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CENTRAL ADMINISTRATIVE TRIBUNAL,
PRINCIPAL BENCH

O.A. NO.2038 of 2003

New Delhi, this the 18th day of March, 2005

HON'BLE SHRI V.K. MAJOTRA, VICE CHAIRMAN (A)
HON'BLE SHRI SHANKER RAJU, MEMBER (J)

Canteen Mazdoor Sabha and another ....Applicants.
(By Advocate : Shri Shyam Babu)

Versus

Union of India and others ....Respondents.
(By Advocate : Shri V.K. Rao)

Present: Shri Shyam Babu, counsel for applicants.

Shri V.K. Rao, Counsel for respondents.

1. To be referred to the Reporters or ~~not~~? Yes

2. To be circulated to outlying benches or ~~not~~? Yes

S. Raju
(Shanker Raju)
Member (J)

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HON'BLE SHRI SHANKER RAJU, MEMBER (J)

1. Canteen Mazdoor Sabha (Regd)
Camp Office : 132P, Sector –4,
Pushp Vihar, M.B. Road,
New Delhi-110017.

2. Shri Surinder Prasad Khugsal,
(Working President)
Canteen Mazdoor Sabha (Regd),
548, Lodhi Road Complex,
New Delhi-110003.

3. Shri Sunder Lal
s/o Shri Hari Singh,
R/o 555/5, Ambedkar Nagar,
Haidarpur.

Presently posted at
Radio Construction & Development,
Unit Canteen,
Safdarjung Airport,
New Delhi.

....Applicants.

(By Advocate : Shri Shyam Babu)

Versus

1. Union of India
through its Secretary,
Ministry of Civil Aviation,
Rajiv Gandhi Bhawan,
New Delhi.

2. Director General
Civil Aviation,
Ministry of Civil Aviation,
Technical Centre,
Opp. Safdarjung Airport,
New Delhi.

3. Airport Authority of India
Rajiv Gandhi Bhawan,
Opp. Safdarjung Airport,
New Delhi.

4. Union of India
through its Secretary,
Ministry of Personnel
[Public Grievances & Pensions]
North Block,
New Delhi-110001.

....Respondents.

(By Advocate : Shri V.K. Rao)

ORDER

SHRI SHANKER RAJU, MEMBER (J) :

Canteen Mazdoor Sabha, represented through its President, and one more affected party have filed this OA seeking the following reliefs:-

> "A. Call for the records of the case and quash / set aside the order dated 13.12.2001 [Annexure h] and Order dated 20.03.2003 passed by the respondent no. 2 with further declaration that the applicant continued to be employee of Director General, Civil Aviation, Ministry of Civil Aviation till 03.05.1999 and their absorption in the National Airport Authority by impugned order dated 13.12.2001 by respondent no.2 was illegal and hit by Section 23 of the Contract Act;
>
> B. Give further declaration that the persons mentioned in para [ix] of the application have completed 10 years of service with the Director General, Civil Aviation, Ministry of Civil Aviation, Government of India, New Delhi and are entitled to all other service/ retiral benefits including pension;
>
> C. Give directions to the respondents to release arrears of benefit in view of the abovementioned prayer alongwith appropriate rate of interest;
>
> D. Grant all consequential reliefs to the applicants and pass such other or further orders as this Hon'ble Tribunal deems just and proper in the facts and circumstances of the case in favour of the applicants;
>
> E. Award costs;"

2. The brief factual matrix, which is relevant to be highlighted for proper adjudication, is that Canteen Mazdoor Sabha (Registered Body), inter alia, incorporated within its employees who have been brought on deputation in National Airport Authority [now called as 'Airport Authority of India' (hereinafter referred to as 'AAI')]. Directorate General of Civil Aviation (hereinafter referred to as 'DGCA'), a department comes under the Ministry of Civil Aviation. On promulgation of Notification dated 11.12.1979 by the Govt. of India, all posts in Canteen and Tiffin Rooms run departmentally by the Govt. of India are treated as civil posts. National Airport Authority was constituted by an Act of Parliament, namely, National Airport Authority Act, 1985 (hereinafter referred to as "the Act"). All the Canteen employees were working under DGCA mainly in connection with the affairs of AAI. Section 13 (3) of the Act ibid deemed all persons transferred and brought on deputation with AAI as deputationists till their absorption.

