FROM NO. 21
(SEE RULE 102(1))
ARMED FORCES TRIBUNAL , REGIONAL BENCH, KOLKATA

APPLICATION NO : O. A NO. 92 OF 2012

ON THIS 27 TH DAY OF AUGUST, 2014

CORAM : HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

13899890-M Hav/MT Asha Nandan Singh,
Son of Babu Chand Singh,
presently posted at 945 TPT Coy ASC Type 'A',
at Ballygunge Military Camp, Kolkata

……Applicant

-VS-

1. Union of India through
The Secretary,
Ministry of Defense,
South Block, New Delhi.

2. The Chief of Army Staff,
Integrated HQ of MoD (Army),
DHQ PO, New Delhi

3. Officer In-Charge,
Record Officer,
ASC Records (South),
PIN 900493 C/O 56 APO.

4. Officer Commanding,
945 TPT Coy ASC Type 'A'
PIN 700 019 C/O 99 APO.

…. …. Respondents

For the petitioner: Mr. Subhash Chandra Hajra, Advocate
Mr. Aniruddha Datta, Advocate

For the respondents: Mr.B K Das, Advocate.

O R D E R

PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

The applicant, who is a Havildar posted in 945 TPT Coy, ASC at Ballygunj Military Camp, Kolkata, aggrieved by the order (impugned) dated 06.08.2011 (Annex. A/3), has filed this original application. As per the ibid impugned order his extension of service by two years that was granted to him earlier by order dated 27.09.2010, has been cancelled and he was asked to retire on completion of his existing term without granting any extension.

2. Briefly, the facts of the case are that the applicant was enrolled in the Army on 30.09.1988 and got all his due promotions till he attained the rank of Havildar. His term of engagement as Havildar was going to expire on 30.09.2012 on completion of 24 years of service. The applicant was earlier placed in low medical category P-3 (temporary) on account of 50% electric burn for an injury attributable to service with effect from 25.02.2002. He was placed in permanent P-3 category with effect from 12.08.2002 for the said disability. On review his medical category was upgraded to P-2 (permanent) on 27.01.2005. He continued to remain in that category i.e. P-2 (Permanent) in subsequent review medical boards, the last of which was held on 29.04.2011. However, he was not boarded out on account of low medical category and continued in the present rank. His term was scheduled to end on 30.9.12 when he would superannuate on his normal terms and conditions of service without any extension.

3. Consequent to recommendation of 5th Pay Commission, the service span of all Central Government employees was extended by two years up to 60 years. This benefit was also made applicable in a modified manner to all personnel of the armed forces in terms of MoD circular dated 21.09.1998. However, the benefit of this extension of service by two years was not automatic for army personnel below officer rank PBOR), unlike civilian employees. A Screening Board was required to

screen such personnel 24 months prior to the date of completion of term of engagement as per existing policy. It was also provided therein that in order to get such extension, the PBOR are required to be in medical category 'AYE' i.e. SHAPE -1. However, it was provided that even though an individual was in low medical category he was also required to be screened like others; his extension could be granted provisionally subject to medical up-gradation to SHAPE-1 category before the extension of service commenced.

4. The applicant was accordingly screened in September 2010 i.e. two years prior to completion of his normal term on 30.9.12. He was granted extension for two years up to 29.09.2014 effective from 30.09.2012; subject to up gradation to medical category SHAPE-1 before commencement of extension. When the position was like that, all on a sudden in the month of September/October, 2011, the applicant came to know that the impugned discharge order (annexure-A3) was received in his office by virtue of which he was to be discharged from service with effect from 30.09.2012 without any extension, i.e. on completion of his existing terms when he would complete 24 years of service. In other words, he would not get any extension of service which was earlier ordered after holding due scrutiny. This discharge order contains several names and the name of the applicant is at serial No. 25.

