

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

CWP No.18745 of 2014 (O&M)

Date of Decision: May 19. 2017

Ishwar Chand Jain

...Petitioner

VERSUS

Punjab & Haryana High Court (Admn. Side) & others

....Respondents

**CORAM : HON'BLE MR. JUSTICE SURYA KANT
HON'BLE MR. JUSTICE SUDIP AHLUWALIA**

Present:- Petitioner in person.

Mr. Swaran Sandhir, Advocate for respondent No.1.

SUDIP AHLUWALIA, J.

In this Writ Petition, the petitioner, who is a former member of the Haryana Superior Judicial Service, has prayed for –

- a) quashing the Pension Pay Order (Annexure P-1), in which his revised pension was fixed at Rs. 17184/- per month, and,
- b) directions upon the respondents to calculate and pay his revised pension at the rate of Rs. 25775/- per month with effect from 1.1.2006, being 50% of the revised pay scale by implementing the recommendations of Sixth Pay Commission, along with interest on the arrears of pension at 18% per annum for the delayed period.

The petitioner has a long history of litigations involving

himself and the respondents, including respondent No.1 i.e. Punjab and Haryana High Court, during and after the period of his Service Career. We will advert to the various facts connected with his service tenure and previous litigations as and when relevant for reference in the present case, but at this initial juncture, we confine ourselves to the factual background concerning the aforesaid specific limited reliefs claimed in this Writ Petition.

3. The petitioner had joined the Haryana Superior Judicial Service on 2.5.1983, and retired on 31.10.2000 on attaining the age of superannuation. During the period of probation, his services were terminated, but such termination was set aside by the Supreme Court and his A.C.R. was also upgraded from 'C' i.e. Unsatisfactory to 'B Plus' i.e. 'Good', in terms of the Supreme Court's judgment reported in **AIR 1988 SC 1395**. Subsequently, a disciplinary inquiry against him was initiated in 1992. The same was, however, dropped, vide order dated 11.1.1996 and he was compulsorily retired in May, 1996. He challenged the order of his retirement and a Division Bench of this Court vide its judgment dated 26.5.1998 allowed his Writ Petition and set aside the order of compulsory retirement. The appeal filed by the High Court was dismissed by the Apex Court in its judgment reported in **(1999) 2 SCC 579**. The petitioner was consequently reinstated, but the dropped inquiry proceedings against him were revived and he was placed under suspension. He again challenged the relevant decision dated 2.6.2000 in CWP No.15669 of 1999, in which, his suspension order was set aside. It is, however, his case that the other reliefs claimed by him in the aforesaid Writ Petition

for quashing the departmental inquiry proceedings were virtually declined, since he was allowed to raise the issue regarding maintainability of those proceedings before the Enquiry Officer and in any other proceedings, if so needed.

4. The judgment setting aside his suspension was, however, not implemented on account of which he had to file a Contempt Petition, notice of which was issued only to the Registrar General. The petitioner challenged that order before the Supreme Court. His S.L.P. was allowed and consequently the High Court was also directed to be impleaded as a party in the Contempt Proceedings. The petitioner also claims to have filed an S.L.P. in the Supreme Court against that part of a Division Bench judgment of this Court, whereby the continuation and revival of departmental inquiry had not been quashed. Notice of the same was ordered to be issued by the Supreme Court and completion of the inquiry was stayed, while an SLP filed by the High Court (Administration Side) was dismissed.

5. Now according to the petitioner in his written submissions tendered before us on 18/10/2016 –

“During the pendency of the contempt petition and the SLP, an understanding was reached and on that Petitioner sent representation dated 05.01.2002 (Annexure P-4) and dated 17.01.2002 (Annexure P-5) requesting therein to withdraw the order whereby decision had been taken to continue with the enquiry after retirement and further made request to pay all his dues i.e. full pension, leave encashment, gratuity,

payment of arrears of salary etc. etc. and offered a voluntary cut of 1/3rd in pension provided enquiry is dropped and all his due and dues including release of selection grade, re-designation as District & Sessions Judge was allowed. It was also stated vide representation dated 17.01.2002 that on favourable consideration of his representation, Petitioner will withdraw his SLP and contempt petition. It is relevant to point out here that if the contempt petition had been allowed against the High Court then it would have earned a bad name and if the challenge to the enquiry were allowed then this could have effect on many other disciplinary enquiries because it was the case of the High Court that in routine charge sheet was never approved by the Full Court. Later on the contempt petition was withdrawn so that the representations could be considered.”

6. The petitioner's representations dated 5.1.2002 and 17.1.2002 were considered in the Full Court Meeting dated 26.7.2002, after which, the following resolution was adopted -

“Representation dated 5.1.2002 and 17.1.2002 of Sh. I. C. Jain Member Superior Judicial Service Haryana who retired from service on 31.10.2000 considered along with the report of Registrar and the request of Sh. I. C. Jain is accepted.”

