FORM NO – 21

(See Rule 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: T.A. 169 OF 2010 (WP (C) 12463/2009)

THIS 15TH DAY OF MAY, 2014

CORAM: Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)

Hon'ble Lt. Gen. K.P.D.Samanta, Member (Administrative)

Prafulla Chandra Behera, aged about 52 years
Son of Late Sukuru Behera,
Vill- Kadarapalli, PO. Golabandha,
P.S. Gopalpur, Dist. Ganjam, Orissa

….. Applicant

- Versus –

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

2. The Commanding Officer, 7, Assam Regiment, C/o 99 APO

3. The Officer-in-Charge, Assam Regiment Records, Abhilekh Karyalaya Records, The Assam Regiment, Happy Valley, Shillong.

……Respondents

For the applicant: Mrs. Sonali Das, Advocate

For the respondents: Mr. Anand Bhandari, Advocate

O R D E R

Per Hon'ble Lt. Gen. K. P. D. Samanta, Member (A):

This application was originally filed before the Hon'ble Orissa High Court as a writ petition bearing No. W.P(C) 12463 of 2009, which, after establishment of Armed Forces Tribunal, was transferred to this Tribunal under operation of Section 34 of AFT Act and has been renumbered as TA 169 of 2010. In this application, the applicant, who was dismissed

from Army Service through a SCM trial, has essentially claimed service pension on the ground that he had put in required span of pensionable service before he was dismissed.

2. The applicant was enrolled in the Assam Regiment of the Army on 6-2-1978. He was holding the rank of Naik when he was put through a SCM. He was in that regiment till 14-1-93, when on being granted annual leave for the period from 15-1-93 to 13-3-93, proceeded to his home at Orissa. He overstayed the leave granted to him by 314 days. It is the case of the applicant that due to his illness and other family problems, he could not return on the scheduled date and overstayed the leave for 314 days and eventually joined the regiment voluntarily on 21-6-94 (according to the respondents on 26.1.1994). He was issued with a charge-sheet dated 16-5-94 wherein he was charged for an offence under section 39(b) of the Army Act for overstaying leave from 18 March 1993 to 25 Jan 1994, when he voluntarily rejoined on 26th January, 1994 (annexure-1). He was tried by a SCM and on conviction was awarded punishment of three months R.I. in Civil Jail and simultaneously dismissed from service with effect from 24.5.1994.

3. The case of the applicant is that prior to his dismissal, he had rendered more than 15 years of pensionable service and therefore, he was eligible for getting service pension, which was denied to him illegally and arbitrarily. The wife of the applicant preferred an appeal to the authorities on 21-12-2000, in reply to which the authorities vide letter dated 1-2-2001 intimated her that since her husband was dismissed from service and awarded punishment of three months R.I. he was not entitled to pensionery benefits (annexure-3). Subsequently also, the applicant's wife made a further prayer for grant of pension to her husband on 18-6-2004, which was also replied on 5-7-2004 in the negative. Thereafter, the applicant filed the instant writ petition in the Hon'ble Orissa High Court in the year 2009 which is now before us as a TA. In this application, the applicant's main prayer is for a direction to the respondents to grant him service pension and other pensionry benefits.

4. After the matter was transferred to this Tribunal, by filing an amendment petition, i.e. MA 48 of 2011, the applicant had sought to challenge the entire Court Martial proceedings and prayed for setting aside the order of punishment that was awarded to him. However, this amendment petition was not allowed by this Tribunal vide order dt. 15.3.2012 on the ground that the court martial proceeding was held against him long 17 years back and during these years, he did not take any effective step to challenge the SCM proceedings. Therefore, on account of such long delay, the challenge against the court martial proceedings that was sought to be made by way of amending the writ petition was not permissible; consequently disallowed and the MA was dismissed. Under such circumstances, the TA was heard only with regard to the prayer for grant of service pension.

5. The respondents have filed a counter affidavit wherein they have stated that the applicant was enrolled on 6-3-1978 (and not on 6th February, 1978 as stated by the applicant). At the relevant point of time he was serving with 7 ASSAM located at Arunachal Pradesh. He was granted leave from 15-1-1993 to 17th March 1993. However, the applicant failed to rejoin without sufficient cause to his unit on 18-3-1993 on expiry of leave. He voluntarily rejoined on 26-1-1994. Thus he remained on unauthorized leave for 315 days. Ultimately, the applicant was proceeded against in a Summary Court Martial on the charge of overstaying leave under Section 39(b) of the Army Act. In the SCM the applicant pleaded guilty and accordingly he was punished with RI for 3 months in Civil Jail and also dismissal from service with effect from 24th May, 1994. It is submitted that the applicant had earlier on two occasions in 1990 and in 1992 also committed the same offence and overstayed leave for 59 days and 68 days respectively. However, it is admitted by the respondents that the applicant had total 16 years and 89 days of service prior to his dismissal on 24th May, 1994, out of which total 442 days of unauthorized leave was treated as non-qualifying service and he had actually 15 years and 12 days of qualifying service. It is the case of the respondents that since

the applicant was dismissed from service, under Regulation 113(a) of Pension Regulations, 1961 he was not entitled to any pension. It is not disputed that as per said regulation, in exceptional cases, the President is empowered to grant pension. The applicant had never made any appeal to the President of India for grant of pension under this provision and therefore question of grant of any pension does not arise. They have sought for rejection of the application.

6. The applicant has filed a rejoinder in which apart from reiterating the plea raised in the main application, he has inter alia stated that the respondents should on their own have forwarded his case to the President for grant of pension.

7. We have heard Ms Sonali Das, the learned counsel appearing for the applicant and Mr. Anand Bhandari, ld. adv. for the respondents. Mrs. Das has mainly argued that the respondents cannot deny service pension to the applicant since he had already rendered pensionable service prior to his dismissal. She has also pointed out that the Court Martial authorities awarded punishment of RI for 3 months and dismissal from service. Under Sec. 71 read with Sec. 73 of the Army Act, which enumerates different kind of punishments that can be awarded by court martial either singularly or in combination with other punishments, as stated therein, forfeiture of the past service for pension is one of the punishments {vide sec. 71 (h) of Army Act}, so also dismissal from service {71(e)} and imprisonment up to 14 years {71(c)}. However, in the case of the applicant, the Court Martial authorities did not pass any such punishment for forfeiture of past service for pension, therefore, the respondents by invoking Regulation 113 of Pension Regulations cannot deny pension to the applicant. According to the learned counsel for the applicant this would mean additional punishment to be awarded by administrative authority, apart from those awarded by Court Martial authorities, which is not permissible under the law as this would amount to double jeopardy. She further submits that the applicant was never intimated or given any opportunity to show

cause before such forfeiture of pension under Pension Regulations through administrative decision. She contends that when pension is denied, it amounts to penal consequences and, therefore, issuance of show cause notice is the minimum requirement in accordance with the principles of natural justice before taking any such action. The learned counsel for the applicant has also referred to the following decisions in support of her plea:

i) Sodhi GS Maj –vs- UOI – (1994) Supp (2) SCC 173
ii) Vohra PS, Col. –vs- UOI, P & H High Court, CWP 5608/91
iii) Biji Abtar Singh Lt. Col –vs- UOI , 1994(8) SLR 159 P & H
iv) Kler Hardev Singh Ex Maj Gen –vs- UOI, 1980 SLJ 172
v) Reg. 3 & 4 Pension Gratuity
vi) Gangeshwar Baitha (Ex Hav) –vs- UOI, TA 92 of 2010 decided 10 Jan 2011 by Kolkata Bench of AFT(unreported)