5. Being aggrieved by such unfair discharge order, the applicant made a representation to the concerned authorities through his Advocate on 04.11.2011 requesting cancellation of his discharge order. The ground taken by the applicant is that in the meantime another policy letter dated 20.09.2010 was issued whereby it was stated that extension of two years of service would also be admissible to persons who are in P-2 medical category, thus merging the medical category criteria for promotion with that grant of extension. Acceptable medical category for promotion was P-2 as per policy in vogue since 1997. The new policy letter diluting the medical category criteria for extension is issued by PS Directorate (PS-2) of AG Branch on 20.09.2010 which is at annexure A/5. The contention of the applicant is that since at the time of issue of this new policy circular of 20.09.2010, he was already in

service the provisions of such circular should also be made applicable to his case and he should be held eligible for extension although he was in P-2 category, as per Para 2 (b)(ii) of the ibid circular.

6. The respondents, however, replied to the said representation vide letter dated 23.01.2012 (annexure A/6) wherein it has been pointed out that the circular dated 20.09.2010 will be applicable with effect from 01.04.2011 for those who would complete their terms of engagement on or after 01.04.2013. Since the applicant was due to retire before 01.04.2013 (i.e. on 30.09.2012) and he had already been screened two years prior i.e. in September, 2010, he would not be entitled to get the benefit of the revised policy of 20.09.2010 nor could he be screened afresh in terms of new circular. Accordingly, he would be discharged as per discharge order dated 06.08.2011 as his medical category could not be upgraded to SHAPE 1. Being aggrieved, he has filed the instant OA before this Tribunal for the relief as stated above.

7. After the case was filed in this Tribunal challenging the discharge order, on 22.08.2012 an interim order was granted restraining the respondents from giving effect to the order dated 06.08.2011 so far as the applicant was concerned and it was directed that he was not required to report for discharge drill at Secunderabad, as directed in the ibid discharge order and further that he be allowed to continue in service as usual in his present grade. By virtue of this interim order the applicant is still continuing in service and as submitted before us during the course of hearing that he has also been given promotion to the rank of Naib Subedar by order dated 26.11.2013 (copy produced before us).

8. The respondents have contested the application by filing an affidavit in opposition (A/O). It is stated that the applicant was P-2 medical category at the time of screening which was held on 22.09.2010 i.e. two years before completion of his existing term and he was granted extension of service from 30.09.2012 to 29.09.2014 provisionally subject to up-gradation of medical category to an acceptable level i.e. SHAPE – 1, in terms of earlier policy circular of 1998. He was placed before a medical board for review/re-categorization subsequently but his medical category remained the same

i.e. P2 for two years with effect from 29.04.2011 to 29.04.2013; and his next re-medical was due on 29.04.2013, which would fall after commencement of extension of service from 30.09.2012. In such circumstances, the extension already granted earlier, was cancelled and he was asked to retire on completion of his existing term on 30.09.2012 by the impugned discharge order dated 08.08.2011. It is submitted that the applicant is not governed by the new policy of 20.9.10 but by the old policy of 1998 according to which unless an individual is upgraded to 'AYE' medical category before commencement of extension, he cannot get the benefit of such extension. The respondents have further clarified that the revised policy dated 20.09.2010 is applicable for screening boards held with effect from 01.04.2011 for those who would complete their terms of engagement on or after 01.04.2013. Since the applicant was screened in Sep 2010 and was going to complete his term on 30.09.2012, he could not be screened afresh for the 2nd time in terms of the revised policy of 20.9.10 and therefore the benefit of this policy is not applicable in his case.

9. The applicant has filed a rejoinder reiterating his claim that he should get benefit of the new policy dated 20.09.2010.

10. The respondents have filed a supplementary affidavit annexing certain documents in support of their stand taken in the counter affidavit. These are clarificatory circulars dated 11.01.2011 and 02.03.2012 clarifying certain queries with regard to the revised policy of 20.09.2010.

11. We have heard the learned counsel for both the parties at length. After completion of hearing both parties have submitted their respective written notes of arguments. We have also gone through the same carefully.

12. Mr. S C Hajra, learned counsel for the applicant has emphatically contended that the applicant became low medical category on account of 50% electrical burn while performing his official duties on 25.2.2002. The injury was treated as attributable to service. He remained in low medical category since

then; first temporarily and then permanently. His medical category was ultimately upgraded to P-2 in 2005. However, there was no complaint about his performance because of such medical shortcomings. He was also granted conditional extension of service in terms of earlier policy of 1998 but before the said extension could take effect from 30.09.2012, the new policy was published on 20.9.10. In terms of new policy, even individuals in P-2 medical category are also eligible for extension which was not there in the earlier policy as per which only SHAPE-1 category was eligible for such extension even though P2 is a promotable category. Since the subsequent policy is beneficial to the applicant who has suffered the disability due to attributable cause, he cannot be denied the benefit of extension, especially when there was no complaint against him in regard to his performance on account of such medical disability since 2005. Furthermore, P-2 category is a promotable category as per extant rules notified in 1997. It is argued by Mr. Hajra that if a person can be promoted to higher rank despite being in P-2 category, it is illogical and irrational to say that he is not eligible to get extension in the same rank.