3. Apex Court in ***M.M.R. Khan and others*** Vs. ***Union of India and others***, 1990 (Supp.) SCC 191, regarding grievance of Railway Canteen workers pertaining to the Statutory canteen, held that there cannot be a distinction between statutory and non-statutory canteen employees and in that view of the matter, directions were issued to the Govt. to treat employees of statutory as well as non-statutory canteens in the Railway Establishments as Railway employees w.e.f. 22.10.1980 and further non-statutory recognized canteen employees would have to be treated as Railway employees w.e.f. 1.4.1990.

4. Apex Court had an occasion to deal with the case of similarly situated Canteen employees of other Govt. departments in Writ Petition (Civil) Nos.6189-7044 and 8246-55 of 1983 in the matter of **Chandrakant Jha and others** Vs. **Union of India and others** and by a judgment dated 11.10.1991, the following directions had been issued:-

> "We have heard learned counsel for the parties. In fact, this group of cases should have been finally disposed of along with the main case W.P. (C) Nos.2275-76 of 1982 reported as M.M.R. Khan and Ors. Vs. Union of India & Ors. (1990 (Supple) SCC 191).
>
> We are of the view that the facts before us in these cases squarely attract the decision in the reported case to be applied to them. In that view of the matter, we allow the Writ Petitions for the reasons indicated in the said Judgment and direct the benefits to be given to the petitioners in the following way.
>
> By an interim order dated 26.9.1983 certain reliefs had been granted. In respect of the reliefs already granted this order shall be deemed to be operative from that date. In case any further benefits are admissible, those will be admissible from 1.10.1991.
>
> For the purpose of calculation of pension service from the date of the interlocutory order shall be counted. No costs."

5. In pursuance thereof, Ministry of Finance issued OM dated 24.1.1992 whereby, employees of non-statutory departmental Canteen were treated as Central Govt. servants. Few of the members of the Association were recruited with Radio Construction and Development Unit Canteen, Safdarjung Airport, New Delhi, which is a part of erstwhile DGCA from 1981 to 1986 in various capacities.

6. In the year 1994, National Airport Authority Act, 1985 was repealed by the Airport Authority of India, which received the assent of the President on 12.9.1994. By virtue of Section 18 of the Airport Authority Act, 1994, every employee of the International Airport Authority, serving in its employment, immediately before the appointed day was deemed to be the employee of the Airport Authority.

7. By virtue of the Notification dated 26.4.1999, Airport Authority invited options from the employees to be absorbed in NAA (now called as AAI) w.e.f. 1.10.1991 with a clear understanding that in the event of opting for retirement benefits after absorption no canteen employee will be eligible for pro-rata pension as none of these employees had competed 10 years of service on 1.10.1991 reckoned from 26.9.1983. In case of no option, a deemed exercise of the option would be construed. It is also made clear that the option exercised shall be final. No representation or request would be entertained. Along with the said option, terms and conditions for permanent absorption were also attached. According to which, Govt. servants, who opt to be covered by the pensionary benefits at the time of retirement shall be entitled to pension as per Govt. rules and Canteen employees, who opt for AAI regulation, their CPF as on the date of absorption shall be taken to be the opening balance in AAI on 1.10.1991. The aforesaid option was sought under Section 13 (3) of the Act.

8. Accordingly, on option, by an order dated 13.12.2001, Canteen employees borne on the strength of DGCA and working as

Canteen staff with AAI were absorbed in public interest in regular service w.e.f. 2.10.1991 and were deemed retired from Govt. service w.e.f. 1.10.1991.

9. Applicants vide letter dated 22.2.2000, who have opted for their absorption earlier, requested that their earlier option giving technical resignation, which was taken as an outcome of fraud, may be treated as withdrawn, with grant of pension.

10. OA 1448/2001 filed by the Canteen Mazdoor Sabha was withdrawn on 15.10.2001, as a result of notification dated 20.6.2001 issued by the respondents. Subsequently, against unlawful absorption, OA 2090/2002 filed by the Association was also withdrawn on 25.9.2002 with liberty to represent against the order dated 13.12.2001. Accordingly, on representation and its rejection, the present impugned order has been passed, giving rise to the present OA.