8. Per contra, Mr. Anand Bhandari, ld. adv. appearing for the respondents, while agreeing with the factual aspects, has submitted that in Para 12 of the A/O the respondents have very clearly stated that the applicant had rendered 16 years and 86 days of total service out of which 442 days was treated as non-qualifying service. Therefore, total service that was rendered by the applicant prior to his dismissal comes to 15 years and 12 days. He has admitted that the applicant had rendered pensionable service prior to his dismissal. However, Mr. Bhandari submits that even then the applicant is not entitled to any pension because under the provision of Reg 113(a) of PR, he is ineligible for pension having been dismissed from service by way of punishment in a SCM trial. He further submits that in Para 14 of his A/O it has been stated that pension is not a bounty or charity. The applicant must first be eligible for pension as per Pension Regulations to be entitled to receive such pension. Mr. Bhandari has placed reliance on the judgement of the Hon'ble Supreme Court reported in AIR 1996 SC 845 (**UOI & Ors –vs- R.K.L.D Azad and another)** and the decision of the Principal Bench of AFT in TA 112 of 2010 (**Nand Lal –vs- UOI & Ors**) decided on 29.4.2010 (unreported).

9. Mr. Bhandari has not disputed that under reg. 113(a) of Pension Regulations, President is empowered to grant pension in exceptional cases even to a dismissed army personnel. His contention is that the applicant was well within his right to apply to the President of India or to the delegated authority praying for grant of pension since pension was stopped under the provision of Pension Regulation 113(a). Unfortunately, he has taken no such step. Therefore, at this stage, the respondents cannot be held responsible for stoppage of his pension. Mr. Bhandari has further submitted that the respondents have acted absolutely in accordance with rules and within the provision of Pension Regulations and have committed no illegality in any manner. As regards non-service of show cause notice before stoppage of pension, Mr. Bhandari submits that there is no provision within the rules and regulations to serve a show cause notice before forfeiting pension to a person who is dismissed from service after conviction in a court martial trial, which is the case in this TA.

10. Mrs. Das, however, has rebutted the submissions of Mr. Bhandari by contending that although pension may not be a charity or bounty but it is a part of service conditions to receive pension on completion of pensionable service. She further submits that there may not be any provision to serve show cause notice before stoppage of pension under reg. 113(a) of PR, but when such administrative action is taken which actually enhances the punishment inflicted through judicial pronouncement upon conviction, then in such case, principle of natural justice demands that an opportunity should be given to the affected individual before taking away his right to pension which he has earned after having put in more than 15 years of service. To buttress this contention, she has referred to the decision of this Kolkata Bench of AFT in the case of **Gangeshwar Baitha (Ex Hav) –vs- UOI, TA 92 of 2010 decided 10 Jan 2011(unreported).** Moreover, as is evident from the record of original SCM proceedings, that have been submitted before this court, the character of the applicant has been certified as “very good irrespective of the trial”.

11. We have considered the rival submissions very carefully and gone through the records produced by the respondents including the original SCM proceedings.

12. As already stated earlier, the present petition is confined only to the prayer of the applicant for grant of service pension. It is the admitted position that the applicant overstayed leave for which he was proceeded against in a SCM trial on a charge framed u/s 39(b) of the Army Act. In the SCM trial, the applicant pleaded guilty and thereafter, the SCM convicted him and inflicted punishment of dismissal from service as also sentence of imprisonment for 3 months RI in civil jail.

13. It is the specific contention of the applicant that even though in terms of Sec. 71(h) of the Army Act, punishment of "forfeiture of service for the purpose of pension.." is one of the several punishments enumerated therein that the court martial authority could have imposed on conviction, in his case, no such punishment was awarded. He was, of course awarded the punishment of "dismissal from service" {71(e)} and "imprisonment for 3 months RI in civil jail" {71(c)}. Therefore, the respondents cannot deny him pension by invoking the provision of reg. 113(a) of Pension Regulations through administrative action, which, in fact, enhanced the punishment that was awarded by the court martial authority, even though, SCM did not think it fit to award any such punishment. Obviously, it was never the intention of the SCM to deny him pension. Apart from that, he was not even issued with a show cause notice prior to denying him pension, which has resulted in adverse penal consequence.

14. The cardinal question that falls for our consideration is whether the respondents are lawfully justified in denying the applicant pension under reg. 113(a) without issuing any show cause notice when the SCM did not award any such punishment though it was within its competence to do so in terms of statutory rules.

15. Before we proceed to examine the issue, it will be useful to take note that in the Pension Regulations for the Army, 1961, there are, in fact, two regulations, which are relevant for our purpose :-

> **"Reg. 16(a) : When an officer who has to his/her credit the minimum period of qualifying service to earn a pension, is cashiered or dismissed or removed from the service, his/her pension, may, at the discretion of the President, be either forfeited or be granted at a rate not exceeding that for which he/she would have otherwise qualified, had he/she retired on the same date. "**
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> **"Reg. 113 (a). An individual, who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. <u>In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date."</u>**

16. It will appear from Pension Regulations for the Army, 1961 that Reg. 16(a) occurs in Chapter 2 which is meant for Commissioned Officers whereas Reg. 113(a) appears in Chapter 3, which is applicable to JCOs, Other Ranks & Non-Combatants (Enrolled) personnel. In the case before us, the applicant was a Naik i.e. Other Rank personnel and obviously Reg. 113(a) applies to his case.

17. Now, turning to the case in hand, ld. adv. for the applicant has placed heavy reliance on the decision of the Hon'ble supreme Court in the case of **Maj G.S.Sodhi –vs- UOI & Ors**, (1991) 2 SCC 371). That was a case of a commissioned officer, who was removed from service in a court martial trial and was denied pension. Following two earlier decisions in the case of **Lt. Col. (TS) Harbans Singh Sandhu –v- UOI,** decided on 22.11.78, (2002)1 SCC 427 and **Religious Teacher Ex Nb. Sub R.K.Sharma –vs- Chief of Army Staff** (WP (Crl.) 244 of 1980 dt. 29.4.80), the Hon'ble Apex Court directed for payment of pension. In **Harbans Singh Sandhu's case**, it was observed by a Bench of three Judges of the Hon'ble Apex Court that since no order was passed under regulation 16(a) of Pension Regulations,