13. Mr. Hazra has raised a point by contending that the cut off date of 1.4.11 fixing the applicability of the policy letter dt. 2.9.10 is wholly arbitrary, illogical and has no nexus with the object. He argues that it is highly improper to give effect to a beneficial order from a future date to deny the benefit to the existing staff like the applicant. His further contention is that if the order is to be applicable for those who would retire on 1.4.13 onwards, and screening is to be held two years prior to that i.e. on 1.4.11, how can it be possible to screen all the persons on a single day to adhere to the stipulated condition if the order is made effective from 1.4.11. Therefore, according to Mr. Hazra, it is fit and proper that the policy of 20.9.10 should be directed to take effect from the date of its issue and the applicant should also be given the benefit of this beneficial policy.

14. Mr. Hazra lastly submits that in view of the interim order granted by this Tribunal the applicant is continuing in service and even he has been granted further promotion in JCO rank. His extended term is going to expire on 29.09.2014 i.e. within a month and therefore at this stage it will not be fair to deny

him the benefit of extension/promotion he has already got by virtue of the interim direction of this Tribunal.

15. Mr. Hajra also annexed copies of Full Bench judgement dated 03.01.2013 in group case headed by O.A.279 of 2011 (**Naib Sub Roshan Lal vs UOI**). He has also annexed two other judgements – one by the Principal Bench in OA No. 513 of 2011(**Nb Sub Gulab Rao-vs- UOI**) decided on 04.04.2012 and another of the same Bench in OA No. 468 of 2011 dated 14.05.2012 (**Nb Sub Rajendra Pal Singh vs UOI**).

16. Per contra, Mr. B.K.Das, learned counsel for the respondents has contended that the new policy of September, 2010 is not applicable to the case of the applicant as it is clearly mentioned in the ibid policy that it will be applicable with effect from 01.04.201. It is explained by him that this policy is with regard to the procedure and criteria for screening board. Such screening is held to determine suitability of an individual to get extension by considering various aspects including discipline, medical fitness etc. Screening is ordinarily held two years prior to the date of expiry of the present term. Therefore, as a corollary it follows that it will be applicable in respect of those whose extension would start two years after the date of applicability i.e. from 01.04.2013. In the case of the applicant, his extension would start from 30.09.2012 and, therefore, he is not coming within the purview of the revised policy of 20.9.10 and his case will be governed by the earlier policy of 1998. According to the earlier policy, P-2 category is not eligible for extension. The applicant was already screened in September, 2010 i.e. two years prior to expiry of his existing term and was granted conditional extension subject to medical up-gradation to SHAPE-1. Thereafter, he was placed before a review medical board in April 2011 when he was again placed in medical category P-2 for two years i.e. up to April, 2013. Under such circumstances, there was no alternative but to issue the discharge order in respect of the applicant and others who are similarly denied extension. Thus the applicant has no case. The respondents have relied on a decision of the Lucknow Bench of AFT dated 15.02.2012 in a group case headed by OA No. 234 of 2010 (**Subedar**

Brajesh Kumar Shukla vs UOI & Ors.). They have also relied on a decision of the Kolkata Bench of the Tribunal dated 25.03.2014 in OA No. 112 of 2012 (**Havildar V Cheeranjeevi vs UOI & Ors**.). It is pointed out that the issues raised by the applicant in this case are fully covered by this decision and it was held that the revised policy of September, 2010 will not be applicable in respect of persons whose extension would start before 01.04.2013.

17. We have carefully considered the rival submissions and have gone through the judgements of different Benches of AFT including the Full Bench judgement dated 03.01.2013 presided by the Principal Bench.

