

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 24<sup>th</sup> November, 2020.

+ W.P. (C) 98/2020

**BRIJLAL KUMAR & ORS.**

**.....Petitioners**

Versus

**UNION OF INDIA & ORS.**

**.....Respondents**

**AND**

**39 OTHER PETITIONS AS PER PARTICULARS IN ANNEXURE  
'A' TO THIS JUDGMENT**

**Counsels for the petitioners:-**

Mr. Ankur Chhibber, Mr. Himanshu Shekhar Tiwari, Mr. Anshuman Mehrotra, Mr. Harsh Dhankar & Mr. Nikunj Arora, Advocates.

Ms. Pallavi Awasthi, Adv.

Mr. Manoj Kumar Gupta, Adv.

Ms. Aparajita Singh, Sr. Advocate and Ms. Pallavi Awasthi, Advocates.

Mr. Manoj Gupta and Mr. Banvendra Singh Gandhar, Advocates.

Mr. Krishna Kumar Prasad, Adv.

**Counsels for the respondents:-**

Mr. Arun Bhardwaj, CGSC for UOI with Mr. Abhishek Sharma & Mr. Nikhil Bhardwaj, Advocates.

Mr. Anil Soni (CGSC) with Mr. Devesh Dubey, Advocates for UOI.

Mr. Harish Vaidyanathan Shankar, Adv.

Mr. Jaswinder Singh, Advocate.

Mr. Sushil Kumar Pandey, Advocate.

Mr. Piyush Beriwal, Mr. Neeraj, Mr. Ankit Raj, Mr. Sahaj Garg, Ms. Vandana Dewan & Ms. Damini Garg, Advocates for R-1 to R-5.

Mr. Avnish Singh, Sr. Panel Counsel for UOI.

Ms. Aakanksha Kaul & Mr. Manek Singh, Advocates.

Mr. Praveen Kumar Jain, Senior Panel Counsel, Mr. Abhishek Khanna and

*W.P.(C) Nos.98, 7337, 7341, 7399, 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655, 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409, 8493, 8558, 8644, 9161, 9192&9216/2020.*

Mr. Sajal Manchanda, Advocates.  
Mr. Nikhil Goel CGSC and Mr. Dushyant Sarna, Advocates.  
Ms. Amrita Prakash, CGSC Advocate.  
Ms. Nidhi Raman CGSC, advocate for R-1 to R-5.  
Mr. Ruchir Mishra, Mr. Mukesh K. Tiwari and Mr. Ramneek Mishra, Advocates for UOI.  
Mr. Ripudaman Bhardwaj, CGSC with Amit Gupta GP, Advocates for UOI  
Mr. Manik Dogra, Sr. Govt counsel, Mr. Dhruv Pande, Advocates  
Mr. Vinod Diwakar CGSC with Mr. Amit Kumar Dogra G.P, Advocates.  
Mr. Manish Mohan, CGSC with Manisha Saroha, Advocates.  
Ms. Arti Bansal, Advocate.  
Mr. Aakash Meena (G.P.) for UOI. Mr. Satya Ranjan Swain, Advocate.  
Mr. Tanveer Ahmed Ansari, Advocate.  
Mr. Vinay Mathew, Adv.  
Mr. Anil Dabas, Adv. for R-1 to 5.  
Mr. Vijay Joshi and Mr. Himanshu Pathak, Advs.  
Mr. Raj Kumar Yadav and Ms. Rupali Kapoor, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**  
**HON'BLE MS. JUSTICE ASHA MENON**

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

1. The petitioner/s, in each of these 40 petitions, (a) impugn/s the letter/circular No. 8(3)/86/A/D(Pension/Services) dated 19<sup>th</sup> February, 1987 issued by the Ministry of Defence (MoD) to the extent that it grants the benefit of *pro rata* pension only to the Commissioned Officers of the Defence Services and not to the Non-Commissioned Officers (NCOs)/Persons Below Officer Rank (PsBOR) of the Defence Services, as discriminatory; and, (b) claim/s *pro rata* pension.

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

2. Needless to state, the petitioner/s in each of the petitions are NCOs/PsBOR who joined the respondents Indian Air Force (IAF) as Airmen/Corporal.

3. It is apposite to preface this judgment with the background in which the controversy being adjudicated by this judgment has arisen.

4. All claims of pension, gratuity or allowance of personnel of IAF are regulated by the Pension Regulations for the Air Force, 1961 as in force at the time of an individual's retirement, release, resignation, discharge, death, etc., as the case may be. The same, (i) in Chapter I titled 'General', (a) vide Regulation 2A (3) 'defines' 'Airman' "as a person subject to the Air Force Act, 1950, other than an officer and includes a Warrant Officer and a Master Warrant Officer but does not include an apprentice"; (b) vide Regulation 2A(4) 'defines' 'Pension' as including "gratuity except when it is used in contradistinction to the term gratuity"; (c) vide Regulation 2A(6) 'defines' 'Qualifying regular service' as meaning "all service including any former service as a combatant which qualifies for pension of a Combatant"; (d) vide Regulation 2A(7) 'defines' 'Retired list' as "An officer is said to be on the retired list if he has served in the regular Air Force as a permanent commissioned officer, and has retired therefrom or otherwise placed on the retired list according to the Regulations in force from time to time, and an officer is deemed to be on the retired list even if he has been recalled or re-employed in the Air Force"; (e) in Regulation 3 prescribes that full rate of pension or gratuity provided for in these Regulations shall not be granted unless the service rendered has been satisfactory; if the service has not been

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satisfactory, the competent authority may make such reduction in the amount of pension or gratuity as it thinks proper; (ii) under Chapter II titled “Commissioned Officers”, (a) in Regulation 25 provides that the minimum period of qualifying service required for a retiring pension is 20 years (15 years in case of a ‘late entrant’) and that only completed years of qualifying service shall count and that the minimum period of qualifying service for a retiring gratuity shall be 10 years; (iii) in Chapter III titled ‘Airmen’, (a) in Regulation 101 provides that the same would apply *inter alia* to those who either joined service on or after 1<sup>st</sup> June, 1953 and served on regular terms/engagements or joined on or after that date or are brought to such terms/engagements after that date; (b) in Regulation 102 *inter alia* provides that an individual who is dismissed under the provisions of Air Force Act is ineligible for pension or gratuity in respect of all previous service and that an individual who is discharged under the provisions of the Air Force Act and the Rules made thereunder remains eligible for pension or gratuity under the said Regulations, with a note, that those discharged from service due to misconduct, corruption, lack of integrity or moral turpitude are not normally eligible for gratuity; (c) in Regulation 103 provides that a flight cadet drawn from the ranks shall continue to be eligible for pensionary benefits appropriate to his rank; (d) in Regulation 104 provides that except where otherwise specifically provided for, no individual may draw more than one pension under the said Regulations; (e) in Regulation 111 provides that all service from the date of enrolment/transfer for man’s service to the date of discharge shall qualify for pension or gratuity; (f) in Regulation 112

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

provides that a person who has been guilty of desertion or fraudulent enrolment shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by court martial of the offence; (g) under the sub-section 'Airmen' in Regulation 121 provides that the minimum qualifying regular service for earning a service pension is 15 years; and, (h) in Regulation 127 provides that the minimum qualifying regular service for earning a service gratuity is five years.

5. Thus, as far as Airmen/PsBOR/NCOs are concerned, and to which category all the petitioners herein belong, the qualifying service, to be eligible for pension, vide Regulation 121 of the Air Force Pension Regulations, is of 15 years as compared to 20 years for Commissioned Officers vide Regulation 25 of the Air Force Pension Regulations.