"the inevitable consequence is that he is entitled to be paid the entire pension and gratuity under the Rules. .." In **Ex Nb sub R.K.Sharma'**s case, (JCO), a two Judge Bench of Hon'ble Apex Court observed that "the court martial has not inflicted a punishment on him of forfeiture of pension or other service benefits and counsel for the other side has assured the court that whatever the pension and other service benefits are permissible to the petitioner under the law will be given to him". On the basis of such submission, relief was granted. Subsequently, in a contempt proceeding in **Maj G.S.Sodhi's case** (1994) Supp (2) SCC 173, the apex court has clearly observed that the question of law was not settled on the issue. It will be appropriate to quote the relevant portion:-

> "……. We gave a direction for payment of the retirement benefits following two earlier judgements of this Court. **Of course, there also the effect of these regulations has not been considered….."**

18. Subsequently, the issue came up for consideration before the Hon'ble Apex Court in the case of **UOI & Ors –vs- Brig. P.K.Dutta (Retd),1995 Supp (2) SCC 29**. In this case also the respondent was a commissioned officer and retired as Brigadier in December 1991. However, a GCM was held against him after his retirement and he was cashiered and punished with 3 years RI. His pension was also not paid and proceeding under reg. 16(a) was initiated for denial of pension. At that stage the he went before the Hon"ble Delhi High Court for pensionary benefits and the said High Court granted the relief. Union Govt. moved the Hon'ble Apex Court contending that while the proceeding under reg. 16(a) was initiated, no such direction could be issued by the Hon'ble High Court. The Apex Court inter alia held as under:-

> "….But before we make the final directions, it is necessary to deal with the contentions raised by the learned counsel for the respondent. He urged the following contentions: Regulation 16(a) of the Pension Regulations has no statutory force. The said Regulations are administrative in nature. They cannot run counter to or be inconsistent with the Army Act or the Rules made thereunder. Section 71(h) of the Army Act indicates that

forfeiture of retiaral benefits is one of the punishments that can be awarded by the Court-Martial itself. In view of the said statutory provision the Regulation cannot empower another authority to impose the said punishment. Rule 14 of the Army Rules too supports the above proposition, says the counsel. We are of the opinion that none of the said contentions merits acceptance. Section 71 specifies the punishments that can be awarded by the Court-Martial. They include the punishment of death, imprisonment for life, cashiering, dismissal from service, reduction in rank, forfeiture of seniority or rank, forfeiture of pay and allowances and so on. One of the punishments which can be awarded is mentioned under clause (h)." Sections 71(h) and (k) read as follows:

> "71. *Punishment awardable by courts-martial*. - Punishment may be inflicted in respect of offences committed by persons subject to this Act and convicted by court-martial, according to the scale following, that is to say –
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> *(h)* forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;
> *(k)* forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal;…"

6. We are of the opinion that clause (h) of Section 71 contemplates *forfeiture of service* for the purpose of increased pay, pension or any other prescribed purpose and is wholly different from Regulation 16(a), which reads thus:

> "16. (a) When an officer who has to his credit the minimum period of qualifying service required to earn pension, is cashiered or dismissed or removed from service, his pension, may at the discretion of the President, be forfeited or be granted at a rate not exceeding that for which he would have otherwise qualified had be retired on the same date."

A reading of both the provisions clearly brings out the distinct fields occupied by them. Regulation 16(a) contemplates a situation where an officer is cashiered, dismissed or removed from service and provides how his pension is to be dealt with. Whereas Section 71(h) provides the punishment which can be awarded by the Court-Martial, Section 71 (h) contemplates a punishment awarded at the conclusion of the Court-Martial while Regulation 16(a) contemplates a stage subsequent to the awarding of punishment of Court-Martial and its confirmation. The nature and content of both the impositions is altogether different and distinct. So is the field occupied by clause (k) of Section 71 wholly distinct from Regulation

16(a)? We are, therefore, unable to see any inconsistency between Section 71(h) and Regulation 16(a).

7. It is true that the Pension Regulations are non-statutory in character. But as held by this Court in **Major (Retd) Hari Chand Pahwa v. Union of India** , the pensionary benefits are provided for and are payable only under those Regulations and can, therefore, be withheld or forfeited under and as provided by those very Regulations. The following holding from the said judgment makes the position clear:

> "We do not agree even with the second contention advanced by the learned counsel. The provisions of Regulation 16(a) are clear. Even if it is assumed that the Pension Regulations have no statutory force, we fail to understand how the provisions of the said Regulations are contrary to the statutory provisions under the Act or the Rules. The pension has been provided under these Regulations. It is not disputed by the learned counsel that the pension was granted to the appellant under the said Regulations. The regulations which provided for the grant of pension can also provide for taking it away on justifiable grounds. A show-cause notice was issued to the appellant. His reply was considered and thereafter the President passed the order forfeiting the pension and death-cum-retirement gratuity. We see no infirmity in the order."

19. Then came the decision of the Apex Court in the case of **R.K.L.D. Azad-vs- UOI &Ors,** 1995 Supp.(3)SCC 426, on which Mr. Bhandari has placed much reliance. In this decision, question of forfeiture of pension in the case of a JCO to whom provision of Reg. 113(a) applied came up for consideration. The Apex Court observed in Para 11 as under:-

> "11. In view of the plain language of the above regulation the respondent cannot lay any legal or legitimate claim for pension and gratuity on the basis of his previous service as, admittedly, he stands dismissed in accordance with Section 73 read with Section 71 of the Act. The second question must, therefore, be answered in the negative."

20. Yet in another decision viz. **UOI –vs- Lt. Col. P.S.Bhargava,** (1997)2 SCC 28, the Apex Court held that regulation 16(a) gave the President the power either to forfeit or to reduce the rate of pension in the event of an officer being cashiered, dismissed or removed

from the service. Reference was made to regulation 4 which stipulated that the conduct of the officer must be good as a condition for grant of pension etc.

21. Subsequently, the issue was once again considered by the Apex Court in the case of **Union of India –vs- Subedar Ram Narain & Ors, (1998) 8 SCC 52**. The respondent in that case was a JCO, who was dismissed from service after holding a GCM on certain charges under Army Act. He was denied pension. In deciding this case the Apex Court noticed that there were different provisions with regard to forfeiture of pension as a consequence of dismissal from service in the Regulations framed under the Army Act, 1950, applicable for JCOs and other ranks (OR). Regulation 113(a) applies to JCOs and Ors, whereas reg. 16(a) applies to commissioned officers. In paras 9 and 10 of the judgement, it has been held as under:-

> "Under Regulation 113, a Junior Commissioned Officer (JCO) or a person belonging to another rank or a non-combatant (enrolled) would become ineligible for grant of pension or gratuity on the passing of an order of dismissal. Forfeiture of pensionary benefits is the normal result of dismissal but the President may in exceptional cases, at his discretion, order the grant of pension. If not order is passed by the President, the result is that dismissed JCO remains disentitled to pension or gratuity.
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> The terms of Regulation 16(a) are clearly different from Regulation 113 (a). According to Regulation16(a), when an officer as defined in Section 3(xviii) of the Army Act, 1950, is cashiered or dismissed or removed from service, then the President has the discretion of either forfeiting his pension or ordering that he be granted pension at a lesser rate. The dismissal, removal etc of a commissioned officer does not, in other words, automatically result in the forfeiting or lessening of his pension. Power is, however, given to the President that in such a case he may either direct the forfeiture of the officer's pension or reduction in the rate thereof. **Major Sodhi** case was one which dealt with the question of forfeiture of a commissioned officer's pension on his being dismissed from service. It is in the context of Regulation 16 (a) that it was observed that as no order was passed under the said Regulation, therefore, the officer concerned would be entitled to the receipt of full amount of pension or gratuity which would normally be payable to him."