18. The only question that falls for our consideration is whether the revised policy dated 20.09.2010 would be applicable to the case of the applicant with modification that the same would take effect from the date of its issue so that he can get extension of serviced despite being in P-2 Category or he will be governed by the old circular of 1998 under which P-2 category personnel are not entitled to get any extension of service. If the later circular is applicable, then, of course, the applicant's discharge vide order dated 06.08.2013 is to be held as valid and he is liable to be discharged with effect from 30.09.2012 i.e. on expiry of his existing term.

19. It is argued by the ld. counsel for the applicant that the ibid revised policy of 20.9.10 should take effect from the date of its issue and not from a prospective date i.e. 1.4.2011 as stipulated. His contention is that fixing such cut off date is arbitrary and has no nexus with the object. On the contrary, by fixing such a prospective date of 1.4.11 as the date of effect, the respondents have sought to deny the benefit of the circular to the existing staff who are in position on the date of issue of the circular. The other contention is that as per the circular, scrutiny is to be held two years prior to the date of extension. If that be the case, then by giving effect to the circular from 1.4.2011 in respect of those who would term would expire on 1.4.2013, it would mean that all such persons working at different units

throughout the country are to be scrutinized for extension on the same date i.e. on 1.4.2011 to maintain the difference of two years, which is absurd and thus, the ibid circular is not implementable in letter and spirit. On the other hand, Ld. counsel for the respondents has very emphatically submitted that fixing of cut off date is the prerogative of the authorities considering various aspects including administrative convenience and judicial review on such cut off date is very limited as held by the Hon'ble apex court in the case of **Govt. of a Pradesh –vs- Subbarayudu & Ors,** (2008) 14 SCC 702 and **State of Punjab –vs- Amar Nath Goyal**, (2005) 6 SCC 754 which also considered the constitution Bench decision in **D.S.Nakara –vs- UOI**, 1983(1) SCC 305. He has further explained that two years gap for conducting screening has been fixed with specific purpose because ordinarily any particular categorization by medical board is valid for two years and therefore, in order to give an opportunity to be upgraded to acceptable medical category by review medical board, such gap of two years has been fixed. It is also not correct that all eligible personnel are to be screened on a particular date to maintain the gap of two years, as argued by the ld. adv. for the applicant. In the note below Para 3 of the ibid circular exception clause has been provided to meet contingencies.

20. As indicated earlier, a larger Bench was constituted at Principal Bench in a group of cases headed by **Nb. Sub Roshan Lal –vs- UOI & Ors** (OA 307/2011) etc. in view of some conflict of decisions of Lucknow Bench dt. 15.2.2012 in OA 234/2010 (**Sub Brijesh Kumar Shukla –vs- Chief of Army Staff**), Kochi Bench dt. 21.3.12 in OA 67/2011 (**Hav Manktu Ram –vs- UOI**) and Principal Bench of AFT dt. 4.4.12 in OA 513/2011 (**Nb Sub Gulab Rao –vs- UOI & Ors**) as indicated in Para 13 of the said order. However, the Full Bench has held that "there is no difference of opinion but in substance the matter involved is about interpretation of policy dated 20.9.10 and also about the validity of the cut off date fixed in the above policy".

21. It will be appropriate to reproduce the relevant observations and findings of the larger Bench which in our opinion would answer the controversy raised in the case before us:-

"…….

21. We have considered the submissions of either side, have gone through various policies and the judgments of the Hon'ble Supreme Court cited by either side and those of Lucknow Bench, Kochi Bench and this Principal Bench.

22. At the outset we may observe at the cost of repetition that so far the judgements of this Principal bench, Lucknow Bench and Kochi Bench are concerned there is no conflict of opinion so as to require adjudication about the correctness of either of the views by this Larger bench. Therefore, we are not detaining ourselves on that.

