argument of the counsel for the petitioners, of the respondents IAF having accepted the judgments in ***Mohammad Israr Khan*** and ***Rakesh Kumar*** supra by having not preferred SLP thereagainst. We do not agree. It was held in ***State of Maharashtra Vs. Digambar*** (1995) 4 SCC 683 that the circumstance of non-filing of the appeals by the State in some similar matters cannot be held to be a bar against the State in filing an SLP in other similar matters. To the same effect are ***Col. B.J. Akkara Vs. Government of India*** (2006) 11 SCC 709, ***Surendra Nath Pandey Vs. Uttar Pradesh Cooperative Bank Limited*** (2010) 12 SCC 400 and ***Union of India Vs. Dr. O.P. Nijhawan*** 2019 SCC OnLine SC 4.

W. We do not find any merit in the contentions of Mr. Arun Kumar Bhardwaj, Advocate, (a) that ***Govind Kumar Srivastava*** supra is a default judgment - the Division Bench therein did notice the eligibility Rules for pension but held that since inspite of similar Rule or Commissioned Officers, benefit of pro rata pension had been conferred, Airmen also were entitled thereto because there was no reason to treat the Airmen differently in the matter of pro rata pension; (b) that ***Govind Kumar Srivastava*** has been decided merely on the basis of Ex-Corporal R.D. Sharma and Ex. Corporal Swarup Singh Kalan - the said judgments are merely referred and else the judgment of the Division Bench is based on circular/letter dated 19th February, 1987 and on the finding of it being discriminatory; (c) that Govind Kumar Srivastava is per incuriam in view of Ashit Kumar Mishra - though undoubtedly Ashit Kumar Mishra was not noticed but the same did not result in any jurisdictional error and does not make Govind Kumar Srivastava nonest in as much as as held above, the rule of not exercising jurisdiction under Article 226 of the Constitution of India for the reason of availability of alternate remedy, is rule of discretion and not a rule of exclusion of jurisdiction and the larger Bench to which reference has been made in Squadron Leader Neelam Chahar would also be bound by the judgments of the Supreme Court in Rojer Mathew and Balkrishna Ram and of which the latter expresses doubt about the correctness of the part of Major General Shri Kant Sharma on basis whereof reference to the larger Bench was made; and, (d) on the basis of ***Amit Kumar Roy*** supra - even if there were to be no absolute right in Airmen to join employment elsewhere, the question for consideration herein is that once the Airmen have been so permitted, whether they are entitled to pro rata pension for the service rendered to respondents IAF, especially since Commissioned Officers who also have no such right and have not served the eligibility period, have been conferred such benefit.

X. Though Mr. Harish Vaidyanathan Shankar, Advocate during hearing sought to inform of the differences between Airmen and Commissioned Officers but without reference to any pleadings and documents and without telling how the said differences are relevant for the purposes of conferment of benefit of pro rata pension. In our view, in a challenge on the ground of discrimination, it is incumbent on the respondents IAF to plead the differences and the nexus thereof to the discrimination averred, unless it is obvious on the face of the discriminatory act. The circular/letter dated 19th February, 1987 does not on the face of it contain any reason for conferment of benefit of pro rata pension to Commissioned Officers only. We have in this context also perused the counter affidavit in W.P.(C) No.98/2020 referred to by Mr. Sushil Kumar Pandey, Advocate. Though the same sets out the different provisions in the Air Force Act and the Air Force Rules pertaining to Commissioned Officers and Airmen, to contend that the same are treated differently but fails to plead why, while a Commissioned Officer not serving the minimum period of eligibility for earning pension, when being discharged for employment elsewhere in terms of letter/circular dated 19th February, 1987, has been conferred

benefit of pro rata pension, a Airman similarly being discharged, has not been conferred the same benefit.

Y. Mention by Ms. Pallavi Awasthi, Advocate, of ***K.K. Dhir*** supra in the context of, the matter of grant of pro rata pension to those Government servants who had joined a PSU after rendering more than ten years of Government service, having seen widening of the door from time to time, is apposite.

45. The counsels for the respondents IAF also reasoned that award of pro rata pension carries with it, a financial burden of Rs.44 crores per month and of Rs.250 crores in payment of arrears.

46. However once we have agreed with the view taken in ***Govind Kumar Srivastava*** supra, of the circular/letter dated 19th February, 1987 discriminating Airmen vis-a-vis Commissioned Officers to be without any rational basis, merely because implementation of the said decision qua Airmen carries a heavy financial burden, cannot come in the way of the consequences of holding the same to be discriminatory and order of payment of pro rata pension to Airmen, not following. Reference in this regard may be made to ***All India Judges Association Vs. Union of India*** (1993) 4 SCC 288; ***State of Mizoram Vs. Mizoram Engineering Service Association*** (2004) 6 SCC 218 and ***State of Rajasthan Vs. Mahendra Nath Sharma*** (2015) 9 SCC 540, holding that the State cannot take a plea of financial burden to deny the legitimate dues.