22. In the said judgement, the Hon'ble Apex Court also dealt with various contentions raised on behalf of the respondent-employee, which have also been raised in the case before us. Dealing with the 'contention that withholding the pension when the respondent had been Court Martialled and dismissed, would amount to double jeopardy', the Apex Court in the case of **Subedar Ram Narain case** (supra), did not find any merit in it and held thus in Para 13:-

> "13. ……Section 71 of the Army Act provides for different types of punishments which could be inflicted in respect of an offence committed by a person subject to the Army Act and convicted by courts martial. The punishments are of varying degrees, from death as provided by Section 71(a) to stoppage of pay and allowance as provided by Section 71(h). The punishment of forfeiture of pay and allowances as provided by Section 71 (j) is of a lesser nature than that of dismissal from service as provided by Section 71(e). When punishment under Section 71(j) is imposed, no recourse can be had to Regulation 113(a), because the said regulation apply only if an order of dismissal is passed against the person concerned. In other words Section 71(j) and Regulation 113(a) cannot apply at the same time. On the other hand, when the punishment of dismissal is inflicted under Section 71(e) the provisions of Regulation 113(a) become attracted. The result of punishment is that the benefit of pension or gratuity which is given under the regulation is taken away. The order of dismissal under the provisions of the Army Act in the case of an employee like the respondent would make him ineligible for pension or gratuity. For a person to be eligible to the grant of pension or gratuity, it is imperative that he should not have been dismissed from service. The dismissal under the provisions of the Army Act is therefore, a disqualification for getting pension or gratuity."
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> It is also relevant to reproduce paras 14 and 15 from the said judgement :-
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> "14. It was also submitted by Shri Malhotra that Regulation 113(a) was discriminatory and, further, pension which is earned becomes the property of the person concerned and the same cannot be taken away. But no such contention was raised before the High Court. In any case, we see no merit in the said contention. Firstly, junior commissioned officers and commissioned officers belong to different classes. They are not similarly situated. Moreover, pension is granted by the rules and regulations which can and do provide for the circumstances which would make a person ineligible to receive the same. Dismissal makes a junior commissioned officer disentitled to receive pension or gratuity. Regulation 113(a) is not in any way invalid.
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> 15. For the aforesaid reasons, we come to the conclusion that unlike regulation 16(a) which applies to the commissioned officers, in the case of non-commissioned officers, other ranks and non-combatants (enrolled), the dismissal of such a person under the Army Act would *ipso facto* render him ineligible for pension or gratuity. The President, however, has a right in the case of a person dismissed under the provisions of the Army Act but in exceptional circumstances and at his discretion to grant service pension at a rate not exceeding that for which the individual concerned would have otherwise qualified had he been discharged on the same day."

23. When the legal position was settled by different rulings of the Apex Court as above, the matter was again brought before it against a Full Bench decision of Hon'ble Delhi High Court in the case of **Union of India –vs- P.D.Yadav,** etc. etc. reported in (2002) 1 SCC 405. In all four appeals (including **A.K.Malhotra's case**) which were decided in that decision, the respondents were all commissioned officers of either Navy or Army and were dismissed from service after trial by GCM for various offences. Thereafter, a show cause notice was issued under 16(a) of Pension Regulations for Army or 15(2) of Navy Pension Regulations and on consideration of their replies, 50% pension was forfeited. Such forfeiture of pension was challenged before the Hon'ble Delhi High Court contending that pension was not a bounty but a deferred portion of compensation for services rendered and the same could not be taken away except by authority of law and that GCM did not think it fit to impose penalty of forfeiture of pension under Sec. 71(h) of the Army Act. Therefore, pension could not be forfeited by non-statutory regulations (Pension Regulations), which would amount to imposing punishment twice and that impugned orders were unreasonable, passed without proper application of mind. A Full Bench of the Hon'ble Delhi High Court quashed the impugned orders taking a view that although a person could be cashiered or dismissed, but that itself was not enough to forfeit pension and that prior satisfactory services of the officer concerned ought to have been taken into consideration before passing the order of forfeiting pension fully or partly. The High Court, therefore, directed the respondents to issue a supplementary show cause notice and decide the matter afresh. The Union Govt. went in appeal against this Full Bench decision before the Hon'ble Apex Court.

24. The Hon'ble Apex Court in a very elaborate judgement allowed the appeals of the Govt. In that decision, all previous rulings on the subject were considered thread bare and it was inter alia held as under: -

> "23. Section 71 of the Army Act provides for various kinds of punishments which may be imposed for offences committed by persons subject to the Act and convicted by Court Martial

> which may vary from death to stoppage of pay and allowances. In terms of Army Pension Regulation 16(a) and Navy Pension Regulation 15(2), pension may be forfeited partly or fully subject to the conditions mentioned therein. These Regulations are independent and the authority to grant or forfeit pension is the President of India and the Central Government respectively. As rightly found by the High Court, the said Regulations are neither inconsistent with not contrary to the provisions of the Army Act or the Navy Act as the case may be. The said Regulations and the provisions dealing with the punishments under the Acts cover different fields and have different purposes to serve. Punishments are imposed after trial on the basis of the misconduct proved. The pension regulations deal with the grant or refusal of pension depending on satisfactory qualifying service earned by a person and depending on the nature of punishments imposed, mentioned in the Regulations. The Regulations come into play at a stage subsequent to the imposition of punishment. No doubt, pension is not a bounty but it is the earning of a person after satisfactory completion of qualifying service and if not otherwise disentitled. Under Section 71(h), a punishment of forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose, can be imposed. If forfeiture of service has the effect of reducing total qualifying service required to earn pension, a person concerned is disentitled for pension itself. In other cases, it may have bearing in regard to claim for increased pay or any other purpose. If by virtue of such punishment itself, a person is not entitled for any pension, the question of passing an order forfeiting pension under Regulation 16(a) may not arise. As per Section 71(k), in case of a person sentenced to cashiering or dismissal from the service, a further punishment of forfeiture of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal may be imposed. Clause (k) of Section 71 does not speak of pension unlike clause (h) of the same Section."