11. The grievance of the applicants is directed against unconscionable action of the respondents, which is stated to be an illegal contract forcing them to exercise, such an option which had resulted in forfeiture of their service to be reckoned for the purpose of pensionary benefits by absorbing them retrospectively.

12. Learned counsel for applicants states that as per Section 13 (3) of the Act, those who have been brought on deputation, their absorption is to be prospective and by extending it retrospectively deliberate attempt of the respondents was to deprive the applicants of their pensionary benefits by curtailing completion of 10 years service as Govt. servants, which would have accorded them pro-rata

pension. Learned counsel states that once the option has been withdrawn on 22.2.2000, Section 23 of the Indian Contract Act, 1872 makes an agreement illegal, if it is forbidden by law and as opposed to public policy.

13. Learned counsel Shri Shyam Babu further states that in administrative order, which has a retrospective effect, is nullity in the eyes of law. Learned counsel states that fundamental rights cannot be waived of. To substantiate his plea, reliance is placed on following catena of decisions:-

1. ***R. Jambukeswaran and ors.*** vs. ***Union of India and ors.***, 2004 (2) ATJ FB CAT 1;
2. ***Mani Kant Gupta and others*** Vs. ***State of Uttar Pradesh***, 2004(1) ATJ 349; and
3. ***Union of India and others*** Vs. ***Wing Commander T. Parthasarathy***, 2001 (1) SCC 158.

14. Shri Shyam Babu further states that present OA is not barred by limitation, as the impugned order was issued in December, 2001. OA 2090/2002 filed against the said order was withdrawn with liberty to file a representation and as the representation was disposed of in the year 2003, the present OA is within limitation. Shri Shyam Babu further resorted to the decision of ***Central Inland Water Transport Corporation Ltd. and another*** v. ***Brojo Nath Ganguly and another***, 1986 (1) ATC SC 103 to contend that unconscionable terms are against the public policy. According to Shri Shyam Babu, learned counsel, option exercised was not willful and applicants, who belong to lower category, were undoubtedly influenced by the

employer to exercise this option, which caused prejudice to the service conditions.

15. On the other hand, Shri V.K. Rao, learned counsel for respondents vehemently opposed the contentions raised by the applicants and states that having exercised option in terms of order dated 3.5.1999 issued by AAI, applicants are estopped by the doctrines of waiver and acquiescence to question the exercise of option.

16. Shri V.K. Rao further contends that as the cause of action has accrued on 13.12.2001 filing of this Original Application in 2003 makes the present one as barred by limitation filing beyond one year as envisaged under Section 21 of the Administrative Tribunals Act, 1985.

17. Shri Rao also contends that all employees of Civil Aviation were absorbed in NAA on 2.10.1989 as all employees were under NAA though applicants, who were treated, as Govt. servants on 1.10.1991, could not have been treated differently. Accordingly, their technical resignation was given effect from 1.10.1991 and from 2.10.1991, the applicants were given the benefit of revised pay scales. In the above conspectus, it is stated that since many agencies were involved in deciding the terms and conditions of Canteen employees. In pursuance of option exercised by them, applicants were absorbed w.e.f. 2.10.1991. Any treatment meted out to the applicants differently from the employees of Civil Aviation, who were also permanently absorbed, would be infraction of doctrine of equality enshrined under the Constitution of India. Accordingly,

1.10.1991 is the universal date of absorption and in that event, any of the employees of Canteen, in view of the decision of the Apex Court in ***Chandrakant Jha's case*** (supra), would have been given pro-rata pension by reckoning the period from 1983 to 1991, but nobody could have completed 10 years of Govt. service.

18. At last, it is stated that being a policy decision, which does not suffer from any malafide or arbitrariness, the present OA is liable to be dismissed.

19. In the rejoinder, applicants reiterated their pleas and while referring to a decision of Principal Bench of this Tribunal in OA 572/1996 in the case of ***Federation of All India Central Govt. Canteen Employees and Another*** Vs. ***Union of India and others*** decided on 3.12.1999, it is contended that after ***Chandrakant Jha's case*** decision (supra) and after promulgation of Ministry of Personnel's OM dated 29.1.1992, a Writ Petition filed before the Apex Court for counting of service was dismissed on 3.10.1994 wherein liberty to approach the High Court was accorded. In those circumstances, entire service prior to absorption of Canteen workers was ordered to be reckoned, as qualifying service towards pensionary benefits though it is stated that Writ Petition is still pending the decision is not overturned yet.