47. We have also considered the aspect of delay. Claim of a large number of petitioners for arrears of pro rata pension, is indeed for more than a decade or two. Ordinarily, they would have been entitled to arrears of three years preceding the petition only. However in the judgments passed till now and which have attained finality, no such restriction has been placed. We are hesitant to treat these petitioners differently and thus opt to grant the same relief i.e. of full arrears, as has been granted till now.

48. The petitions are thus allowed.

49. Rejections by the respondents IAF, of the representations of the petitioners preceding filing of these petitions for grant of pro rata pension, are quashed and a mandamus is issued to the respondents IAF to, within twelve weeks hereof, pay to each petitioner, arrears of pro rata pension, from the date of discharge, till the date of payment, and to, with effect from the month of March, 2021 commence payment of future pro rata pension to each of the petitioners. If the arrears are not paid within twelve weeks as aforesaid, the same will also carry interest at 7% per annum, from the expiry of twelve weeks, till the date of payment."

5. Learned counsel for the applicant further submitted that case of the applicant is covered with the aforesaid judgments being equally applicable, hence, applicant is entitled to pensionary benefits.

6. Per contra, learned counsel for the respondents submitted that applicant was enrolled in Indian Air Force on 15.07.1996 and discharged from service w.e.f. 21.07.2009 voluntarily on selection of civil post under the clause "at his own request before fulfilling the conditions of enrolment" with two years Reserve Liability vide Discharge order No. RO/2503/1/RW (Dis) dated 15.07.2009. Before discharge from service, he had rendered total 13 years and 07 days

of qualifying regular service. He was not transferred to Regular Air Force Reserve. Accordingly, he was paid Rs. 257231/- on account of service gratuity and Rs. 12861/- on account of Death-cum-Retirement Gratuity for the qualifying service he had rendered.

7. Learned counsel for the respondents further submitted that applicability of pension to Airmen is governed by Pension Regulations for the Air Force, 1961 (Part-1). As per Regulation 121, the minimum qualifying regular service required to earn service pension is 15 years. However, combined colour and reserve qualifying service for earning Reservist pension is 15 years as per Regulation 136 (a). As the applicant had rendered a total of 13 years and 07 days of qualifying regular service only against 15 years, he was not granted any kind of pension at the time of his discharge from service in terms of Regulation 121 & 136 (a) of Pension Regulations for the Air Force, 1961 (Part-1). Applicant submitted a legal notice dated nil for grant of reservist pension and after examining the case according to rules, it was rejected being devoid of merit vide letter dated 06.04.2016. As per Regulation 136 (a), the prescribed combined colour and reserve qualifying service for earning Reservist Pension is 15 years and period actually served in the 'Regular Air Force Reserve' is taken into account for grant of Reservist pension and the period of 'RESERVE LIABILITY' as '*Reserve Liability is the conditions of terms of engagement in which an airman is liable to be transferred to an Air Force Reserve if and when constituted'*. It is pertinent to mention that '*there was neither an Air Force Reserve during applicant's reserve liability period nor it was constituted by the competent authority*, Therefore, Section 5 of Reserve and Auxiliary Air Force Act, 1952 is not applicable. Hence, applicant's contention for grant of Reservist Pension treating his reserve liability period into actual reserve service is against the statutory provisions issued by Govt. of India on the subject and therefore, applicant is not eligible for Reservist Pension. He pleaded for dismissal of OA.

8. Having heard the submissions of learned counsel both sides and having gone through the aforesaid judgment of the Hon'ble Delhi

High Court in ***Brijal Kumar*** (supra), we find that applicant has served more than 10 years of service, i.e. 13 years in Indian Air Force and was discharged from service having been selected in a civil post, therefore, his case is covered with ***Brijal Kumar*** (supra) case and the applicant is entitled for grant of pro rata pension from the date of discharge from service.

9. Accordingly, O.A. is allowed. The impugned order passed, if any, by the respondents is set aside. The respondents are directed to grant pro rata pension to the applicant alongwith arrears from the date of discharge from service. They are further directed to implement this order within a period of four months from the date of receipt of certified copy of this order. Delay shall invite interest @ 8% per annum till actual payment.

10. No order as to costs.

(Vice Admiral Abhay Raghunath Karve) **(Justice Umesh Chandra Srivastava)**
Member (A) **Member** (J)

Dated: October, 2021
SB