7. Here, the petitioner claims that according to the aforesaid resolution, the Full Court had declined his conditional offer of voluntary cut in his pension and had instead chosen to only accept his request to drop the inquiry. The petitioner, therefore, withdrew his Contempt

Petition and SLP pending before the Supreme Court in purported fulfillment of his promise as made in his representations. However, he was not re-designated as District and Sessions Judge, nor his Selection Grade and other retiral benefits including Gratuity and Salary arrears were ordered to be released in spite of acceptance of his representations. On the contrary, the High Court's Registry recommended to the State of Haryana for 1/3rd cut in his pension and the State released the pension with such a cut. Prior to that, the petitioner had submitted two more representations dated 14.8.2002 and 16.8.2002, in which, he had sought for grant of his Selection Grade Pay and other retiral benefits etc. But those representations were rejected, on account of which, he filed CWP No.12391 of 2003, which was ultimately allowed in part vide judgment dated 1.7.2009 (Annexure P-9). His LPA No.371 of 2010 in relation to the reliefs not granted in the aforesaid judgment is as yet pending.

8. However, during pendency of the CWP No.12391 of 2003, the recommendations of the National Judicial Pay Commission were accepted, on account of which, the basic initial pay scale of the District Judge (Entry Level) was fixed at Rs. 51,550/- per month and the pension was to be minimum of 50% such revised pay scale. The petitioner, therefore, filed CWP No. 5767 of 2009 before the judgment in CWP No.12391 of 2003 was pronounced. However, during the pendency of aforesaid Writ Petition, the respondents issued the impugned pension pay order (Annexure P-1) fixing his pension at Rs.17184/- w.e.f. 1.1.2006 instead of Rs.25,775/- per month. The petitioner, however, claims that he became inclined to withdraw the said Writ Petition in

view of oral observations of the Division Bench to the effect that the aforesaid Pension Pay Order should be specifically challenged. He, therefore, withdrew his Writ Petition with permission to file a fresh one being the present Writ Petition.

9. In relation to the specific reliefs claimed by the petitioner regarding admissibility of pension at full 50% of the revised pay scale amounting to Rs. 25,775/- per month, it has been made out that the truncated amount of Rs.17,184/- per month happens to be the balance figure after deduction of the 1/3rd amount ostensibly volunteered for cut in terms of his representations dated 5.1.2002 and 17.1.2002. He, however, claims that such cut from his pension is illegal and improper. In support of this contention, he has raised various questions including legality and propriety of such deduction/cut in view of certain provisions of the Pension Act, as well as application of the principle governing 'Public Policy' in the given facts and circumstances of his case.

10. We may now advert to all the seven questions of law, which the petitioner has raised in Para 15 of his Writ Petition, and which are reproduced as follows -

“(A) Whether the initiation and continuance of the Departmental Inquiry against the petitioner, before and after his retirement was illegal, void because neither the charge-sheet had been approved by the Full Court nor preliminary inquiry was initiated on the directions of the Full Court therefore any action taken/cut imposed in the pension on the basis of that charge-sheet is bad and nonest in the eyes of law?”

(B) Whether the charge-sheet which had been signed by the

then Registrar who was on medical leave is illegal and disciplinary inquiry could not have been started on the basis of that and as such any action taken foundation of which is the charge-sheet is bad and nonest in the eyes of law?

(C) Whether pension/revised pension less than the minimum prescribed cannot be fixed and paid?

(D) Whether no cut can be imposed in the pension without there being a finding of guilt in the departmental enquiry?

(E) Whether the offer of voluntary cut and its acceptance is barred by Section 12 of the Pension Act and as such is not enforceable, there cannot be any estoppel against law?

(F) Whether the offer of voluntary cut on the condition of dropping of enquiry etc. is against the public policy and not enforceable?

(G) Whether the offer of voluntary cut of Rs.1331/- per month can be enlarged to 1/3rd cut?

11. We have already referred to the written submissions placed on record by the petitioner in Para 5 earlier. Now in the Third para on page 3 of those written submissions, he referred to the pendency of LPA No.371 of 2010 with regard to the reliefs not granted to him in the earlier CWP No.12391 of 2003, which was disposed of by Hon'ble Mr. Justice Ajay Tewari vide judgment delivered on 1.7.2009. This Court therefore, directed the petitioner to place on record a copy of the aforesaid Writ Petition in order to understand what was the relief(s) denied to him against which, LPA No.371 of 2010 is pending. He thereafter tendered a copy of aforesaid CWP No.12391 of 2003, perusal of which goes to show that the Legal Questions raised as well as the relief(s) claimed are

substantially identical with those questions raised and claimed now. The questions raised by him in the previous Writ Petition as contained in Para 33 of the same are as follows -