23. Taking up the submissions made by the learned counsels so far the first submission made by the learned counsel for the petitioners are concerned, the submission is quite attractive and accordingly, we have seriously considered the same that when a person with particular category can be promoted why he cannot be given extension and hat whether it is paradox which has been removed or sought to be removed by the new policy of 20.09.2010 but find the submissions to be not capable of being accepted. We may straightway observe that right to get promotion in the cadre is a natural phenomenon and right to be considered for such promotion is the legally vested right of the employee subject to fulfilling the requisite eligibility conditions. Obviously, if the employer had laid down parameters for eligibility for promotion, which eligibility may have permitted medical P2 category person also for promotion but then so far extension is concerned right to get extension is neither a normal phenomena of service nor is it a vested right. On the other hand as pointed out by the learned Additional solicitor General that it was in view of giving effect to the Government of India letter dated 30.05.1998 whereby the retirement age of the employees was increased by two years and accordingly, Ministry of Defence had also increased the retirement age of various categories of persons en block carving out exception for certain categories of person mentioned in the letter dated 30.5.1998 and 3.9.1998 and various categories of persons whose retirement age was not en block increased, for them orders were issued by way of policies to screen them for extension of their service for two years. Obviously, so far services as such is concerned, the tenure was not increased but there was a screening laid down to be held and on the individual fulfilling the criteria laid down for screening was held entitled to two years extension of service. This was altogether new policy for giving extension of two years service ……. It is always a choice of the employer if the employer would like to apply the best of the lot for giving extension and in that process if the parameters happened to be stringent as compared to the parameters available to the entitled individual to comnplete4 the original tenure of service including earning promotion, in our view it cannot be said that any paradox existed nor can be said that laying down the stringent parameters for extension is or was in any manner unfair or even harsh.

24. ……. Significantly the requirement of screening in advance by two years was very much material. In our view the new policy did not simply water down the earlier policy nor did it simply liberalize parameters, rather it had laid down different parameters in which process some parameters were liberalized still some parameters were made more stringent., the petitioners are neither entitled to invoke compassion nor sympathy nor can it be said that there would be any violation of the Article 14 of the Constitution.

25. So far as the second submission is concerned about the action of the policy being made to be effective from 01.04.2011, being arbitrary is concerned; in our view the submission also has no force. As found above, the new policy was not a policy laid down only to ameliorate the

conditions of the individual but is a new policy laying down different parameters. Obviously, rather of necessity as and when an employer lays down or frames a new policy some date has to be fixed from which date it is to be effected and unless that date so fixed, is hit by the mischief of judicially pronounced parameters, no interference an be made therein. In the present case this is a different story that the validity of the cut off date has already been upheld by the judgement of **Lucknow Bench in Sub Brijesh Kumar's** case as noticed above, still we have again re-examined the issue and find that the fixation of cut off date does not suffer from any of the vices making it presumable (sic) to be interfered with nor it hit with Article 14 of the Constitution. Rather, as submitted by learned Additional Solicitor General that to start implementation of the policy, it is required to be disseminated to all concerned authorities and enable them to carry out preparatory work by the Record office and Line Directorate. We find this to be precise reason mentioned in para 9 of the earlier letter dated 20.9.2010. Obviously, for constituting screening boards and starting to undertake screening good amount of spade work has to be done including individual required to be screened assimilating necessary dates of those individuals, constituting screening boards at different places and so on so forth and looking to the large number of employees required to be screened, practically six months time as was contemplated to be required and taken into account for fixing the cut off date cannot be said to be arbitrary. Even in the earlier policy of 1998 also six months time was contemplated……..Thus we do not find any force in this submission either".

27. Then we take up the next submissions made on the basis of the persons serving during the period 1.4.2011 to 31.3.2012 being deprived of the benefit of new policy despite the policy in its own terms having been made applicable from 1.4.2011.

28. Making this submission also it was submitted that when the policy was made applicable w.e.f. 01.04.2011, all those employees who are in serine as on 02.04.2011 do become entitled to the benefit of new policy and since the petitioners fulfill the eligibility criteria for being granted extension they cannot be denied extension. It was also submitted that even if hyper technically they are found to be not entitled still the policy should be read in a benevolent manner so as to extend benefit of this policy to them. As a limb of that very argument, it was submitted that the clarificatory letters are subsequent improvements and cannot be said to form part of policy and since those letters are also coming in the way of the petitioners, they also should be struck off. In our view this submission also does not have force inasmuch as to start with we may observe that the ne4w policy is a policy by way of complete body providing complete mechanism of its operation and applicability right from the start point and therefore, when it is made applicable w.e.f. 01.04.2011, it necessarily means that it is to start its operation from the start point w.e.f. 01.04.2011. In our opinion, this start point of operation is undertaking of screening and therefore, screening is to take place in accordance with new policy w.e.f. 01.04.2011 from which date the policy has been made applicable. Since even an old policy as well as a new policy, the screening is to be undertaken two years before the scheduled date of superannuation or discharge, the obvious consequence is that the screening is to be only of those incumbents who are to get superannuated or discharged on or after 01.04.2013…… The other aspect of the matter is that the employees who are continuing under the terms of their original engagement and are scheduled to superannuate or get discharged on or before 31.03.2013 so also the employees who are continuing on extension during this period and their extension had been cut short in accordance with old policy are concerned, they are all employees who have already been screened under the old policy of 21.09.1998 and either have