6. The respondents IAF, at all relevant times, has had a policy of grant of "Permission to Airmen/NCs(E), to apply for civil posts/services under Central/State Governments and Public Sector Undertakings (PSUs)". We have however, on asking, been supplied only the Air Force Orders (AFOs) dated 19<sup>th</sup> September, 2008, 31<sup>st</sup> May, 2012 and 8<sup>th</sup> December, 2017, containing the policy from time to time in this regard and the AFOs containing the policy prevalent prior to 19<sup>th</sup> September, 2008 have not been made available to us. However save for minor changes (the most significant of which has been in the most recent AFO dated 8<sup>th</sup> December, 2017), the said policy, for the purposes of decision of these petitions, has remained the same. It is not the case of the respondents IAF, that the policy at the time of grant of permission to any of the petitioners in these petitions did not exist  
*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

or was any different. The AFO dated 19<sup>th</sup> September, 2008, being the earliest made available to us, provides that (i) Airmen/NCs(E) (being Non-Combatants (Enrolled)) who have completed seven years of service from the date of enrolment, are permitted to apply for civil posts under Central/State Government and PSUs including Para-Military Forces; (ii) Non-Government Organisations (NGOs)/Trusts, even if funded by the Government, shall not be covered in the permissible category of civil posts; (iii) all applications in this regard are to be directly forwarded to the prospective- employers by the units, after verifying the eligibility including criticality of manpower; (iv) applications of Airmen belonging to critical trade shall be rejected at unit level; the criticality of trades will be updated by Air Headquarters twice a year, in June and December; (v) forwarding of the applications shall not be construed as acceptance to grant No-Objection Certificate (NOC); (vi) at the time of forwarding the applications, Station/Unit Commanders are to ensure *inter alia* that the Airmen/ Non-Combatants (Enrolled) who have rendered a certificate of undertaking to serve for any specific period owing to promotion under Grade III, Courses, Deputation/Posting within India/abroad, are not permitted to apply for any civil post within the specified period of undertaking; and, (vii) permission to apply for civil post is a privilege and hence issuance of NOC cannot be claimed as a matter of right.

7. The petitioner/s in all these petitions claim to have applied under the policy, as in the AFOs dated 19<sup>th</sup> September, 2008, 31<sup>st</sup> May, 2012 and 8<sup>th</sup> December, 2017, in force from time to time, for permission and claim to

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have been issued the NOC thereunder and to have left the service of the respondents IAF, though after seven years but before 15 years of qualifying service for receipt of service pension. They, under the Air Force Pension Regulations aforesaid were thus not eligible for pension and were not receiving any pension.

8. We may reiterate that under the Air Force Pension Regulations aforesaid, the qualifying service for receipt of service pension for Commissioned Officers of the respondents IAF was/is 20 years. Though we have no document in this regard but it is not in dispute that there was/is a similar policy, as for Airmen, for the Commissioned Officers also, to, after obtaining the NOC of the respondents IAF, leave the service of the respondents IAF to join other prescribed employment.

9. The respondents IAF, vide letter/circular No.8(3)/86/A/D (Pension/Services) dated 19<sup>th</sup> February, 1987 aforesaid and which in these petitions is impugned as discriminatory, *inter alia* provided as under:-

*“No.8(3)/86/A/D(Pension/Services)  
Government of India/Bharat Sarkar  
Ministry of Defence/Raksha Mantralaya*

*New Delhi, Dated the 19<sup>th</sup> February, 1987*

*The Chief of the Army Staff  
The Chief of the Naval Staff  
The Chief of the Air Staff*

*Subject:- Grant of pro-rata pensionary benefits to the Commissioned Officers of Defence Services on permanent absorption in Central Public Enterprises.*

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

Sir,

*I am directed to say that in supersession of this Ministry's*

|   |       |                                                                                                                                                                                                                                                                                                                                                                                   |
|---|-------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 |       | marginally noted letters on the above subject, grant of pro-rata pensionary benefits to the Commissioned Officers of the Defence Services on their absorption/Appointment in Central Public Enterprises under the control of the Department of Defence Production or other Civil Ministries will henceforth be regulated in accordance with the <u>provisions of this letter.</u> |
| 2 | ..... |                                                                                                                                                                                                                                                                                                                                                                                   |
| 3 | ..... |                                                                                                                                                                                                                                                                                                                                                                                   |
| 4 | ..... |                                                                                                                                                                                                                                                                                                                                                                                   |
| 5 | ..... |                                                                                                                                                                                                                                                                                                                                                                                   |
| 6 | ..... |                                                                                                                                                                                                                                                                                                                                                                                   |
|   | _____ |                                                                                                                                                                                                                                                                                                                                                                                   |

2. *The provisions of this letter will apply to those who:*

- (i) *While on deputation to Central Public Enterprises exercise an option for permanent absorption and are discharged/permitted to retire prematurely from Defence Services for this purpose.*
- (ii) *are appointed in Central Public Enterprises on the basis of their own applications sent through proper channel in response to advertisements and are permitted to retire prematurely from service in the Defence Services for the purpose of taking up the appointment in the Enterprises.*

3. *Officers with not less than 10 years qualifying service will be entitled to receive pro-rata pension worked out according to*

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*the methods given in Annexure 'A' to this letter. Illustration examples as regards the method of calculation of Pro-rata pension are also given in the Annexure.*

*4. Death-cum-retirement gratuity based on the length of qualifying service of an absorptee till the date of his absorption will be admissible, as calculated under the DCRG rules applicable to him before absorption.*

*5. No pension or service gratuity/Death-cum-Retirement gratuity will be payable to those absorbed in an Enterprise with less than 10 years of service.*

*6.....*

*7.....*

*8.....*

*9.....*

*10.....*

*11.....*

*12.....*

*13.....*

*14. Any liberalisation of pension/gratuity and other rules as decided upon by the Govt of India in respect of officers and applicable from a date after the permanent absorption of an absorptee would not be extended to him.*

*15.....*

*16. This letter takes effect from 6.3.85 i.e. it will be applicable to those officers who are absorbed permanently on or after 6.3.85.*

*17. Pension Regulation of the three services will be amended in due course.*

*18. This issues with the concurrence of the Finance Division of this Ministry vide their U.O. No.4787-Pen of 1986.*

*Yours faithfully*

*Sd/-----*

*(SHIV RAJ NAFIR)*

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

*Deputy Secretary to the Govt of India”*

10. Thus, while under the Pension Regulations aforesaid, the minimum qualifying service for earning pension, for Commissioned Officers of the respondents IAF was 20 years but vide aforesaid letter/circular, a provision was made for grant of *pro rata* pension to those Commissioned Officers of the respondents IAF who left service with the permission/NOC of the respondents IAF even prior to having served the minimum qualifying period of 20 years and on the conditions as laid down in the letter/circular aforesaid. However no corresponding provision in the aforesaid letter was made for Airmen/NCOs/PsBOR to get *pro rata* pension if left the service of the respondents IAF with the permission/NOC of the respondents IAF before completion of 15 years of qualifying service, even if satisfying the other conditions as prescribed in the letter/circular dated 19<sup>th</sup> February, 1987, for Commissioned Officers.

11. Civil Writ Petition No.4942/1994 titled ***Ex-Corporal R.D. Sharma & Ors. Vs. Union of India & Ors.*** was filed in this Court by Airmen/NCOs/PsBOR, who had been permanently absorbed in the Hindustan Aeronautics Limited (HAL), after being Airmen in the Air Force, due to the conversion of the Aircraft Manufacturing Depot at Kanpur, a unit of the respondents IAF, into the Kanpur Division of the HAL on 1<sup>st</sup> June, 1964, for *pro rata* pension. The said writ petition was disposed of vide order dated 9<sup>th</sup> December, 1994 by a Division Bench of this Court, directing the respondents IAF to consider the writ petition as a

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representation of the petitioners therein and to decide the same within two months therefrom.

12. We are informed that pursuant to the aforesaid directions, a decision was taken to grant *pro rata* pension to the Airmen/NCOs/PsBOR working in the unit of the respondents IAF which was converted into HAL.