a) *Whether the petitioner is entitled to addition of 4 years, 4 months and 15 days and another 10 years of his practice at the Bar, in the qualifying service for grant of retiral benefits including pension?*

b) *Whether the petitioner is entitled to re-designation post facto as District & Session Judge and release of selection grade (now supertime scale w.e.f. 1.1.1996) w.e.f. the dates it was released to his juniors i.e. 28.9.1992 and to get fix his pension accordingly?*

c) *Whether the offer of voluntary cut in the pension was only for Rs.1331/-p.m.?*

d) *Whether the offer of voluntary cut in the pension was conditional and since the condition has not been fulfilled, therefore, it cannot be enforced?*

e) *Whether the 1/3rd cut in the pension is illegal void ab-initio and cannot be imposed?*

f) *Whether the initiation and continuance of the Departmental Inquiry against the petitioner, before and after his retirement and appointment of new inquiry authority, was illegal, void for the reasons stated in the Writ Petition?*

g) *Whether the voluntary cut in the pension cannot be enforced in view of section 12 of the Pensions Act and also being contrary to the public policy, aims and objects of grant of pension?*

h) Whether the recommendation / order dated 28.2.2003, 7.5.2003, 12.6.2003 Annexures P-16 to P-18, of the respondents is illegal and liable to be quashed?

i) Whether petitioner is entitled to receive full pension calculated on the basis of 32 years qualifying service and/or 50% of the minimum of pay of the post held by him at the time of retirement.

j) Whether the order imposing 1/3rd cut in the pension is arbitrary, contrary to law, against principle of natural justice and cannot be enforced?

k) Whether the order rejecting representation of the petitioner is/are non-speaking one and liable to be set aside on this ground alone?

l) Whether the petitioner is entitled to arrears of pension with interest w.e.f. 1.2.2001?

m) Whether the petitioner is entitled to interest on the arrears of pension, if so from when?

12. Similarly, certain relief(s) claimed with the prayer portion of previous Writ Petition as mentioned in Para 36 thereof are as follows-

“It is, therefore, respectfully prayed that this Hon'ble Court may graciously be pleased to quash the order annexure P-10, P-16 to P-18 and to direct the respondents:-

e) to calculate and pay the pension to the petitioner on the basis of last pay/emoluments drawn (fixed as per prayer 'C' above) by him on the date of retirement on 32 years qualifying service (as per prayer 'd' above) or 50% of the

minimum of pay of the post held by the petitioner at the time of retirement, whichever is higher;

f) to pay interest on the amount of arrears of pension for the delayed period i.e. From 1-2-2001. ”

13. As we have already seen at the very beginning of this judgment, the claim in the present Writ Petition is for calculation of the petitioner's revised pension being 50% of his Revised Pay Scale with effect from 1.1.2006 coming to Rs.25,775/- as against Rs.17,184/- per month which was admittedly claimed by deducting 1/3rd of his pension ostensibly in view of his voluntary offer to surrender the same. In addition, he has claimed interest on the arrears of pension, which was the only other relief claimed in the present Writ Petition. In the given circumstances, the present Writ Petition would appear to be barred by the principles of resjudicata as the subject matter involved in the same is directly and substantially identical to what was raised and claimed in the earlier Writ Petition. We say so because a glance over the questions in both the Writ Petitions would clearly indicate that the questions (A) and (B) in the present Writ Petition were the same as those covered in question (f) of the earlier Writ Petition. Similarly, question (C) in the present Writ Petition is absolutely covered in question (i) of the earlier Writ Petition. Again, the question (D) in the present case is virtually covered in question (d) in the previous Writ Petition. Thereafter, the questions (E) and (F) in the present Writ Petition are virtually identical in questions (g) and (j) of the earlier proceedings. Lastly, the question (G) in the present Writ Petition is directly covered in question (c) of the earlier

Writ Petition.

14. The petitioner nevertheless contends that res judicata does not apply to his present writ petition. It would appear proper to consider his written submissions in this regard, which have been mentioned under the heading 'RESJUDICATA' in item (IX) on Pages 9 and 10 thereof, which are set out below -

“ ix. RESJUDICATA

Petitioner had filed CWP No. 12391/2003 seeking directions to fix the pension and with regard to the pension, it was stated as under :-

“(e) to calculate and pay the pension to the petitioner on the basis of last pay/emoluments drawn (fixed as per prayer ‘c’ above) by him on the date of retirement on 32 years qualifying service (as per prayer ‘d’ above) or 50% of the minimum of pay scale of the post held by the petitioner at the time of retirement, whichever is higher.”