> not been found suitable or approved for extension or did not remain eligible to have extension till commencement of the extension or who did not retain eligibility till completion of extension. However, the fact remains that all those persons have been screened under old policy. Admittedly, the screening is to be undertaken only once and since it had already been undertaken in accordance with the policy of 1998, in absence of any expressed provision or any provision by necessary implication being there in the new policy, they cannot be subjected to either second screening nor the earlier screening can be allowed to be reviewed or reconsidered. Obviously, therefore, they cannot claim either second screening or review of the old screening or reopening of the screening already done.
>
> *** ***
>
> 30. …… As regards which in the present case, the new policy does not contain any such pro9vision for giving relaxation except those as contained in Note appended to para 3 of the policy dated 20.09.2010 and admittedly cases of none of the petitioners fall in the said Note. Thus, so far as the petitioners are concerned, there is no power of relaxation reserved in the policy and, therefore, two judgements relied upon do not help the petitioners. "

22. Thus, the larger Bench has upheld the cut off date of 01.04.2011 as the starting point for conducting screening as per the new policy dt. 20.9.2010 and further that the ibid policy is applicable to those who would superannuate on or after 1.4.2013. It is also observed that there is no provision of second screening or review of earlier screening nor is there any provision of relaxation and further that any favour shown to the petitioners would also amount to discrimination against those who had already retired though being similarly circumstanced like the petitioners. Thus, the larger Bench has in fact upheld the Lucknow Bench decision.

23. The respondents have also relied on an unreported decision of this Kolkata Bench in OA 112 of 2012 decided on 25.3.2014 (**Havildar V Chiranjeevi –vs- UOI & Ors**). The facts of that case are exactly similar with those of the present case and we find that relying on Lucknow Bench decision, the said OA was dismissed.

24. Since the facts of the present case are on all fours, we have to follow our own decision, which, to our knowledge, has not yet been reversed by any higher court. That apart, for judicial propriety and

discipline, the decision of the larger Bench must prevail; and as already discussed above, the larger Bench decision also is in conformity with the decision of this Bench in **Hav. V. Chiranjeevi's** case (supra)

25. In view of the above, we hold that the present application is devoid of any merit and as such, it is liable to be dismissed.

26. Now, we have to consider a very important aspect. As already stated, by virtue of the interim order granted by this Tribunal on 22.8.2013, the applicant is continuing in service on extension and has in the meantime even earned promotion to the rank of Nb Sub. His present extended term is going to expire next month i.e. at the end of September 2014. Since we have held that the case has no merit and the OA is to be dismissed, in that event the applicant would not be eligible for extension and would retire on expiry of his existing term in terms of 1998 policy i.e. from 30.9.2012. In that case the pertinent question that arises is how to regularize the period he has worked on extension beyond 30.9.12 till date to which he was not legally entitled to but has worked on the strength of the interim order granted by this Court.

27. The law is quite clear on this issue. Interim order is not a final decision. As the expression 'interim' itself makes it clear that it is only an order passed as an interim measure, as laid down in Sec. 26 of AFT Act, to prevent any loss being caused to the applicant during pendency of the case. In this context, it will be relevant to quote from the observation of the Hon'ble Apex Court in the case of **Kanoria Chemicals & Industries Ltd. & Ors –vs- U.P. State Electricity Board & Ors** (1997) 5 SCC 772 as under :-

> "Stay of operation of order or notification only means the order or notification which has been stayed would not be operative from the date of passing of the stay order and it does not man that the order or notification has been wiped out from existence. An order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court."