25. In dealing with the contention that forfeiture of pension in addition to the punishment imposed under section 71 op Army Act amounted to double jeopardy, it was observed by the Apex Court as under :-

> 25. ……In our view, this contention has no force. There is no question of prosecuting and punishing a person twice for the same offence. Punishment is imposed under Section 71 of the Army Act after trial by Court Martial. Passing an order under Regulation 16(a) in the matter of grant or forfeiture of pension comes thereafter and it is related to satisfactory service. There is no merit in the contention that the said Regulation is bad on the ground that it authorized imposition of a double penalty; may be in a given case, penalty of cashiering or dismissal from service and the consequential forfeiture of pension may be harsh and may cause great hardship but that is an aspect which is for the President to consider while exercising his discretion under the said Regulation. May be in his discretion, the President may hold that the punishment of cashiering or dismissal or removal from service was sufficient having regard to circumstances of the case and that a person need not be deprived of his right to pension. A crime is a legal wrong for which an offender is liable to be prosecuted and punished but only once for such a crime. In other words, an offender cannot be punished twice for the same offence. This is demand of justice and public policy supports it. This principle is embodied in the well-known maxim "*Nemo debet bis vexari*,*((si constat curiae quod sit) pro una et eadem causa*" meaning no one ought to be vexed twice if it appears to the court that it is for one and the same cause. Doctrine of double jeopardy is a protection against prosecution twice for the same offence. Under Articles 20-22 of the Indian Constitution, provisions are made relating to personal liberty of citizens and others. Article 20(2) expressly provides that "No one shall be prosecuted and punished for the same offence more than once." Offences such as criminal breach of trust, misappropriation, cheating, defamation etc., may give rise for prosecution on criminal side and also for action in civil

court/other forum for recovery of money by way of damages etc., unless there is a bar created by law. In the proceedings before General Court Martial, a person is tried for an offence of misconduct and whereas in passing order under Regulation 16(a) for forfeiting pension, a person is not tried for the same offence or misconduct after the punishment is imposed for a proved misconduct by General Court Martial resulting in cashiering, dismissing or removing from service. Only further action is taken under Regulation 16(a) in relation to forfeiture of pension. Thus, punishing a person under Section 71 of the Army Act and making order under Regulation 16(a) are entirely different. Hence, there is no question of applying principle of double jeopardy to the present cases.

26. On the contention that prior satisfactory service up to the date of cashiering or dismissal on the verdict of court martial, ought to have been taken into consideration for grant of pension even after one is dismissed or cashiered from service, the Apex Court held as under :-

"27. ……The High Court having rejected all other contentions raised by the respondents, partly allowed their claim on the ground that the otherwise prior satisfactory services of the respondents till the date of imposition of various punishments on them was not taken into consideration by the President or the Central Government, as the case may be, in passing the orders under the Pension Regulations forfeiting their pension. Mainly on this ground, the High Court directed the authorities to reconsider the cases of the respondents and pass orders after issuing supplementary show-cause notices. Consideration of prior satisfactory service of a person till the date of imposition of punishment of cashiering or dismissal or removal from service cannot be read into Army Pension Regulation 16(1) or Navy Pension Regulation 15(2). For exercise of power under the said Regulations, what is to be seen is whether the very terms of these Regulations are satisfied or not. A plain reading of these Regulations shows that in case of a person who has been cashiered or dismissed or removed from service, at the discretion of the President under Regulation 16(a) and in case of an officer who is dismissed otherwise than with disgrace from the service, the Central Government under Regulation 15(2) of the Navy Pension Regulations can pass order forfeiting pension, partly or fully. The very fact that such punishment is imposed on a person for proven misconduct after trial by the Court Martial, itself shows his unsatisfactory service. In our view, the High Court has read something more in these Regulations in insisting for considering prior satisfactory service of a person up to the date of imposition of punishment, which is not required by the very Regulations. We may clarify here itself that in these cases we are only considering, so far as they relate to grant or forfeiture of pension in relation to and in the context of regulation 16(a) of Pension Regulations for the Army and Regulation 15(2) of the Navy (Pension) Regulations. Under Regulation 2-A(4) of the Army Pension Regulations 'pension' is defined as including gratuity except when it is used in contradiction to the term gratuity. Hence the pension and gratuity, as defined, are included for consideration. Regulation 3 shows that full rate of pension of gratuity shall not be granted unless the service rendered has been satisfactory; if the service has not been satisfactory the competent authority may reduce the rate of pension or gratuity as it thinks proper. Thus, Regulation 3 and Regulation 16(a) of the Army Pension Regulations deal with distinct and different situations. Further, Regulation 4 states that future good conduct shall be an implied condition for every grant of pension or allowances. Consideration of satisfactory service may be relevant in terms of Regulation 3 for granting pension in the normal course after satisfactory qualifying service. But Regulation 16(a) being a distinct and specific Regulation enables for forfeiture of pension, partly or fully, as a sequel to imposition of a particular type of punishment. Regulation 16(a) in this regard is self-contained. The High Court clearly committed an error in holding that previous satisfactory service of a person up to the date of imposition of punishment should have been

> taken into consideration for exercise of power under Regulation 16(a) and it cannot be sustained. This being the position we are unable to agree with the High Court that a previous satisfactory service of a person prior to the date of imposition of punishment should be considered for the purpose of Regulation 16(a). Consequently the impugned judgments cannot be sustained.

27. In the light of the above observations, the Apex Court allowed the appeals filed by Union of India and reversed the decision of the Full Bench of Delhi High Court in **P.D.Yadav's** case including **A.K.Malhotra**'s case by holding as under:

> "29. …….We have perused copies of the notings of the Ministry of Defence and the orders made pursuant thereto. From the said records, we find that there has been application of mind and having regard to the serious nature of charges already narrated above and keeping in view the relevant circumstances including the punishments imposed on proved charges, the impugned orders appear to have been passed forfeiting pension. The said orders passed forfeiting pension are not merely based on the fact that the appellants were punished by Court Martial, as assumed by the High Court. Moreover, by issuing show-cause notices giving opportunity to the respondents to explain the circumstances and their hardship before passing the impugned order, the principles of natural justice were also complied. In the given circumstances when the impugned orders forfeiting pension were passed in the discretion of the authorities exercising the power available under the Regulations, we cannot find fault with them. Thus, the orders passed are neither arbitrary nor unreasonable. In this view, we do not find any error or infirmity or illegality in passing the said orders."

Recently also the Hon'ble Apex Court in **Shish Ram –vs- UOI & Ors**, (2012) 1 SCC 290, held that regulation 113(a) is clear that an individual, who is dismissed under the provision of Army Act, is ineligible for pension or gratuity in respect o all previous service.

28. Now, we come to the decision rendered by this Kolkata Bench of AFT in **Gangeshwar Baitha (Ex Hav) –vs- UOI in TA 92 of 2010** decided 10 Jan 2011(unreported) on which much emphasis was laid by the ld. adv. for the applicant in support of her case that no show cause notice was issued to the applicant before forfeiting his pension.

29. The decision in **Baitha's** case was pronounced by this Bench mainly relying on the ratio of the judgement in **Major G.S.Sodhi's** case (supra) as also the Full Bench decision of Hon'ble Delhi High Court in **A.K.Malhotra's case** (1997(4) SLR 151). The petitioner therein was a Havildar i.e. NCO. He was dismissed in a SCM trial on the charge of unauthorized absence and accordingly his pension was forfeited by administrative decision.