It was pleaded in the petition that Petitioner is entitled to minimum of 50% of the pay scale as pension without any cut (for the reasons stated in the writ petition) and after discussing the same the Hon’ble Judge vide judgment dated 01.07.2009 (Annexure P-9) had allowed the writ petition and directed the Respondents to fix and pay the pension of the Petitioner at the minimum of 50% of the pay scale.

The point regarding the cut in pension was the main grievance of the Petitioner and the Respondent High Court was fully aware of it and it has stated as under in para 1 of the preliminary objection of the written statement (Annexure P-8 Pages 84 of writ petition) :-

“That in this writ petition, petitioner is aggrieved against the action of the respondents whereby 1/3rd cut has been imposed upon his pension. Before giving parawise reply, following preliminary facts are necessary.”

Even in the reply filed by Respondent High Court in CWP No.5767/2009 in preliminary objection no. 2, it has been stated as under:-

“That the present writ petition is liable to be dismissed as no cause of action has arisen to the petitioner to invoke the extra-ordinary writ jurisdiction of this Hon’ble Court by way of present writ petition as one of the grounds in the present writ petition i.e. fixation of his pension @ 50% of the minimum pay in the revised scale of pay on 1.1.1996 had already been raised by him in the Civil Misc. No. 10210 of 2008 in CWP No.12391/2003 which has been decided on 1.7.2009 (Annexure R-1). As such raising of same plea in the present Writ Petitioner is barred by principle of res-judicata.”

Similarly, in reply to C.M. No. 16840 of 2012 in CWP No. 5767 of 2009, in para 3, the Respondent High Court has stated as under:-

“That it needs to be pointed out here that vide judgment dated 01.07.2009, passed in CWP No. 12391 of 2003, the case of the petitioner was allowed only to extent that his pension should not be less than 50% of the minimum pay in the revised scale of pay of the post last held by him and there was no mention of revoking the 1/3rd cut imposed in his pension, though the same was duly

considered. The 1/3rd cut in the pension of the petitioner is still operative, as the administrative orders of Hon'ble Full Court vide which a cut of 1/3rd was imposed in his pension have neither been quashed nor set aside on judicial side.....”

Both the copies of the reply in the writ petition and of the reply in the C.M. No. 16840 are attached as Annexure P-10 & P-11 filed with C.M. No. 9092/2015 in the present writ petition – Pages 124-132 and 133-135.

Petitioner humbly submits that it is settled law that once a plea is raised and the relief claimed is granted then objection about that is deemed to have been rejected by the Court and this principle is mentioned in Section 11 of the Code of Civil Procedure and it has been so clarified by the Hon'ble Supreme Court in the judgment titled The Workmen of Cochin Port Trust Vs. The Board of Trustees of The Cochin Port Trust & Anr. AIR 1978 SC 1283 (Judgment at Sr. No. 17 – Pages 25-32 of the Judgment booklet)

Petitioner humbly submits that the point of cut in the pension is res-judicata and now the Respondent High Court cannot plead that the cut is valid and the Petitioner is not entitled to revised pension of Rs.25775/- p.m. w.e.f. 1.1.2006.”

15. The above written submissions only seek to assert that the respondent/High Court cannot plead that the cut in the petitioner's pension is not valid in view of the earlier judgment. He has also selectively relied upon certain extracts in the Written Statement filed on behalf of the respondent in CWP No.5767 of 2009, but has conveniently ignored the fact that the aforesaid Writ Petition was not decided on

merits, but had been withdrawn by him voluntarily as already noted in Para 8 of this judgment earlier. The net result therefore, is that the observations and decision in CWP No.12391 of 2003 would be binding on the petitioner to the extent they relate to his pleadings raised in the present Writ Petition. As we have already seen earlier, the questions raised and reliefs (claimed) by him in that Writ Petition are virtually identical with those in the present one. It is clearly for this reason that the petitioner, in trying to pre-empt the applicability of resjudicata here has selectively referred to pleadings of the respondent in CWP No.5767 of 2009, which was not at all decided on merits, only with a view to divert the attention from the applicability of the decision in CWP No.12391 of 2003 to the facts & circumstances of the present case. Since his LPA against that decision regarding the reliefs not granted to him in that Writ Petition is admittedly pending, he clearly has no occasion to revert back to those same reliefs in this new Writ Petition by juggling with the facts and language.

16. However, he has emphasized before us that his claim for disbursement of pension at the rate of 50% of the last pay drawn by him without any cut being made therefrom is now occasioned by a new cause of action, viz. the Rules introduced only in the year 2009 after the new Pay Scales for Judicial Officers were adopted, while his earlier Writ Petition was disposed of prior to that on 1st of July in the same year. In addition, he has asserted that in any case, the question of illegality of imposing any cut on his pension was not considered in his earlier Writ Petition. We are not very convinced with this second submission

because if there was any legal bar against the imposition of a cut in his pension for any such reason, which already existed when his earlier Writ Petition was disposed of, in that case, the same ought to have been raised from his side in the earlier proceeding, and agitating those now would apparently be hit by the principle of *constructive res judicata*.