In a recent decision in the case of **Kalabharati Advertising –vs- Hemant Vimalnath Narichania & Ors**, reported in 2012(1) AFLJ 47, the Hon'ble Apex Court has reiterated the above proposition of law and has observed as under :-

> "No litigant can derive any benefit from the mere pendency of a case in a Court of Law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "*Actus Curiae neminem gravabit*", which means that the act of the Court shall prejudice non-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a arty invoking the jurisdiction of the Court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court."

28. In the instant case also but for the interim order passed by this Court staying the operation of discharge order of the applicant, he would have superannuated on completion of existing term of engagement without getting any extension in view of his unacceptable medical category. Since the original application has since been dismissed on merit, it is also the duty of the Court to restore *status-quo ante* so that respondents are not prejudiced. However, since the applicant has worked on extension by virtue of the interim order granted by this Court and also got a promotion, we are of the view that he was entitled to get salary of the post in which he worked and also shouldered higher responsibilities. Therefore, in the interest of justice and fair play, no recovery should be made for the period he has worked on extension. In other words, no benefit in rank and salary that has accrued to him during his extended period (after 30 Sep 2012 till date) cannot be recovered or withdrawn retrospectively.

29. There is however a peculiar clause the Regulations for Army 1978, as revised, to grant extension of colour service in exceptional circumstances. These are in Regulation 146, 163 for JCOs and Regulation

164 including its notes, which can be adopted to meet such peculiar cases where the soldier has worked, earned salary and also promoted in recognition of his performance, although on the strength of an interim order from this Tribunal. For ease of reference we quote below the following Regulations from the Regulations for the Army 1978 (revised):-

> "146. **Compulsory Retention in Service.** A man enrolled for contractual period of engagement who has completed prescribed service or age limit applicable for his rank, and does not wish to extend it, may be retained in service compulsorily for so long as a war is imminent or existing or the establishment to which he belongs is 10% below strength or in other cases if exigencies of service so require. A formal extension of colour service is not necessary in such case."
>
> 163. **Retirement JCOs.**
> (a) xxxxxxxx
> (b) xxxxxxxx
> © xxxxxxxxx
>
> ***Note-1:*** *Extension beyond the specified service limits in respect of above categories of JCOs (except Ris Maj/Sub Maj) may be sanctioned by the Chief of the Army Staffin very exceptional circumstances and that too if these are in the interest of service. xxxxxxxxxxxxx.*
>
> 164. **Retirement NCOs.**
> (a). xxxxxx
> (b) xxxxxx
> © xxxxxx
> (d) xxxxxxx
>
> **NOTE**: *Compulsory retention of NCOs beyond their contractual period of engagement as entered in the Enrollment Form will be regulated under the provisions of Para 146 of the Regulations for the Army where necessary."*

29. The applicant was a NCO (Havildar), when the interim order was passed; but during the currency of the interim order he got promoted to the rank of a JCO (Nb Subedar). Therefore, on the strength of this Oder the competent authority can regularize his extension in service from the date of promotion to the rank of JCO till 31st Aug 2014 (i.e. last date of month) under the provisions of Para 163 of the Regulations for the Army as quoted ibid. Similarly the period from 30th Sep 2012 to 31st Aug 2014 can be regularized on the strength of this Order by grant of extension by the competent authority under the provisions of Para 164 and 146 of the Regulations for the Army as quoted ibid.

30. In the result, the application fails and accordingly stands dismissed on contest, but with following directions to regularize the service rendered on the strength of the interim order:-

a) We direct that no monetary or promotional benefits accrued upon the applicant during the subsistence of the interim order shall be withdrawn or recovered.

b) He shall be deemed to retire in the present rank on 31st Aug 2014. The date of 31st Aug 2014 i.e. last date of the month is ordered instead of the date of pronouncement of this order for ease of accounting of pension benefits as is done for all central government employees including the army personnel.

c) The period from 30 Sep 2012 till 31 Aug 2014 shall be regularized on the strength of this order by the competent authority as per Reg. 146, 163 and 164 of the Regulations for the Army as discussed in ibid Para.

d) No costs.

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

31. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities.

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

(JUSTICE R.N.RAY)
MEMBER (JUDICIAL)