13. Another writ petition, being Civil Writ Petition No.3471/1996 titled ***Ex. Corporal Swarup Singh Kalan Vs. Union of India & Ors.***, came to be filed in this Court, the petitioner wherein claimed to be identically placed as the petitioners in ***Ex-Corporal R.D. Sharma*** supra. The said writ petition was disposed of by a Single Judge of this Court, directing the representation of the petitioner therein for grant of *pro rata* pension to be considered and decided within eight weeks therefrom.

14. We are informed that in pursuance thereto, the petitioner therein was also granted the benefit of *pro rata* pension. On inquiry, we are further informed that the petitioner in ***Ex. Corporal Swarup Singh Kalan*** supra was not in the union of IAF which was converted to HAL, unlike the petitioners in ***Ex-Corporal R.D. Sharma*** supra.

15. Mention at this stage may be made of ***Ram Singh Yadav Vs. Union of India*** (2005) 116 DLT 486. The claim of the petitioner before the Division Bench of this Court in that case was for grant of pension from the date of his discharge from service of the Indian Army. The petitioner therein had a service career spanning 10 years and 258 days before his discharge from service for having been found unsuitable for Military

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service in terms of provisions of Rule 13–III(v) of the Army Rules, 1954. After noticing, that (i) Regulation 132 of the Pension Regulations for the Army provided that the minimum qualifying service for earning service pension was 15 years; (ii) letter dated 19<sup>th</sup> February, 1987 aforesaid of the MoD for grant of *pro rata* pension to Commissioned Officers of the Defence services on permanent absorption in public sector enterprises; (iii) the petitioner was not a Commissioned Officer in the Army nor could be considered as permanently absorbed in a PSU; (iv) the order dated 9<sup>th</sup> December, 1994 in ***Ex-Corporal R.D. Sharma supra***; (v) the circular of the MoD dated 29<sup>th</sup> April, 1997 dealing with grant of *pro rata* pension to ex-Airmen who were absorbed in PSUs before completing 10 years of service in Government of India; and, (vi) the order dated 29<sup>th</sup> November, 2001 in LPA No.342/2000 titled ***Union of India & Ors. Vs. U.B.S. Gaur & Ors.*** setting aside the order the Single Judge granting *pro rata* pension to Airmen who had rendered less than 10 years of service, it was held that since the qualifying service in the Army was 15 years as provided in Regulation 132 of the Pension Regulations of the Army and there was no provision for grant of *pro rata* pension to PBOR, the relief of *pro rata* pension could not be granted to the petitioner therein.

16. We may now straightway travel to the year 2017, when a bunch of petitions, filed in or about the year 2016 by ex-Airmen of the respondents IAF, who were then working in public sector or State Government enterprises after resigning from the respondents IAF, seeking *pro rata* pension, came to be decided by the Division Bench of this Court in ***Ashit***

***W.P.(C) Nos.98, 7337, 7341, 7399, 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655, 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409, 8493, 8558, 8644, 9161, 9192&9216/2020.***

**Kumar Mishra Vs. Union of India** MANU/DE/3584/2017. The respondents IAF, opposing the said writ petitions raised a preliminary objection to the maintainability of the writ petitions contending that the dispute and issues raised were a 'service matter' as defined in Section 3(o) of the Armed Forces Tribunal Act, 2007 and the petitioners had an alternative remedy as per the said Act and should move the Armed Forces Tribunal (AFT) for the relief. The said preliminary objection found favour with the Division Bench of this Court and it was held that the claim of the petitioners therein, being ex-employees of the IAF, for pension under the Air Force Act, was within the domain of the AFT. Accordingly the writ petitions were transferred to AFT and the parties directed to appear before the AFT.

17. Mention may next be made of another writ petition being W.P.(C) No.10026/2016, though filed at the same time as the writ petitions aforesaid transferred to the AFT by the Division Bench of this Court vide judgment dated 26<sup>th</sup> May, 2017, but in which the claim for *pro rata* pension was premised on the challenge to the letter/circular No. 8(3)/86/A/D(Pension/Services) dated 19<sup>th</sup> February, 1987 aforesaid, as discriminatory. The said writ petition titled **Govind Kumar Srivastava Vs. Union of India** came to be decided on 9<sup>th</sup> January, 2019 vide judgment reported as MANU/DE/0048/2019. The counsels for the respondents Union of India/IAF in this petition also took a preliminary objection to the maintainability thereof for the reason of availability of alternate remedy before the AFT. It was the contention of the counsel for the petitioner

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therein that the AFT was not entertaining challenges made before it to the circulars; reliance was placed on an order dated 31<sup>st</sup> July, 2018 of the Principal Bench of AFT holding that the challenge to circulars could not be entertained by AFT in terms of Section 14 of the Armed Forces Tribunal Act as it did not give power of issuance of writ to the AFT. Per contra the counsel for the respondents IAF relied on *L. Chandra Kumar Vs. Union of India* (1997) 3 SCC 261 to contend that AFT was empowered to test the *vires* of subordinate legislations and Rules. The Division Bench of this Court held that since the challenge in the writ petition before it was to a letter/circular of the MoD on the ground of being discriminatory for granting the benefit of *pro rata* pension only to Commissioned Officers and not to NCOs/PsBOR, and the AFT vide its order dated 31<sup>st</sup> July, 2018 had already held that it could not entertain such challenge, there was no merit in the preliminary objection raised by the respondents IAF to the maintainability of the writ petition. Proceeding to decide the writ petition, recording that (i) the petitioner therein enrolled as an Airman on 19<sup>th</sup> June, 1998; in 2003 he was promoted to the rank of Corporal; (ii) pursuant to an advertisement issued by Air India, the petitioner applied for post of Technical Officer on 10<sup>th</sup> January, 2007 and on 4<sup>th</sup> July, 2008, NOC was issued by the respondents IAF permitting the petitioner to take up employment with Air India, which was a PSU; (iii) the petitioner was discharged from the respondents IAF after having served for 10 years and one month on 21<sup>st</sup> July, 2008 and on 8<sup>th</sup> August, 2008 joined Air India as a Technical Officer; (iv) the petitioner, on 29<sup>th</sup> April, 2016 applied to the

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respondents IAF for grant of *pro rata* pension and which application was rejected vide response dated 6<sup>th</sup> June, 2016; (v) the case of the petitioner was that PsBOR/NCOs like the petitioner were being discriminated in the matter of grant of *pro rata* pension as the payment of *pro rata* pension only to Commissioned Officers vide letter/circular dated 19<sup>th</sup> February, 1987 was not based on any rational criteria or principle; (vi) it was further the case of the petitioner that certain other PsBOR/NCOs had been allowed *pro rata* pension; reference was particularly made to the petitioner in ***Ex. Corporal Swarup Singh Kalan*** supra and it was contended that the petitioner Govind Kumar Srivastava was no different; (vii) it was further the contention of the petitioner that the Central Government, in respect of Persons of the Indian Audit and Accounts Department, had amended the Central Civil Services (Pension Rules), 1972 by inserting Rule 37A and allowed *pro rata* pension to a Government servant who, upon being sent on deputation to PSU, is absorbed there and though the petitioner had also joined a PSU i.e. Air India but was denied *pro rata* pension; (viii) the respondents contested the petition relying upon Regulation 121 of the Air Force Pension Regulations prescribing qualifying service for Airmen as 15 years and contending that there was no provision for grant of *pro rata* pensionary benefits to PsBOR; (ix) it was further the defence of the respondents IAF that a few ex-Airmen who had less than 15 years of qualifying service and were discharged from Air Force on being permanently absorbed in HAL during 1960-70 had been granted *pro rata* pensionary benefits on the direction of the Courts to consider their representation; and, (x) with respect to the petitioner in ***Ex.***