17. Nevertheless, we are inclined to provisionally grant some indulgence to the Petitioner here on this count, in view of his assertion that the new Rules pertaining to admissibility of pension to Judicial Officers, which came into force in 2009, could not have been relied upon by him in the earlier Writ Petition and to some extent, their substance is inextricably linked to other questions regarding illegality of imposing any cut in his pension.

18. In brief, the overall assertion of the Petitioner in this regard is that the Rules operative since 2009 lay down that the pension payable to the Judicial Officers shall not be less than 50% of the pay last drawn, and as a corollary, any cut from the same which has the effect of reducing his actual disbursement to a figure below 50% is violative not only of those Rules, but also void, being in conflict with the relevant provisions of Pension Act. To support these contentions, the Petitioner has raised various arguments and quoted certain judgments as well as the provisions of the Pension Act, which we now proceed on to consider in the following Paragraphs.

19. Admittedly, according to Rule 16 of the Punjab Superior

Judicial Service Rules, 1963 as applicable to the Petitioner in the State of Haryana, the members of the Superior Judicial Service shall be governed by All India Services (Death-cum-Retirement Benefits) Rules, 1958 as amended from time to time. The relevant extracts from All India Services (Death-cum-Retirement Benefits) Rules, 1958 are set out below -

“6. Recovery from pension.- (1) The Central Government reserves to itself the right of withholding whether permanently or for a specified period, and the right of ordering the recovery from pension of the whole or part of any pecuniary loss caused to the Central or a State Government, if the pensioner is found in a departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the Central or a State Government by misconduct or negligence during his service, including service rendered on re-employment after retirement.

[Provided that no such order shall be passed without consulting the Union Public Service Commission].

Provided further that -

- (a) such departmental proceeding, if instituted while the pensioner was in service, whether before his retirement or during his re-employment, shall after the final retirement of the pensioner, be deemed to be a proceeding under this sub-rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the pensioner had continued in service;*
- (b) such departmental proceeding, if not instituted while the pensioner was in service, whether before his retirement or during his re-employment;*
 - (i) shall not be instituted save with the sanction of the Central Government ;*
 - (ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings;*
 - and*
 - (iii) shall be conducted by such authority and in such place or places as the Central Government may direct and in accordance with the procedure applicable to proceeding on*

which an order of dismissal from service may be made;

(c) such judicial proceeding, if not instituted while the pensioner was in service whether before his retirement or during his re-employment, shall not be instituted in respect of a cause of action which arose or an event which took place more than four years before such institution.

Explanation:- For the purpose of this rule :

(a) a departmental proceeding shall be deemed to be instituted when the charges framed against the pensioner are issued to him or, if he has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted -

(i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to the criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented, or, as the case may be, an application is made to a civil court.

Note-1- *Where a part of the pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees three hundred and seventy five per mensem.*

Note-2- *Where Central Government decides not to withhold or withdraw pension but orders recovery of any pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of the member of the service."*

20. Now contention of the petitioner is that while admittedly there is scope of cut in the Pension to the maximum extent of 1/3rd in the aforesaid Rules, nevertheless, such cut is not justified in his case for certain reasons. The first such reason is the observation of the Supreme Court in the case of **"All India Judges Association & Ors. Vs. Union of India & Ors."** in Writ Petition(s) (Civil) No.(s).1022/1989, which is as follows -

"Before considering the said prayer, at the very outset we wish to clarify that the prescription in 23.18 intend to ensure that it should be read to the effect that the minimum of the revised pension of the

*retired judicial officers should be 50% of the pay of the post held at the time of their retirement, as revised from time to time. **In other words, if by virtue of the exercise of revising the pension of a retired judicial officer prior to 1.1.2006 in the revised scale of pay, by any chance the pension gets reduced below 50% of the revised scale, the minimum revised pension should not fall below 50% of the corresponding revised scale.** In the same breath, it must be stated that if such revision results in more than 50% in the revised scale, such higher pension in the revised scale corresponding to pre-revised pension which was last drawn pay of the retired judicial officers, should be protected. If once, we understand the implication of para 23.18 to such categories of judicial officers, there is no difficulty in directing the State Government to apply the said prescription in para 23.18 and workout the pension payable to the judicial officers falling under the said paragraph without reference to the number of qualifying years of service for working out the revised pension payable to them.*

(Emphasis supplied)

21. Thereafter, the Petitioner has contended that no cut on his pension could be imposed because in any case, no finding of guilt in the departmental proceedings was arrived at against him at any stage. To support this contention, he has relied upon the case “***D.V.Kapoor v. Union of India and others***” (AIR 1990 Supreme Court 1923) in which, it was held inter-alia -

“As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60.”