As observed in **P.D.Yadav's** case in para 17 that no principle of law was decided in **Sodhi's** case and only direction was given on the submission of the Govt. respondents, observing that no order was passed under regulation 16(a). Further, the Full Bench decision of Hon'ble Delhi High Court in **A.K.Malhotra's** case was also reversed by the Hon'ble Apex Court in **P.D.Yadav's** case (supra). Unfortunately, this position of law was not brought to the notice of this Bench at the time of hearing in **Baitha's** case. Be that as it may, in that decision, this Tribunal has held that the authorities were not justified in passing an administrative order of forfeiture of pension and gratuity of the petitioner therein without giving him an opportunity to make his submission in this respect. It has not been brought to our notice that this decision was appealed against or reversed by any higher judicial forum.

29. From a careful reading of the rulings quoted above on the issue of forfeiture of pension after an individual is punished by way of dismissal from service in a court martial trial, the legal position that emerges is that there are two separate and distinct provisions in the Pension Regulations for Army– one applicable to commissioned officers i.e. reg. 16(a) and the other applicable to non-commissioned and other rank personnel i.e. reg. 113(a). It is also trite that dismissal, removal or cashiering of a commissioned officer after trial in a court martial, does not automatically result in forfeiture or lessening of his pension. Power is, however, given to the President, either to direct forfeiture of the officer's pension or reduction in the rate thereof. For the purpose, a separate proceeding is drawn up under reg. 16(a) subsequent to dismissal, by issuing a show cause and then passing appropriate order by the President after consideration of the reply received. But in the case of NCO i.e. JCO/OR personnel to whom reg. 113(a) applies, they become *ipso facto* ineligible for grant of pension or gratuity in respect of all previous services after their dismissal from service in a court martial trial. In other words, forfeiture of pension is automatic and normal consequence of dismissal in their case. Unlike a commissioned officer, no separate proceeding of showing

cause is required to be followed before forfeiting pension under reg. 113(a). However, the President may, in exceptional cases, at his discretion, order grant of pension. If no order is passed by the President, the inevitable result is that the dismissed JCO/OR remains disentitled to pension or gratuity. It has further been held by the Apex Court that even though separate regulations are framed for officers and non-officers with different procedures, the ibid regulations i.e. 16(a) and `113(a) are not discriminatory because officers and non-officers belong to different classes and therefore, separate regulations for them are permissible under the law.

30. In the case in our hand, we have seen that the applicant was dismissed from service after a court martial trial long back in 1994 and no pension was sanctioned nor even any intimation was given to him in that regard. As a result, he could not even make a petition before the President for grant of pension, which admittedly, he could very well do under the provision of regulation 113(a). Therefore, his case was not even considered by the President at all for want of such a petition from him, as submitted by the respondents. Position is otherwise for officers because a separate proceeding is drawn up in their case under reg. 16(a) before forfeiting pension partly or wholly and for the purpose a show cause notice is given to them. Undisputedly, PBOR and Other rank personnel in the Army are less qualified than commissioned officers and may not be conversant with rule position thoroughly. We have also noticed that in a number of cases, no petition is filed by such dismissed persons before the President for grant of pension under reg. 113(a) being ignorant of their right to do so. There may be many deserving and exceptional cases where if any such appeal was filed in time, pension might have been sanctioned by the President in his discretionary power. As we have noticed in the present case, it was only after the wife of the applicant made a representation in the year 2000, that she was informed by the authorities in 2001 that since her husband was dismissed from service, he was not eligible for pension. Had this position

been made known to the applicant himself at the time of his dismissal in 1994 and he was apprised of his right to make a representation before the President for grant of pension, the matter would have been finally settled long back. We are of the view that even if a show cause notice was issued to the applicant, like it is done for officers, the applicant would have become aware of the provisions of Presidential appeal. However, as observed by Apex Court, a show cause notice may not be issued in terms of the regulation 113(a); at least, an intimation could have been given by the authorities to the dismissed soldier apprising him of his right under the rules. That would have saved many families of such unfortunate dismissed soldiers, who, may otherwise deserve and would come within the purview of "exceptional cases" to benefit from Presidential discretion. We are, therefore, of the considered opinion that the authorities in the interest of equity and fair play must inform the concerned soldiers, who are dismissed in a court martial trial by way of punishment, that as a consequence of dismissal they have also become ineligible for pension even though they have to their credit pensionable service but they could always make an appeal before the President or the delegated authority for sanction of pension. We hope and trust that Govt. of India in the Ministry of Defence would give a serious thought to this aspect and issue appropriate instructions to all concerned that such a notice/intimation is given to the concerned persons so that they can at least apply for service pension to the competent authority in terms of reg. 113(a).

31. Now, we come to the more vital and important issue as to how such discretion of the President is to be exercised as and when an appeal is filed by a dismissed soldier or his family for grant of pension and what will be the criteria for determining "exceptional cases" as enjoined in the reg. 113(a). Obviously, any such consideration should not be routine and mechanical nor it can be passed without proper application of mind and in a cryptic manner, because that would go against the minimum requirement of principles of natural justice.

32. As observed by the Apex Court in **P.D.Yadav'**s case (supra), previous satisfactory service of a person up to the date of imposition of punishment may not be a ground for grant of pension because consideration of prior satisfactory service cannot be read into the regulation 16(a) or 113(a). That being the legal position, then what will be criteria for such consideration or exercise of discretion by the President in deserving and exceptional cases? Admittedly, there are no guidelines given in any of the rulings cited above, as a result, the authorities may not follow uniform guidelines in the matter of exercise of discretion by the President in the case of an officer or by the delegated authority in the case of a soldier which may result in anomalous position in that in some cases, pension is sanctioned and in some more deserving and exceptional cases it is denied without any rhyme or reason.

33. In this context, we may refer to a very recent decision of the Hon'ble Apex Court in the case of **Mohinder Dutt Sharma –vs- UOI** (Civil Appeal No. 2111 of 2009) decided on 11.4.2014. In that case, the appellant was a constable of Delhi Armed Police, who was proceeded against departmentally for unauthorized and willful absence and on conclusion of DA proceedings, he was dismissed from service. As a consequence, his pension was also forfeited. He claimed that he had long 24 years of unblemished service prior to dismissal and had good and sufficient reasons for such absence. He went before the CAT, Principal Bench by filing an OA claiming compassionate allowance under rule 41 of CCS (Pension) Rules, 1972, which was dismissed against which he moved the Delhi High Court under Article 226, which was also rejected. Being aggrieved, he preferred the ibid appeal before the Hon'ble Apex Court.

34. It may be noted in this connection that rule 41 of CCS (Pension) Rules, 1972, which relates to 'compassionate allowance' is more or less similar to reg 16(a) or reg. 113(a) of Army Pension Regulations, which provides that in case of dismissal from service pension is forfeited but competent authority in deserving cases can exercise his discretionary power

and can grant 'compassionate allowance' to the extent of 2/3rd of pension admissible. It will be relevant to quote rule 41 as under:-

> "**41. Compassionate allowance**:
>
> (1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity: **Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both** which would have been admissible to him if he had retired on compensation pension.
>
> (2) A compassionate allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of Rupees three hundred and seventy-five per mensem."