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**Corporal Swarup Singh Kalan** it was stated that he was granted *pro rata* pension as a 'special case' and should not be quoted for grant of *pro rata* pension to other ex-Airmen absorbed in PSUs, it was held (a) that there was no justification put forth by the respondents IAF for denying benefit of *pro rata* pension to PsBOR/NCOs in the respondents IAF except by saying the Regulation 121 of the Air Force Pension Regulations did not provide therefor, ignoring that such *pro rata* pension has indeed been granted to Commissioned Officers of IAF notwithstanding that the Air Force Pension Regulations did not envisage such payment; (b) that the basis of differential treatment being accorded to NCOs/PsBOR in the matter of grant of *pro rata* pension had not been satisfactorily explained by the respondents IAF; (c) that the respondents IAF had also not explained how even in the Central Government, there was a notification dated 30<sup>th</sup> September, 2000 recognising the grant of *pro rata* pension for the Government servants absorbed in PSUs, who do not, at the time of such absorption, satisfy the requirements of completing the qualifying service for grant of full pension; (d) that there was no explanation why the NCOs/PsBOR in the IAF had been singled out for a differential treatment in the matter of grant of *pro rata* pension; (e) that in the case of Commissioned Officers of the respondents IAF, the minimum period to be completed for grant of *pro rata* pension was 10 years; the petitioner though a PBOR, satisfied this requirement, having completed 10 years and one month in IAF; (f) that the Court in **Ex. Corporal Swarup Singh Kalan** supra had only directed consideration of his representation, without examining the *vires* of

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circular/letter dated 19<sup>th</sup> February, 1987; (g) that though it was open to the IAF to, in pursuance to the direction of the Court, reject Ex. Corporal Swarup Singh Kalan's representation but IAF granted *pro rata* pension to him and the only explanation therefor in the counter affidavits filed by the respondents IAF was that the same was treated as a 'special case'; however it remained unexplained, for what reason it was treated as a 'special case'; (h) that there was no distinction between the petitioner therein and Ex. Corporal Swarup Singh Kalan; (i) that though in **Ram Singh Yadav** supra the Division Bench had held that *pro rata* pension could not be accorded in the absence of any provision but there was no circular/letter as the circular/letter dated 19<sup>th</sup> February, 1987 granting *pro rata* pension to Commissioned Officers, for consideration therein; and, (j) that once the NCOs/PsBOR fulfilled the same conditions as prescribed for Commissioned Officers to get *pro rata* pension, there was no justification or rational basis for discrimination. Accordingly, the petition was allowed, the rejection by the respondents IAF of the claim of the petitioner therein for *pro rata* pension was quashed and a direction issued to the respondents IAF to grant *pro rata* pension to the petitioner, from the date of discharge, in terms of circular/letter dated 19<sup>th</sup> February, 1987.

18. After the dicta in **Govind Kumar Srivastava** supra, this Court has been inundated with petitions by PsBOR/NCOs fulfilling the conditions as laid down in letter/circular dated 19<sup>th</sup> February, 1987 for Commissioned Officers, for grant of *pro rata* pension and a large number of such petitions have been allowed, following **Govind Kumar Srivastava** supra. We also

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have for the last nearly five months, allowed a large number of such petitions on the very first day when they came up before the Court, directing that if the petitioner/s therein, on verification were found to be similarly situated as **Govind Kumar Srivastava** supra, be granted *pro rata* pension.

19. However recently we were informed that the AFT, vide its order dated 29<sup>th</sup> September, 2020 in the matters transferred to it vide order dated 26<sup>th</sup> May, 2017 in **Ashit Kumar Mishra** and other connected petitions supra, has declined the relief of *pro rata* pension claimed therein. The counsels for the respondents IAF thus sought an opportunity to address, contending that they wanted to distinguish **Govind Kumar Srivastava** supra.

20. Being of the view that an opportunity needs to be given to the counsels for the respondents IAF, we stopped disposing of the petitions already pending and/or coming up before us and posted all the said petitions for hearing on 22<sup>nd</sup> October, 2020, directing the respondents IAF to, in the meanwhile, verify whether the petitioner/s in each of the petitions was similarly placed as the petitioner in **Govind Kumar Srivastava** supra and to inform us of the same on 22<sup>nd</sup> October, 2020.

21. That completes the preface/background to this adjudication.

22. In the light of the aforesaid background, we, on 22<sup>nd</sup> October, 2020, opted to commence proceedings by hearing the counsels for the respondents IAF first, with the counsels for the petitioners responding and the counsels

for the respondents IAF having an opportunity of rejoinder and after conclusion of hearing, reserved judgment in all the petitions.

23. We may mention that on 23<sup>rd</sup> October, 2020, two other fresh petitions came up before us namely W.P.(C) No.8409/2020 and W.P.(C) No.8493/2020 and all the counsels having already been heard on 22<sup>nd</sup> October, 2020, judgments in the said petitions were also reserved to be pronounced along with the batch of petitions heard on 22<sup>nd</sup> October, 2020. Similarly W.P. (C) No. 8558/2020 came up before us for the first time on 2<sup>nd</sup> November, 2020 and W.P. (C) 8644/2020 came up before us for the first time on 4<sup>th</sup> November, 2020 and judgment therein was also reserved, to be pronounced along with this batch of petitions. W.P.(C) No.9161/2020, W.P.(C) No.9192/2020 and W.P.(C) No.9216/2020 came up before us for the first time on 20<sup>th</sup> November, 2020 and judgment therein was also reserved, to be pronounced along with this batch of petitions.

24. During the hearing on 22<sup>nd</sup> October, 2020, on enquiry from the counsels for the respondents IAF, whether any of the petitioner/s in any of the petitions did not fulfill the conditions prescribed in letter/circular dated 19<sup>th</sup> February, 1987 for grant of *pro rata* pension for Commissioned Officers and/or was/were not similarly situated as the petitioner in ***Govind Kumar Srivastava*** supra, no petitioner in any of the petitions was pointed out.

25. Mr. Arun Bhardwaj, Advocate, opening arguments on behalf of the respondents IAF contended, that (i) the petitioner/s in each of the petitions,

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instead of claiming to be covered by the dicta in ***Govind Kumar Srivastava*** supra, should raise specific grounds and in the absence thereof, are not entitled to maintain the petition; (ii) there has been no adjudication in law, till now, of the legal question which has arisen in these petitions; (iii) Ex-Corporal R.D. Sharma was working in the unit of IAF which was converted into HAL; W.P.(C) No.4942/1994 filed by him was disposed of vide order dated 9<sup>th</sup> December, 1994, on concession of the counsel for the respondents IAF that a decision on his representation will be taken; (iv) similarly W.P.(C) No. 3471/1996 filed by the Ex. Corporal Swarup Singh Kalan was also disposed of vide order dated 12<sup>th</sup> September, 1996, to decide his representation also; (v) in neither of the two orders there is any decision on merits; (vi) the dicta of this Court in ***Govind Kumar Srivastava*** supra, (a) is *per incuriam*; (b) is bad because this Court therein appropriated to itself the jurisdiction to decide what was in the domain of AFT, on the basis of order dated 31<sup>st</sup> July, 2018 of the AFT in another matter holding that challenge to the circular/letters/policies could not be decided by AFT; (c) upholds the challenge to the circular/letter dated 19<sup>th</sup> February, 1987 merely because the counsels then appearing for the respondents IAF could not defend the challenge; (d) allows the petition only for this reason and not on merits; (e) wrongly relies on ***Ex-Corporal R.D. Sharma*** supra which was distinct from the case of ***Govind Kumar Srivastava*** and the petitioners herein – they were all working in the Aircraft Manufacturing Depot of IAF, which in 1964 was shifted to HAL and they were all absorbed in HAL; it is for this reason that in response to their representation, decision was taken to