22. To further support his argument, the Petitioner has emphasized that according to Sections 11 and 12 of the Pension Act, 1871, no deduction can be made from the pension of a retired employee and that all assignments, agreements, orders, sales and securities of any kind made by the person entitled to any pension, are null and void. The relevant provisions under Sections 11 & 12 are however, set down below -

***“11. Exemption of pension from attachment.—** No Pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a Decree or Order of any such Court.*

***12. Assignments, etc., in anticipation of pension to be void.--** All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in Section 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowances or for giving or assigning any future interest therein are null and void.”*

23. The Petitioner has also cited the decision of Madras High Court in case **“K. Ganesan Vs. The Registrar, Central Administrative Tribunal, Madras Bench,& Others” (W.P. No. 22207 of 2002)**, wherein it was held that action in terms of Rule 37-A of the Pension Rules, regarding surrender of the right to pension, is itself illegal, being in conflict with Section 12 of the Act as quoted above. The relevant extracts from the decision of the Madras High Court are set out below -

“That apart, even if the petitioner was obliged to surrender such a right for the drawal of 2/3rd of his pension by agreeing for the terms contained in Rule 37-A of Pension Rules in as much as such a wholesale surrender of the right to pension as contained in the said Rule conflicts Section 12 of the Pensions Act, it will have to be held that the Rules providing for such surrendering of right in opposition to Section 12 of the Act cannot be permitted to operate. When under Section 12 of the Act, there is a prohibition imposed on the pensioner himself to barter away his right under very many circumstances except as provided under Section 12A of the Pensions Act, we are convinced that surrendering of the right for drawal of 2/3rd of Pension after its commutation as provided under Rule 37-A (b) is repugnant to Section 12 and is straight away hit by the prohibition imposed under Section 12. Consequently any action based on Rule 37-A(b) is wholly illegal and therefore the surrendering of rights of the petitioner for drawing 2/3rd of his pension at the time of its commutation to that extent can not operate against his interest. We therefore declare that such surrendering rights by the petitioner at the time of his absorption in the year 1986 while commuting 2/3rd of his pension, was invalid and consequently the petitioner was lawfully entitled for the restoration of his pension after the expiry of the period of commutation of 2/3rd pension.”

24. Further, the Petitioner has cited another decision of the Allahabad High Court in case **“B.P.Tandon and another v. Nawab Mehdi Ali Khan and another” (1977 LAB. I.C. 599)**, in which it was held that even a compromise decree for future payment of commuted value in pension, which itself is pension would be null and void in view of Section 12 of the Pension Act. The relevant observations of the Allahabad High Court in this regard are as follows -

“A perusal of the above would show that section 12 renders null and

void all assignments and agreements etc. in respect of money not payable at or before the making of such assignment or agreement, on account of any pension to which the person making the assignment or agreement may be entitled. We have already reproduced earlier the compromise that was entered into between the parties. The mode of payment of the decretal amount agreed upon in the compromise was that the defendant was to pay Rs.50/- in monthly instalments and was also to pay Rs.500/- from each of the commutations granted to them from time to time. It was further stipulated that, in the event of default, it will be open to the decree-holder appellants to get the decree executed by attaching the commutation granted to the defendants. A reading of the compromise indicates that the commutations referred to therein were commutations to be granted to the defendants subsequent to the date of the compromise. In view of the language contained in sec. 12 of the Act, however, no assignment or agreement can be made in regard to the amount which was not due on account of the pension on the date thereof. It will, therefore, follow that the agreement contained in the compromise relating to the execution of the decree was null and void as also concluded by the lower court of appeal. The decree-holder could not, therefore, ask for attachment of the commuted amount on the basis of that condition, contained in the compromise decree.”

25. In the light of all the arguments and contentions of the Petitioner referred to in the preceding paragraph, it would be interesting to also take note of his own disposition and conduct after his representations dated 5.1.2002 and 17.1.2002 were allowed by the High Court. As we have already seen, he had himself volunteered to surrender 1/3rd of the Pension he was drawing at the relevant time as a *quid pro quo* for dropping of the

disciplinary proceedings pending against him. The amount of Rs.1331/- voluntarily offered by him for cut being 1/3rd of the pension of Rs.4993/- being disbursed to him at the relevant time is actually a miscalculation. The same ought to have been Rs. 1664/- odd. Now after the High Court accepted his aforesaid representations, he subsequently submitted a self serving letter of '*Expression of gratitude for acceptance of his request to drop the enquiry and to release the due and pay the dues*' on 14.8.2002 in which, he thanked the Court for having allowed his request '*without any strings i.e. without the offer of voluntary cut of Rs.1331/- P.M. in the pension*'. In our view, this was a clear and clever attempt to wriggle out his commitment simply because his representations in question had been 'accepted', and the communication of which was sent to him on 29.7.2002, and the text of which noting has already been reproduced in earlier Para 6 of this judgment.