35. In explaining the scope of the ibid rule the apex court observed that despite an individual is inflicted with severest punishment of dismissal from service for proven misconduct and wrongdoing, the rule contemplates sanction of a compassionate allowance of, up to two-thirds of the pension or gratuity (or both). The consideration for admissibility of the benefits contemplated under rule 41 of Pension Rules, 1972 has to be by accepting that the delinquency committed by the punished employee was of a magnitude which is sufficient for the imposition of the most severe punishments and is also commensurate with the delinquency committed. But still, a window has been kept open by the rule itself for grant of some kind of benefit in the form of compassionate allowance to save the family of such dismissed employee from ruin.

36. Having held thus, the Apex Court also considered the issue with regard to evaluation of the claim of the punished employee and laid down the parameters for such consideration of a claim by a dismissed employee as under :-

> "13. In our considered view, the determination of a claim based under Rule 41 of the Pension Rules, 1972, will necessarily have to be sieved through an evaluation based on a series of distinct considerations, some of which are illustratively being expressed hereunder:-
>
> (i) **Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of moral turpitude**? An act of moral turpitude is an act which has an inherent quality of baseness, vileness or

depravity with respect to a concerned person's duty towards another, or to the society in general. In criminal law, the phrase is used generally to describe a conduct which is contrary to community standards of justice, honesty and good morals. Any debauched, degenerate or evil behaviour would fall in this classification.

(ii) **Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of dishonesty towards his employer?** Such an action of dishonesty would emerge from a behaviour which is untrustworthy, deceitful and insincere, resulting in prejudice to the interest of the employer. This could emerge from an unscrupulous, untrustworthy and crooked behaviour, which aims at cheating the employer. Such an act may or may not be aimed at personal gains. It may be aimed at benefiting a third party, to the prejudice of the employer.

(iii) **Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act designed for personal gains, from the employer?** This would involve acts of corruption, fraud or personal profiteering, through impermissible means by misusing the responsibility bestowed in an employee by an employer; and would include acts of double dealing or racketeering, or the like. Such an act may or may not be aimed at causing loss to the employer. The benefit of the delinquent could be at the peril and prejudice of a third party.

(iv) **Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, aimed at deliberately harming a third party interest?** Situations hereunder would emerge out of acts of disservice causing damage, loss, prejudice or even anguish to third parties, on account of misuse of the employee's authority to control, regulate or administer activities of third parties. Actions of dealing with similar issues differently, or in an iniquitous manner, by adopting double standards or by foul play, would fall in this category.

(v) **Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, otherwise unacceptable, for the conferment of the benefits flowing out of Rule 41 of the Pension Rules, 1972?**

14. While evaluating the claim of a dismissed (or removed from service) employee, for the grant of compassionate allowance, the rule postulates a window for hope, "...if the case is deserving of special consideration...". Where the delinquency leading to punishment, **falls in one of the five classifications delineated in the foregoing paragraph**, it would ordinarily disentitle an employee from such compassionate consideration. An employee who falls in any of the above five categories, would therefore ordinarily not be a deserving employee, for the grant of compassionate allowance.

In a situation like this, the deserving special consideration will have to be momentous. It is not possible to effectively define the term "deserving special consideration" used in Rule 41 of the Pension Rules, 1972. We shall therefore not endeavour any attempt in the said direction. Circumstances deserving special consideration, would ordinarily be unlimited, keeping in mind unlimited variability of human environment. But surely where the delinquency leveled and proved against the punished employee, **does not fall** in the realm of misdemeanour illustratively categorized in the foregoing paragraph, it would be easier than otherwise, to extend such benefit to the punished employee, of course, subject to availability of factors of compassionate consideration"

37. After considering the appeal in the light of above parameters, the Hon'ble Apex Court noticed that the appellant had 24 years of unblemished service and charge against him was unauthorized absence for 320 days. He had to his credit many good entries earlier and his misconduct did not fall in any of the above criteria; and even his family circumstances were pathetic. It was held that the punishing authority was not justified in refusing him compassionate allowance and accordingly the appeal was allowed by setting aside the judgement of the courts below and remanding the case for reconsideration in the light of the parameters as laid down above.

38. Now, turning to the case in hand, according to the language in reg. 113(a) it is provided that-

> ".....**in exceptional cases**, however, he may, at the discretion of the President, be granted service pension or gratuity the rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.

39. Undisputedly the object and purpose of rule 41 of CCS (Pension) Rules applicable for civilians, and that of reg. 113(a) of Army Pension Regulations, applicable for army personnel are almost the same i.e. to provide some kind of monetary help in the form of pension/allowance in deserving and exceptional cases where a person, who has to his credit pensionable service, is dismissed from service either through a DA proceeding or through court martial trial, in order to save him and his family from starvation and peril. It is true that ordinarily the army personnel are governed by more strict and stringent rules than civilians for understandable and cogent reasons. But after a person is dismissed either under army rules or under DA rules, there remains no difference in their status because both are hapless dismissed persons with no means of livelihood. In such circumstances, in any form of compassionate allowance or pension will be a boon for them opening a window of hope.

40. No Army Order or Army Instruction has been brought to our notice which could explain what are the "exceptional cases" used in reg. 113(a) and on what basis, such pension can be granted to an individual, who is dismissed in a court martial trial. As noticed by the

Apex Court, “it is not possible to effectively define the term "deserving special consideration" used in Rule 41 of the Pension Rules, 1972”. It was also observed that “circumstances deserving special consideration, would ordinarily be unlimited, keeping in mind unlimited variability of human environment. But surely where the delinquency leveled and proved against the punished employee does not fall in the realm of misdemeanor illustratively categorized in the foregoing paragraphs, it would be easier than otherwise, to extend such benefit to the punished employee….”. In our considered opinion such parameters as laid down by the Apex Court above, would also be very relevant and would equally apply with all force, for determination of ‘exceptional cases’ where such pension can be awarded to a dismissed soldier under reg. 113(a). Of course, in cases where the individual is involved in heinous and unpardonable crime like, murder, rape or any offence against the State cannot be granted such benefits. It is hoped that the competent authorities in the MoD should also consider the matter in its proper perspective and issue appropriate instructions for guidance of all concerned that whenever the case of a dismissed army personnel is considered for grant of pension under ‘exceptional circumstances’ as per reg. 113(a), the parameters laid down by the Apex Court in **Mohinder Dutt Sharma’s c**ase (supra) should be followed.

41. It is relevant to note here that there has been an amendment to the Pension Regulations for the Army by Government of India letters dated 09.06.99 and 10.08.2000 (GoI, MoD No. 12 (6)/9I/D (Pension/Service) dated 09.06.1999 and 10.08.2000) as per which Regulation 16 (a) meant for commissioned officers and Regulation 113 (a) dealing with conditions for all personnel below officer rank have been reworded leaving no difference with regards to being un-eligible for pension when dismissed or cashiered (for officers) under the provisions of the Army Act 1950 or under Army Rule 14. Relevant paragraphs of the ibid government letter (available at page 31 of Lall’s Compilation on “Pension Regulations for the Army, Part-I, 1961, 2012 edn.) is quoted below:-

" GOIO Amendment to Regulation 16 and 113 of Pension Regulations for The Army 1961.