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grant them *pro rata* pension; (f) wrongly relies on *Ex. Corporal Swarup Singh Kalan* supra who was wrongly granted the benefit of *pro rata* pension, without being entitled thereto in law; (g) does not notice the earlier dicta of the Co-ordinate Bench in *Ashit Kumar Mishra* supra holding the writ petitions to be not maintainable and the jurisdiction over the dispute being of AFT; (h) does not decide/hold that AFT had no jurisdiction to entertain the challenge therein to the circular/letter dated 19<sup>th</sup> February, 1987; on the contrary the writ petition was entertained only because of the order of AFT and which order was contrary to *L. Chandra Kumar* supra; (vii) after *Govind Kumar Srivastava* supra, in order dated 5<sup>th</sup> December, 2019 in W.P.(C) No.9139/2019 titled *Squadron Leader Neelam Chahar Vs. Union of India & Ors.* it was noticed that in *Govind Kumar Srivastava* supra the earlier judgment in *Ashit Kumar Mishra* supra was not noticed and observing so, the matter was directed to be placed before Hon'ble the Chief Justice for constituting a larger Bench to decide whether the challenge to the Air Force Human Resource Policy No.3/2013 could be raised before the AFT functioning under the Armed Forces Tribunal Act; the said reference to a larger Bench is still pending consideration; (viii) once the question has been referred to a larger Bench, the decision in all these petitions should await the decision of the larger Bench of this Court and/or all these petitions be tagged along with *Squadron Leader Neelam Chahar* pending before a three Judge Bench of this Court; (ix) Supreme Court in *Union of India Vs. Major General Shri Kant Sharma* (2015) 6 SCC 773 has held that the jurisdiction of the AFT is in substitution of Civil

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Court and the High Court, so far as it pertains to matters enumerated in the Armed Forces Tribunal Act and the High Court should not entertain petitions under Article 226 of the Constitution of India if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of itself contains a mechanism for redressal of grievance; (x) attention was invited to Sections 3(o), 14, 30 and 31 of the Armed Forces Tribunal Act to contend that AFT has jurisdiction over matters relating to pension and other retiral benefits; (xi) attention was also invited to Article 136(2) of the Constitution of India to contend that even a SLP against the order of the Tribunal is not maintainable; (xii) it was argued that if the High Court continues to exercise parallel jurisdiction with the AFT, it would lead to an anomalous situation; (xiii) High Court of Allahabad has been refusing to entertain writ petitions where the jurisdiction is of the AFT; (xiv) attention was next invited to ***Balkrishna Ram Vs. Union of India*** (2020) 2 SCC 442 to contend that in the matters prescribed in the Armed Forces Tribunal Act, the original jurisdiction vests in AFT and that writ petitions should not be entertained when the remedy before the AFT is available; (xv) the AFT, vide order dated 29<sup>th</sup> September, 2020 in T.A No.1/2017 titled ***Ex. Corporal Mohitosh Kumar Sharma Vs. Union of India*** and in other connected applications, all of which were transferred pursuant to the order in ***Ashit Kumar Mishra*** supra, has negated the claim of the petitioners therein for *pro rata* pension, giving detailed reasons; (xvi) if this Court allows these petitions and directs grant of *pro rata* pension to the petitioners herein, the same would tantamount to setting

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aside the said order dated 29<sup>th</sup> September, 2020 of the AFT and whereagainst, as per **Major General Shri Kant Sharma** supra, writ petitions before this Court are not maintainable and the only remedy is of approaching the Supreme Court under Sections 30 & 31 of the AFT Act; and, (xvii) in conclusion, it was stated that either this Court should refer all these petitions also to the larger Bench constituted in pursuance to **Squadron Leader Neelam Chahar** supra or these petitions be transferred to AFT, as done in **Ashit Kumar Mishra**, or the legal question arising, be posed/referred to the Supreme Court for adjudication.

26. Mr. Jaswinder Singh, Advocate also appearing for the respondents IAF took us through the order of the AFT in **Ex. Corporal Mohitosh Kumar Sharma** aforesaid to apprise us of the reasons which prevailed with AFT for declining the relief of *pro rata* pension and during his arguments, Ms. Aakanksha Kaul, Advocate also appearing for the respondents IAF, on enquiry, drew our attention to paragraphs 25 and 29 of the order of the AFT, to show that **Govind Kumar Srivastava** supra was noticed and dealt with.

27. Mr. Sunil Kumar Pandey, Advocate also appearing for the respondents IAF drew our attention to **Sail Ex-Employees Association Vs. Steel Authority of India** 2009 SCC OnLine Del 2420 and to counter affidavit filed in W.P.(C) No.98/2020 setting out the differences between PsBOR and Commissioned Officers. Attention was also invited to **Union of India Vs. Havildar/Clerk S.C. Bagari** (1999) 3 SCC 709 holding that the concept of equality has an inherent limitation arising from the very W.P.(C) Nos.98, 7337, 7341, 7399, 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655, 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409, 8493, 8558, 8644, 9161, 9192 & 9216/2020.

nature of guarantee under the Constitution of India and those who are similarly circumstanced are entitled to equal treatment; if there is a rational classification consistent with the purpose for which such classification was made, equality is not violated and holding, that for the purposes of the facility of study leave, Commissioned Officers and NCOs could not be equated.

28. Mr. Harish Vaidyanathan Shankar, Advocate also appearing for the respondents IAF drew our attention to Regulation 25 and Regulation 121 supra of the Air Force Pension Regulations aforesaid, prescribing different periods of qualifying service of 20 years and 15 years, for Commissioned Officers and for NCOs/PsBOR respectively and contended that that the letter/circular dated 19<sup>th</sup> February, 1987 was with respect to Commissioned Officers joining Central/public sector enterprises and contended that the said period of 20 years and 15 years respectively was fixed keeping in view the public interest in making the Commissioned Officers and PsBOR serve for this much minimum time. He also contended that the respondents IAF rendered better assistance to the AFT than were able to render at the time of hearing of *Govind Kumar Srivastava* supra.

29. At this stage we enquired from the counsels for the respondents IAF, that if the minimum period of qualifying service for Commissioned Officers and for Airmen/NCOs/PsBOR was stipulated keeping in view public interest in retaining them in IAF for this much minimum time, why was the policy of discharging them from service, prior to 20 years and 15 years also formulated. It was also enquired, whether any less effect could be given to a W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

judgment, merely because one of the parties thereto did not render proper assistance at the time of hearing.

30. Mr. Harish Vaidyanathan Shankar, Advocate sought to highlight the difference between Airmen and Commissioned Officers, by contending that Airmen join at the age of 17 years, as against the age of 21 years at which the officers join the IAF.

31. Mr. Arun Bhardwaj, Advocate drew our attention to ***Amit Kumar Roy Vs. Union of India*** (2019) 7 SCC 369 laying down that grant of NOC to join PSU/Central/State Government is a privilege and not a right.

32. Commencing arguments on behalf of the petitioners, Ms. Aparajita Singh, Sr. Advocate informed (i) ***Govind Kumar Srivastava*** was pronounced on 9<sup>th</sup> January, 2019; (ii) SLP preferred thereagainst was dismissed on 26<sup>th</sup> April, 2019, though the question of law was left open; (iii) in the judgment dated 11<sup>th</sup> December, 2019 in W.P. (C) 5642 titled ***Mohammad Israr Khan Vs. Union of India, Govind Kumar Srivastava*** was reiterated; (iv) again in ***Rakesh Kumar Vs. Union of India*** MANU/DE/0121/2020 pronounced on 15<sup>th</sup> January, 2020, ***Govind Kumar Srivastava*** was reiterated; (v) On 26<sup>th</sup> May, 2017, ***Govind Kumar Srivastava*** as well as ***Ashit Kumar Mishra*** and other connected petitions were listed before the same Division Bench which distinguished between ***Govind Kumar Srivastava*** and ***Ashit Kumar Mishra*** bunch of petitions because while in ***Ashit Kumar Mishra*** bunch of petitions there was only a claim for *pro rata* pension, in ***Govind Kumar Srivastava*** there was a

challenge to the constitutionality of letter/circular dated 19<sup>th</sup> February, 1987 and thus while *Ashit Kumar Mishra* bunch of petitions were transferred to the AFT, *Govind Kumar Srivastava* was retained for hearing arguments; and, (vi) *Govind Kumar Srivastava* supra has since been followed in about 200 other petitions and 177 of which orders have already been implemented. It was argued that AFT was bound by the dicta of this Court in *Govind Kumar Srivastava*, *Mohammad Israr Khan* and *Rakesh Kumar* supra and committed illegality in not following the same. It was further argued that the onus is on the respondents IAF to show that all the said earlier judgments are wrong.