26. A plain reading of the aforesaid noting clearly shows that the representations of the Petitioner were simply 'accepted' by the High Court. By commonsense, it would mean that his offer to surrender 1/3rd of his pension was also accepted as part of such overall acceptance since it was apparently felt that it was no need to be any more specific in view of the cut in pension offered by the Petitioner voluntarily. He however, chose to interpret such acceptance as being '*without any strings attached i.e. without acceptance of voluntary offer of cut in pension*' and insisted on exemption from such cut henceforth. This supposition was however, subsequently rejected categorically by the High Court by way of letter No.1690/RHC (7) dated 16.9.2010, which has been made available before us. In our view,

after having got the inquiry proceedings to be dropped against him by offering the voluntary cut of 1/3rd of his pension which according to him could be the maximum penalty imposable against him under the Rules, the Petitioner tried to wriggle out of his offer by attributing initially some misplaced generosity on the part of the High Court, and when it was clarified that there was no decision to exempt him from such voluntary cut, he now seeks to question the legality and validity of such cut itself by way of his other legal submissions and citations.

27. It is not that the Ld. Single Judge had not passed any reasoned order in rejecting the petitioner's claim that the cut of Rs.1331/- only (which was 1/3rd of his original pension) was not enforceable. On the other hand, in its judgment, the Ld. Single Judge in the said Writ Petition had only determined that pension was admissible to an employee in terms of proviso to Rule 18(1) (b) (i) of All India Services (Death)-cum- Retirement Rules, 1958 regardless of years of service put in by the employee. But it was nowhere the observations of the Ld. Single Judge that no deduction from the aforesaid 50% amount could be made in any special case such as that covering the petitioner, who himself had volunteered to suffer a cut of such proportion in lieu of dropping of disciplinary proceedings against him. In fact, the Ld. Single Judge had explicitly rejected the petitioner's contention in this regard by observing -

“The first argument of the petitioner is that his representation (Annexure P-2) was in the nature of an offer by which he had agreed that he would accept a cut of Rs.1331/- only in his pension subject to exoneration in the inquiry, and the grant of the benefit of redesignation as Sessions Judge as well as selection grade from the date his juniors were granted

this benefit. He has argued that this offer having been accepted by the Full Court, the deduction in his pension cannot be more than Rs.1331/- and his prayers also deserve to be allowed.

In my opinion, this argument is too far fetched. A perusal of the extract from the representation reveals that the petitioner just wanted to bring an end to the whole unsavoury controversy and had rather pleaded that even if he was to be held guilty the maximum punishment which would be imposed upon him could only be 1/3rd cut of pension and that he was ready to voluntarily accept the same. In my opinion, far from being an assertion of innocence this can equally be construed to be an admission of guilt. Had the inquiry continued and had the petitioner been found guilty he would have been not only liable to suffer a cut in his pension it would also have a deeming effect of dis-entitling him from selection grade and redesignation. Thus, the argument that by the acceptance of his representation it must be deemed to be held that the petitioner was exonerated and that, thus, he would be entitled to the selection grade or re-designation cannot be accepted.

Apart from omnibus argument reported above, the petitioner has also argued that when his case was considered for re-designation, ACRs for the years 1983-84, 1984-85, 1988-89 and 1991-92 were not considered in the correct prospective as they were materially changed on judicial intervention. He has, thus, argued that in any case, respondent No.1 is bound to reconsider his claim on the basis of modified ACRs.

I am afraid that even if this assertion is accepted to be correct yet it cannot be held that the inquiry which was going on would have no affect on the entitlement of the petitioner for these claims. It must be remembered that the allegations against the petitioner were serious, relating to his integrity and in my opinion, in the event of a finding of guilt, the petitioner would not be entitled

for re-designation and selection grade even if he had excellent service record. The technical argument of deemed date/s being sought to be raised by the petitioner on the basis of a judgment of the Hon'ble Supreme Court in Union of India etc. etc v. K.V.Jankiraman etc. etc. AIR 1991 SC 2010 cannot come to the aid of a person aspiring to higher echelons of judicial service if his integrity as a Judge is in doubt, since in my opinion that is the core competency required for any judicial office let alone the exalted one of District and Sessions Judge.”

28. Therefore the petitioner's assertion that there could not have been cut imposed in the absence of any finding of guilt is unconvincing. As already noted, the Ld. Single Judge while disposing of earlier Writ Petition has also opined that in a way, the offer to surrender 1/3rd of his pension in lieu of dropping of the inquiry proceedings against him itself amounts to a tacit admission of guilt, especially serious considering that the subject matter involving directly touched upon his integrity while in office. Since that decision is separately under challenge in the pending LPA No. 371/2010, we do not find any reason to avoid its applicability *qua* the contentions raised in this new Writ Petition.