I am directed to state that under the provision of Regulation 113(a) of Pension Regulations for the Army (Part-I), 1961, as amended vide CS No. 80/IV/67 a PBOR who is dismissed under the provisions of the Army Act is ineligible for pension and gratuity in respect of all previous service though in exceptional cases, President may at his discretion, grant service pension or gratuity or both at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. Similar provisions in respect of commissioned officers do not exist vide Regulation 16 of PA (Part-I), 1961. The disparity in the provisions has been engaging attention of the Government for some time past.

2. It has now been decided that all Indian Army personnel including commissioned officers who are cashiered/dismissed under the provisions of Army Act, 1950, or removed under AR 14 i.e., as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, the Competent Authority on submission of an appeal to that effect may at his discretion sanction pension/gratuity or both at a rate not exceeding that which would be otherwise admissible individual so cashiered/dismissed/removed been retired/discharged on the same date in the normal manner.

3. An individual who is compulsorily retired or removed on grounds other than misconduct or discharged under the provisions of Army Act, 1950, and the rules made thereunder, remains eligible for pension/and/or gratuity as admissible on the date of discharge. This will suo-motu apply to cases of dismissal/removal converted into discharge subsequently.

4. All appeals to the competent Authority in this regard will be preferred within two years o the date of cashier/dismissal/removal.

5. Competent Authority both for Commissioned Officers and PBORs for Reg. 16 and 113 will be the President.

6. Pension Regulations for the Army will be amended in respect of the above provisions in due course.

7. The provisions of this letter shall come into effect w.e.f. 09-06-1999. However, past cases will be decided as hitherto before. "

42. Subsequently the relevant regulations in the Pension Regulations for the Army, Part-I, 2008 have been revised. Relevant regulations are quoted below:-

"**Regulation 29 (a)** *(old Reg. 16(a)* : An officer who is cashiered/dismissed under the provisions of the Army Act or removed under the Rules made thereunder as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, the competent authority on submission of an appeal to that effect may at his discretion sanction pension/gratuity or both at a rate not exceeding that

which would be otherwise admissible had he been retired on the same date in the normal manner.

(b) An officer who is compulsorily retired/removed on grounds other than misconduct under the provisions of the Army Act and Rules made thereunder remains eligible for pension and, or gratuity as admissible on the date of retirement/removal. This will suo motu apply to cases of dismissal/removal converted into retirement subsequently.
(c) All appeals to the competent authority in this regard will be preferred within 2 years of the date of cashiering/dismissal/removal.

*** *** *** *** **

"**Regulation 41 (a)** (*old Reg. 113(a)*- " An individual who is dismissed under the provisions of the Army Act, 1950 or removed under the Rules made thereunder as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, the competent authority on submission of an appeal to that effect may at his discretion sanction pension/gratuity or both at a rate not exceeding that which would be otherwise admissible had he been retired/discharged on the same date in the normal manner.

(b) An individual who is compulsorily retired/discharged on grounds other than misconduct under the provisions of the Army Act and Rules made thereunder remains eligible for pension and, or gratuity as admissible on the date of discharge. This will suo motu apply to cases of dismissal/removal converted into discharge subsequently.
(c) All appeals to the competent authority in this regard will be preferred within 2 years of the date of cashiering/dismissal/removal."

43. Notwithstanding the above, the ratios and interpretations by various decisions of the Apex Court still remain relevant except that the rules for the officers and PBOR would have the same scope and spirit of application while making them ineligible for pension if they are dismissed or cashiered under the provisions of the Army Act 1950. **In exceptional cases, however, the Competent Authority on submission of an appeal to that effect may at his discretion sanction pension/ gratuity or both at a rate not exceeding that which would be otherwise be admissible to the individual so cashiered/ dismissed/ removed had he been retired/ discharged on the same date in the normal manner. Such an appeal to the competent authority in this regard needs to be made within two years of the date of dismissal and the President is the competent authority, unless powers have been delegated to other prescribed authorities within the Integrated Defence Headquarters.**

44. In the case in hand it is quite clear that the applicant, having been dismissed under the provisions of the Army Act 1950, is not eligible for pension, unless the competent authorities sanction such pension using their discretionary powers; for which the applicant should have appealed to the President through proper channel which he has not done, obviously for want of knowledge about the rule position. We are of the view that the applicant should have been made aware of such provisions when he was dismissed, intimating him that he would be disentitled from pension being not eligible under the rules, but he could appeal to the competent authority praying for their discretion with reasons. The applicant was admittedly not intimated of such repercussions. Drawing a relevant parallel, we observe that in case of non-grant of disability pension to a soldier who is discharged in low medical category, he is always intimated in writing the reasons (absence of attributabilit/aggravation or low percentage of disability) and further advising him that he could appeal to higher authorities within a stipulated time frame. A similar effort in this case to intimate the applicant the reasons for non-eligibility of pension and provisions for appeal would have gone a long way in demonstration of transparency in administration besides being close to adherence of natural justice. We cannot ignore that the applicant had put in more than 15 years of military service sacrificing his entire youth; least that the employers could have done is to explain him as to why he was being disentitled from receiving pension despite having earned pensionable service and having not being punished to the extent of forfeiture of service for pension. We also are of the view that a Sepoy in the army ordinarily does not understand these rules/regulations impacting his service conditions unless he is explained and made to understand by his officers.

45. Under such circumstances we are inclined to grant an opportunity to the applicant to appeal before the competent authority under the provision of Regulation 113 (a) of the Pension Regulations for the Army (as revised). The delay in making such appeal be

condoned. The competent authority must consider the appeal sympathetically and use their discretion as provided for in the ibid regulation and dispose the appeal with a reasoned order within three months of receipt of such an appeal by the applicant.

46. For the reasons discussed in the foregoing paragraphs, we are unable to hold that the applicant is entitled to get service pension even after his dismissal in court martial trial. However, we dispose of this TA with liberty to the applicant to make appropriate appeal petition before the competent authority for grant of pension in terms of reg. 113(a). If such petition is filed, the competent authority shall consider and decide the same in the light of our observations made and the parameters as laid down by the Apex Court as enumerated in the preceding paragraphs, within 90 days from the date of receipt of such appeal/representation. No costs.

47. Ld. Registrar of this Bench shall forward a copy of this order to the Secretary, MoD, New Delhi, Respondent No. 1 for taking such action as may be deemed fit and proper in the light of our observations made in Para 30 & 40 above.

48. Let original records be returned to the respondents on proper receipt.

49. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both parties on observance of due formalities.

(LT. GEN. K.P.D.SAMANTA)
ADMINISTRATIVE MEMBER

(JUSTICE RAGHU NATH RAY)
JUDICIAL MEMBER