33. Mr. Harish Vaidyanathan Shankar, Advocate for the respondents IAF at this point vehemently denied that *pro rata* pension is being paid in pursuance to orders in 177 petitions.

34. Mr. Ankur Chhibber, Advocate also appearing for the petitioners drew our attention to the difference between the language of Section 14(1) of the Armed Forces Tribunal Act and Section 14(1) of the Administrative Tribunals Act, 1985. It was argued that while under Section 14(1) of the Administrative Tribunals Act the jurisdiction of the High Court under Article 226 is also excluded, it is not so in the Armed Forces Tribunal Act. It was contended that it is for this reason that while the Central Administrative Tribunal (CAT) in *L. Chandra Kumar* supra has been held to be empowered to entertain challenge to subordinate legislations, the AFT is not so empowered. It was thus contended that it is the High Court alone which could have entertained the challenge to the circular/letter dated 19<sup>th</sup>

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February, 1987 and the AFT had no jurisdiction with respect thereto. He also argued that, (i) in **Ashit Kumar Mishra** and other connected petitions supra there was no challenge to the letter/circular dated 19<sup>th</sup> February, 1987 and challenge was made merely to the rejection of the representation claiming *pro rata* pension; per contra in **Govind Kumar Srivastava** supra there was a challenge to the circular/letter dated 19<sup>th</sup> February, 1987; (ii) vide paragraph 13 of **Balkrishna Ram** supra a doubt has already been expressed with respect to the dicta in **Major General Shri Kant Sharma** supra to the extent it holds that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation and that the High Court will not entertain a petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the aggrieved person or the statute under which action complained of has been taken itself contains a mechanism for redressal of grievance; (iii) **Ashit Kumar Mishra** transferred the writ petitions to AFT, relying on the said part of **Major General Shri Kant Sharma**, of the correctness whereof doubt has been expressed in **Balkrishna Ram**; (iv) AFT has been constantly refusing to entertain challenges to policy matters, as was also noticed in **Govind Kumar Srivastava** supra; (v) AFT, in the order in the case of **Ex. Corporal Mohitosh Kumar Sharma** supra and other transferred applications has committed a glaring illegality in not following the binding dicta of **Govind Kumar Srivastava** supra; (vi) as per **Roger Mathew Vs. South Indian Bank Limited** (2020) 6 SCC 1, in such an eventuality writ petition against

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the order of AFT would lie before the High Court; (vii) the Armed Forces Tribunal Act does not take away the jurisdiction of the High Court under Article 226 of the Constitution of India; (viii) though the counsels for the respondents IAF have contended that the dicta in ***Govind Kumar Srivastava*** supra was a result of the failure of the counsels then appearing for the respondents IAF to place the proper material before the Court but nothing further has been placed before this Court along with the counter affidavits in these petitions also; (ix) that even if the respondents IAF were unable to effectively represent themselves before the Division Bench of this Court in ***Govind Kumar Srivastava*** supra, certainly it cannot be their say that the Additional Solicitor General who represented the respondents IAF before the Supreme Court in the SLP against the decision in ***Govind Kumar Srivastava*** supra, also could not assist the Bench of the Supreme Court which dismissed the SLP in *limine* though keeping the question of law open; (x) the respondents IAF had yet another opportunity in ***Mohammad Israr Khan*** supra to place whatever material they had with them, to contest the claim of discrimination against the PsBOR/NCOs, but still did not; (xi) the order of this Court in ***Mohammad Israr Khan*** supra has already been implemented; attention in this regard was invited to Annexure P-19 to W.P.(C) No.7337/2020; (xii) even though the question of law had been kept open in the order of dismissal of SLP in ***Govind Kumar Srivastava*** supra but the respondents IAF, neither in ***Mohammad Israr Khan*** nor in ***Rakesh Kumar*** or thereafter, addressed anything different; not only so, the respondents IAF did not even prefer a SLP against the orders in

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**Mohammad Israr Khan** supra and **Rakesh Kumar** supra; (xiii) rather, in **Rakesh Kumar** this Court further held (a) that the MoD, in issuing the letter dated 19<sup>th</sup> February, 1987, virtually adopted the rationale of Rule 37 of the CCS (Pension) Rules, 1972 applicable to permanent Central Government employees, although there was a separate set of Pension Regulations for the Armed Forces; (b) in fact the benefit of *pro rata* pension, by a subsequent letter dated 21<sup>st</sup> April, 1988 issued by the MoD, was extended even to Defence personnel absorbed, after discharge, in central autonomous bodies; (c) the position is not different for Central Government employees who are absorbed in Nationalized Banks and Insurance Companies; (d) by OM dated 30<sup>th</sup> May, 1995 issued by Department of Pension & Pensioners' Welfare, it was clarified that Nationalized Banks including the Reserve Bank of India and State Bank of India and its subsidiaries, the General Insurance Corporation and its four subsidiaries are to be treated as autonomous bodies for the purposes of grant of *pro rata* retirement benefit to the permanent Central Government employees who are absorbed by these bodies ; (e) also, vide Notification dated 30<sup>th</sup> September, 2000 Rule 37A was inserted in the CCS (Pension) Rules enabling those serving in the Indian Audit and Accounts Service to avail *pro rata* pension upon absorption in Public Sector Undertaking or central autonomous bodies; (f) vide OM dated 26<sup>th</sup> July, 2005 it was clarified that all employees of Central Government or central autonomous bodies serving prior to 31<sup>st</sup> December, 2003 and governed by the Old Pension Scheme who took up appointment under a State Government by submitting a technical resignation on or after

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1<sup>st</sup> January, 2004, would be eligible for grant of *pro rata* pension benefit for the period they served under the Central Government or the central autonomous bodies; (g) although it was the contention of the respondents IAF that the aforesaid OMs do not apply to Defence personnel but the said OMs read with the letters of MoD do reflect the consistent and broad policy of the Central Government to extend the benefit of *pro rata* pension not only to Central Government employees but to Defence personnel as well; (h) there was no reason in making a distinction for the purpose of *pro rata* pension benefit, between such of those Defence personnel who are NCOs/PsBOR who are subsequently absorbed in Central Public Sector Enterprises/Public Sector Undertakings/ Nationalized Banks and central autonomous bodies after observing all the formalities; (i) the distinction drawn by the respondents IAF between Central Public Sector Enterprises and a Public Sector Undertaking, for the purposes of grant of *pro rata* pension has no rational basis – both are Public Sector entities and in terms of the policy of the respondents IAF at the relevant point of time, an NOC could be granted for absorption in a Public Sector Bank or Nationalized Bank; in such circumstances, to deny *pro rata* pension only because a Public Sector Bank or a Nationalized Bank would not fall strictly within the definition of Central Public Sector Enterprises would subject the petitioner to hostile discrimination (j) for the purposes of grant of *pro rata* pension no distinction can be drawn between those who get absorbed in a Central Public Sector Enterprise or a Public Sector Undertaking or a Public Sector Bank or a Nationalized Bank, upon discharge from the Armed Forces; (xiv)

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

the respondents IAF cannot be permitted to argue afresh whenever a petition has to be filed because of the failure of the respondents IAF to grant similar relief to similarly situated persons; in this way there will never be any finality to any issue; (xv) after the respondents IAF have already implemented the orders in several matters of grant of *pro rata* pension, the question of referring the matter to the larger Bench, as is sought, does not arise; (xvi) the answer returned by the AFT to the first question framed by it i.e.

*“(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?”*

is directly contrary to the dicta of this Court in **Rakesh Kumar** supra;

(xvii) the answer returned by the AFT to the second question framed by it i.e.