29. The other contentions regarding the alleged illegality, voidness of his own offer of cut from his pension in view of the provisions of Sections 11 and 12 of the Pension Act and the citations relied upon by him also do not cut much ice with us. We say so for the simple reason that all those general provisions of law are understood to be applicable during the course of ordinary civil litigations between the private parties and not where

cut in pension is specifically authorized in terms of Service Rules applicable to a public servant, who incidentally happens to be a Senior Judicial Officer in this case. But even assuming that the provisions of Sections 11 and 12 of the Pension Act relied upon by the Petitioner do have any applicability in the present case, still **we cannot be oblivious of the settled legal position that a litigant cannot be permitted to 'approbate' and 'reprobate' at the same time..**

30. In this regard, it would be an apposite to refer to certain decisions of the Apex Court. In ***“New Bihar Biri Leaves Company vs. State of Bihar” (AIR 1981 SC 679)***, it was held inter alia -

"48. While accepting the highest Tender of rates per standard bag or the highest bid, it is not possible to classify the purchasers whose offers/bids have been accepted into 'honest' purchasers and 'dishonest' purchasers. Everybody whose offer or bid is accepted, is assumed to be honest.

51. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by Tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition 13 on the ground that this condition is violative of Articles 19 (1)(g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character, also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

52. For the foregoing reasons, the challenge to the impugned Condition, No. 13, on the ground of Article 14, also, is unsustainable and is rejected."

31. The above decision was followed by the Supreme Court in **"Shyam Telelink Limited now Sistema Shyam Teleservices Limited vs. Union of India"** reported in (2010) 10 SCC 165 where, in dismissing the appeal it was observed -

"22. Although the appellant had sought waiver of the liquidated damages yet upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the migration package. Allowing the appellant at this stage to question the demand raised under the migration package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate."

23. The maxim qui approbate non reprobate (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

24. In Ambu Nair vs. Kelu Nair the doctrine was explained thus: (IA p.271) "Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other

mortgage debt, the appellant, Their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well-accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honyman, J. in smith v Baker LR at p. 357:

'...at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and it another time say it is void for the purpose of securing some further advantage.' "

25. The view taken in the above decision has been reiterated by this Court in *City Montessori School v. State of U.P.* To the same effect is the decision of this Court said: (*New Bihar Case, SCC p.558, para 48*) "48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbate non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., *Verschures Creameries Ltd. V. Hull & Netherlands Steamship Co. Ltd.,.....*)"

32. In "*R.N. Gosain Vs. Yashpal Dhir*" [(1992) 4 SCC 683], the Apex Court held -

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the

footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".

33. In “**Nagubai Ammal & Ors. V. B. Shama Rao & Ors.**” [1956 SCR 451], it was held -

*"But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in **Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd.** and in particular, the observations of Scrutton, L.J., at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree. Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief."*

Referring to some English decisions, it was observed :

*"It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."*In “**Ambu Nair since Deceased v. Kelu Nair, since Deceased**” [(1932-33) 60 Indian Appeals 266], it was held :

*"Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt the appellant, their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of **Honeyman J. in Smith v. Baker (1)**, "at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage." See also per **Lord Kenyon C.J. in Smith v. Hodson (1)** where the same expression is used."*

27. A party consenting to an order cannot be permitted to resile therefrom while retaining the benefit obtained therefrom.

{See **Union of India v. Krishan Lal Arneja [(2004) 8 SCC 453]}**."}

34. The aforesaid decisions comprehensively cover the Petitioner's own conduct in first offering a voluntary cut in his pension in lieu of dropping of the pending inquiry proceedings in which according to him the penalty could not have been any more than what he was offering and after the proceeding was dropped in acceptance of his offer, than seeking to challenge the legality and validity of his own offer and the consequent action taken by the Authorities thereupon. This conduct of approbation and reprobation cannot be condoned by us in the given facts and circumstances.

35. We therefore conclude by observing that not only the present Writ Petition is barred by res judicata, but it was also filed motivatedly for extracting certain monetary reliefs, which were not granted to the petitioner in his earlier Writ Petition, and against which decision, admittedly his own

LPA is pending. Further, the petitioner's belated effort to wriggle out of his own voluntary offer of cut in his pension as *quid pro quo* for dropping the disciplinary proceedings pending against him at the relevant time, is also unfortunate, coming as it does from a former senior Judicial Officer.

36. With the above observations, the Writ Petition is dismissed.

(Surya Kant)
Judge

(Sudip Ahluwalia)
Judge

May 19, 2017
AS

Whether speaking/reasoned : **Yes/No**
Whether Reportable : **Yes/No**