*“(2) Whether the applicants are entitled for pro-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?”*

is totally contrary to the dicta of this Court in **Govind Kumar Srivastava**, **Mohammad Israr Khan** and **Rakesh Kumar** supra; (xviii) the same is the position with respect to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> questions framed by the AFT also in **Ex. Corporal Mohitosh Kumar Sharma**; (xix) though all the said judgments were cited before the AFT but the AFT has illegally

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proceeded to decide contrary thereto; (xx) merely because the Supreme Court has left the question of law open, did not entitle AFT to decide contrary to the binding dicta of this Court; (xxi) the decision of the AFT is in the teeth of the judgments of this Court; and, (xxii) in *State of Uttar Pradesh Vs. Arvind Kumar Srivastava* (2015) 1 SCC 347 it was held that the normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit.

35. Ms. Pallavi Awasthi, Advocate also appearing for the petitioners pointed out that, (i) the order of the AFT in *Ex. Corporal Mohitosh Kumar Sharma* supra is silent qua the letter/circular dated 19<sup>th</sup> February, 1987; (ii) *Ram Singh Yadav* supra was not a case of discharge but a case of dismissal from service and thus is not relevant for the present controversy; (iii) in *K.K. Dhir Vs. Union of India* (2006) 135 DLT 300, a Division Bench of this Court allowed the writ petition against the order of the CAT refusing *pro rata* pension to the petitioner therein, who had before joining Oil and Natural Gas Corporation served in the Office of the Accountant General, Punjab, Chandigarh, holding that the issue with regard to grant of *pro rata* pension to those Government servants who had joined a PSU after rendering more than 10 years of Government service was a matter which had seen widening of the door from time to time, either by the Government itself or by judicial pronouncements; initially such benefit was restricted by stipulating that the movement from Government service to a PSU should be a transfer or deputation as opposed to a move by the Government servant of

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his own volition and should have been in public interest; subsequently the said conditions were relaxed by the Government from time to time and once the conditions have been relaxed, all Government servants who had 10 years or more of qualifying service before they moved to PSUs, either on transfer/deputation or of their own volition and in respect of whom there was a declaration of their move being in public interest or not, would be entitled to *pro rata* pension; pension is not a bounty payable on the sweet will and pleasure of the Government; the right to receive pension is a valuable right vesting in a Government servant – it is not *an ex gratia* payment; it is a payment for the past services rendered; and, (iv) the respondents IAF themselves have released pension on its own to the petitioner/s in ***Ex-Corporal R.D. Sharma*** supra and to ***Ex. Corporal Swarup Singh Kalan*** supra and also to several others, after the decision in ***Govind Kumar Srivastava*** supra and there should be no discrimination between those to whom *pro rata* pension has been and is being released and others now before the Court.

36. Mr. Manoj Kumar Gupta, Advocate also appearing for the petitioners stated that, (i) the counsels for the respondents IAF are wrong in creating a distinction between Airmen and Officers, on the basis of entry age; the entry age for officers is also between 16 to 18 years, through the National Defence Academy (NDA) or between 21 to 23 years, through Combined Defence Services Examination (CDSE), as compared to the entry age for Airmen being between 18 to 21 years; (ii) the Government itself has been shortening the minimum period after which Airmen become entitled to seek

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permission/NOC for joining Central Government/State Government services; earlier it was 18 years, then was reduced to 15 years and now is seven years; (iii) the respondents IAF themselves were granting permission/NOC to Airmen for joining Central/State Government/PSUs till 11<sup>th</sup> December, 2019 and in 10 months since then, no change has been pleaded; (iv) though review of the judgment in **Mohammad Israr Khan** supra was applied for by the respondents IAF but subsequently withdrawn; (v) the case of **Ex-Corporal R.D. Sharma** supra was not different from the case of any others; (vi) the respondents IAF, after having granted *pro rata* pension to the petitioners in **Ex-Corporal R.D. Sharma** supra and others ought to have itself granted *pro rata* pension to others who were being discharged after rendering more than ten years of service to join Central/State Government or PSUs but did not and thus the petitioners should not be denied relief or any part of the relief on account of delay; (vii) with reference to the letter dated 24<sup>th</sup> June, 2020 of the respondents IAF rejecting the representation of the petitioner in W.P.(C) No.7639/2020, the only reason given was of the judgments of the Court being in *personam* and not of there having been any change in policy and did not even state that the judgments granting *pro rata* pension were under challenge or intended to be challenged; and, (viii) **Amit Kumar Roy** supra relied upon by the counsels for the respondents IAF was not a case of *pro rata* pension.

37. Mr. Arun Bhardwaj, Advocate for the respondents IAF arguing in rejoinder drew attention to paragraph 15 of **Amit Kumar Roy** supra, rejecting the contention that the appellant therein had an unqualified right

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

under Article 19(1)(g) of the Constitution to leave the service of the IAF and holding that a person who has been enrolled as a member of the IAF does not have an unqualified right to depart from service at his or her will during the term of engagement and that if the same was permitted, will seriously impinge upon manning levels and operational preparedness of the Armed Forces and further holding that interests of the service are of paramount importance and a balance has to be drawn between the interests of the service with situations involving requests by persons enrolled to take civilian employment.

38. Mr. Jaswinder Singh, Advocate for the respondents IAF, in rejoinder contended that the distinction sought to be drawn by Mr. Ankur Chhibber, Advocate between Section 14 of the Armed Forces Tribunal Act and Section 14 of the Administrative Tribunal Act is contrary to the dicta of the Supreme Court in ***L. Chandra Kumar*** supra.

39. Mr. Harish Vaidyanathan Shankar, Advocate for the respondents IAF drew attention in detail to the reasoning of the AFT in ***Ex. Corporal Mohitosh Kumar Sharma*** supra, explaining the context in which the letter/circular dated 19<sup>th</sup> February, 1987 was issued and has contended that the said reasoning was not considered by the Division Benches of this Court in ***Govind Kumar Srivastava*** supra or in any of the subsequent judgments. He also contended that there is an inherent difference between an Airman and a Commissioned Officer and that the orders of grant of *pro rata* pension can be said to have been implemented only on issuance of the Revised Pension Payment Order.

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

40. Mr. Ankur Chhibber, Advocate, putting in a last word stated that the respondents IAF, in the counter affidavits in none of the petitions have taken the pleas as urged by Mr. Harish Vaidyanathan Shankar, Advocate, of the context in which the circular/letter dated 19<sup>th</sup> February, 1987 was issued and which form the reasoning of the order of AFT in *Ex. Corporal Mohitosh Kumar Sharma*. He also referred to *Mohindhr Singh Gill Vs. Chief Election Commissioner, New Delhi* (1978) 1 SCC 405, laying down that when a statutory functionary makes an order based on certain grounds, its validity must be judged on the reasons so mentioned and it cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. It was argued that the letter/circular dated 19<sup>th</sup> February, 1987 does not contain any such explanation, as forms the basis of the order of the AFT.

41. We have considered the rival contentions.

42. 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.

43. 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:-

- 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.
- B. The counsels for the respondents IAF in this regard have themselves informed that the aforesaid question, vide order dated 5<sup>th</sup> 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*.
- 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 ***Roger Mathew Vs. South Indian Bank Limited*** (2020) 6 SCC 1.

- 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.
- 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

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

improbabilities and render extremely useful and indispensable services and the country owes respect and gratitude to them. We have recently in judgment dated 10<sup>th</sup> 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

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

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 19<sup>th</sup> 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

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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 19<sup>th</sup> 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 25<sup>th</sup> July, 2008 in FAO(OS) No.403/2002 titled ***International Development Research***

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

*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 12<sup>th</sup> 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 non est.

M. Thus we are not inclined, to either transfer the *lis* raised in these petitions to the AFT or to tag these petitions with

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

*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 19<sup>th</sup> 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?*
- (2) *Whether the applicants are entitled for pro-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?*
- (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?*
- (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?*

- (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 21 others 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 4<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> 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

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

dated 19<sup>th</sup> 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 19<sup>th</sup> 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

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

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 19<sup>th</sup> 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 **Roger 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

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

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 19<sup>th</sup> 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 19<sup>th</sup> 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

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

rendering more than ten years of Government service, having seen widening of the door from time to time, is apposite.

44. 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.

45. However once we have agreed with the view taken in ***Govind Kumar Srivastava*** supra, of the circular/letter dated 19<sup>th</sup> 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.

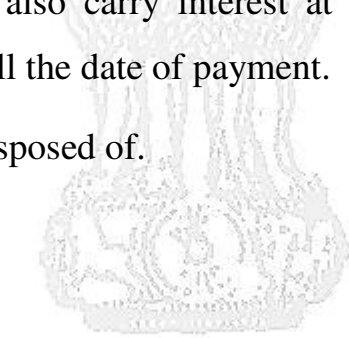
46. We have also considered the aspect of delay. Claim of a large number of petitioners for arrears of *pro rata* pension, is indeed for more than a decade or two. Ordinarily, they would have been entitled to arrears of three years preceding the petition only. However in the judgments passed till now 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.

47. The petitions are thus allowed.

48. 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.

The petitions are disposed of.



**RAJIV SAHAI ENDLAW, J.**

**ASHA MENON, J.**

**NOVEMBER 24, 2020**

‘pp’

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

**ANNEXURE – A**

**PARTICULARS OF 39 OTHER PETITIONS JUDGMENT  
WHEREIN IS PRONOUNCED ALONG WITH W.P.(C). No.98/2020  
TITLED BRIJ LAL KUMAR & ORS. VS. UNION OF INDIA & ORS.**

- + 1. **W.P. (C) 7337/2020**  
**DHARMENDRA KUMAR MISHRA** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 2. **W.P. (C) 7341/2020**  
**VIJAY KUMAR SHARMA** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 3. **W.P. (C) 7399/2020**  
**MANOJ KUMAR SINGH** .....Petitioner  
Versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 4. **W.P. (C) 7409/2020**  
**DEEPAK JOSHI** ....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 5. **W.P. (C) 7421/2020**  
**RAJESH SINGH** .....Petitioner  
Versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

- + 6. **CHANDRA BHAN** **W.P. (C) 7422/2020** **.....Petitioner**  
versus  
**UNION OF INDIA & ORS.** **.....Respondents**  
**AND**
- + 7. **RAKESH KUMAR** **W.P. (C) 7639/2020** **.....Petitioner**  
versus  
**UNION OF INDIA & ORS.** **.....Respondents**  
**AND**
- + 8. **AJAY KUMAR** **W.P. (C) 7649/2020** **.....Petitioner**  
versus  
**UNION OF INDIA & ORS.** **....Respondents**  
**AND**
- +9. **SANJAY KUMAR SAHOO** **W.P. (C) 7650/2020** **....Petitioner**  
versus  
**UNION OF INDIA & ORS.** **.....Respondents**  
**AND**
- + 10. **HARI NARAYAN YADAV & ORS.** **W.P. (C) 7652/2020** **.....Petitioners**  
versus  
**UNION OF INDIA & ORS.** **.....Respondents**  
**AND**
- + 11. **SUDHIRRANJAN SAHOO, & ORS.** **W.P. (C) 7655/2020** **.....Petitioners**  
Versus  
**UNION OF INDIA & ORS.** **.....Respondents**

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

AND

+ 12. W.P. (C) 7660/2020  
**PANKAJ KUMAR ANAND** .....Petitioner  
versus

**UNION OF INDIA & ORS.** .....Respondents  
AND

+ 13. W.P. (C) 7716/2020  
**SATISH CHANDRA PRABHAKAR & ORS.** .....Petitioners  
versus

**UNION OF INDIA & ORS.** .....Respondents  
AND

+ 14. W.P. (C) 7761/2020  
**RAJ KUMAR SINGH** .....Petitioner  
versus

**UNION OF INDIA & ORS.** .....Respondents  
AND

+ 15. W.P. (C) 7902/2020  
**SANTOSH KUMAR** .....Petitioner  
versus

**UNION OF INDIA & ORS.** .....Respondents  
AND

+ 16. W.P. (C) 7954/2020  
**ABHIMANYU NAYAK** .....Petitioner  
versus

**UNION OF INDIA & ORS.** .....Respondents  
AND

+ 17. W.P. (C) 8014/2020  
**AMIT KUMAR SHUKLA** .....Petitioner  
versus

**UNION OF INDIA & ORS.** .....Respondents

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

AND

- + 18. W.P. (C) 8019/2020  
DEVESH KUMAR SINGH .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 19. W.P. (C) 8027/2020  
AMIT PAUL .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 20. W.P. (C) 8136/2020  
DEEPENDER SINGH PARMAR .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 21. W.P. (C) 8139/2020  
BISWAJIT MAHATO .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 22. W.P. (C) 8140/2020  
KHANGEMBAM SANJAY SINGH .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 23. W.P. (C) 8141/2020  
DAYANAND SHARMA .....Petitioner  
versus  
UNION OF INDIA & ORS. ....Respondents  
AND
- + 24. W.P. (C) 8169/2020  
SUKANTA KUMAR PAUL .....Petitioner

W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.

- Versus
- UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 25. **KAMAL KUMAR** **W.P. (C) 8201/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 26. **GOPAL LAL BUNKER** **W.P. (C) 8228/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 27. **CHANDRAJEET KUMAR** **W.P. (C) 8267/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 28. **ASHIM BHATTACHARYYA** **W.P. (C) 8268/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 29. **SUBODH KUMAR GANGWAR** **W.P. (C) 8306/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents  
**AND**
- + 30. **PRAVEEN SONI** **W.P. (C) 8324/2020** .....Petitioner  
versus  
**UNION OF INDIA & ORS.** .....Respondents

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

- AND**
- + 31. W.P. (C) 8325/2020  
**PRAMENDRA KUMAR & ORS.** .....Petitioners
- Versus
- UNION OF INDIA & ORS.** .....Respondents
- AND**
- + 32. W.P. (C) 8335/2020  
**SANDEEP KUMAR KATIYAR & ORS.** .....Petitioners
- Versus
- UNION OF INDIA & ORS.** .....Respondents
- AND**
- + 33. W.P.(C) 8409/2020  
**SHRAVAN KUMAR MITTIREDDY** ..... Petitioner
- Versus
- UNION OF INDIA & ORS.** ..... Respondents
- AND**
- + 34. W.P.(C) 8493/2020  
**RAJ KUMAR BHARADWAJ** ..... Petitioner
- Versus
- UNION OF INDIA & ORS.** ..... Respondents
- AND**
- + 35. W.P.(C) 8558/2020  
**RAHUL KUMAR SHARMA** .....Petitioner
- Versus
- UNION OF INDIA & ORS.** ..... Respondents
- AND**
- + 36. W.P.(C) 8644/2020  
**SATYENDRA KUMAR** .....Petitioner
- Versus
- UNION OF INDIA & ORS.** ..... Respondents

*W.P.(C) Nos.98, 7337, 7341, 7399 , 7409, 7421, 7422, 7639, 7649, 7650, 7652, 7655 , 7660, 7716, 7761, 7902, 7954, 8014, 8019, 8027, 8136, 8139, 8140, 8141, 8169, 8201, 8228, 8267, 8268, 8306, 8324, 8325, 8335, 8409 8493,8558,8644, 9161, 9192&9216/2020.*

**+37.**

**KARAM CHAND**

**.....Petitioner**

## Versus

**UNION OF INDIA & ORS.**

## ..... Respondents

AND

**+38.**

**BRIJ KISHORE GUPTA**

**.....Petitioner**

## Versus

**UNION OF INDIA & ORS.**

#### ..... Respondents

AND

**+39.**

**TANMOY CHATTERJEE**

**.....Petitioner**

## Versus

**UNION OF INDIA & ORS.**

#### .... Respondents