20. We have carefully considered the rival contentions of the parties and perused the material available on record.

21. On the submissions adduced by both the parties, the following issues are *germane* to be adjudicated:-

(1) Whether Section 13 (3) of the National Airport Authority Act, 1985 envisaged a prospective absorption!;

(2) Whether option exercised on an agreement is a void contract being opposed to the public policy and forbidden by law!;

(3) Whether retrospective absorption of the applicants is permissible!; and

(4) Whether entire past service of Canteen employees to be reckoned for the purpose of qualifying service for the pensionary benefits!

22. It is no more res integra that Govt. of India on 11.12.1979 declared all Canteen employees as holders of civil post. For non-statutory Canteen employees, decision of the Apex Court in the case of ***M.M.R. Khan*** (supra) has not made any distinction and as a result thereof, in Railways from the date of notification in 1980, Canteen employees were treated as regular Railway servants. In ***Chandrakant Jha's case*** (spura), which was filed in 1983, interim order treated the Canteen employees as holder of civil posts but benefit had been further continued till 1.10.1991 and the period from 1983 to 1991 was treated as a Govt. service reckonable for pensionary purposes. In the result, Memorandum dated 24.1.1992 was passed treated the Canteen employees as holder of civil posts.

23. It is also no more *res integra* that DGCA was under the Ministry of Civil Aviation and the employees of the Association were employed. However, in 1985 on promulgation of Act i.e. The National Airport Authority Act, 1985 whereby DCGA is responsible

for the regulation and control of civil aviation activity in the country and as a result of an all-round increase in the above activities, to improve efficiency, the authority has been empowered to run independently by the above Act and Section 13 of the Act provides the transfer of assets and liabilities of the Central Govt. to AAI. Accordingly, Section 13 (3) of the Act ibid which is reproduced above provides that every employee holding any office under the DGCA or in connection with such affairs of the DGCA shall be treated as on deputation with the authority but shall hold his office in the Authority by the same tenure and upon the same terms and conditions of service, as he would have held such office, if the Authority duly absorbs such employee in its regular service. Proviso to above Section stipulates that during the period of deputation when a person is employed with the Authority has to be paid by the Authority. However, another proviso to this Section stipulates that any employee, who has, in respect of the proposal of the Authority to absorb him in his regular service, intimated within such time, as may be specified, to the Authority his intention of not becoming a regular employee of the Authority, shall not be absorbed by the Authority.

24. The above Rule, if it is interpreted on the principle of literal and grammatical construction, provides that till the person is absorbed, that employee cannot be treated as an employee of the Authority and would be treated as a Govt. employee and service rendered before such absorption would be reckoned towards pensionary benefits etc.

25. The above provision does not empower the authorities to absorb an employee retrospectively. The words 'an employee shall continue till his absorption by the authority in its regular service' connotes that after the promulgation of the Act, ibid, any order passed shall have to be prospective in nature. The above conclusion is well supported by the fact that employees of Civil Aviation, who were in office on deputation in 1985 when the Act had came into being, were absorbed with a prospective effect from 2.10.1989.

26. It is trite law that statutory provisions or acts of the Parliament, which does not specifically provide operation of any provision retrospectively, would have to be operated only prospectively.

27. Apex Court in the case of ***Virender Singh Hooda and Ors.*** vs. ***State of Haryana and Anr.***, 2005 (1) SC SLJ 46 has observed as under :-

> "33. The legislative power to make law with retrospective effect is well recognized. It is also well settled that though the legislature has no power to sit over Court's judgment or usurp judicial power, but, it has subject to the competence to make law, power to remove the basis which led to the Court's decision. The legislature has power to enact laws with retrospective effect but has no power to change a judgment of court of alw either retrospectively or prospectively. The Constitution clearly define the limits of legislative power and judicial power. Non can encroach upon the field covered by the other. The laws make by the legislature have to conform to the constitutional provisions. Submissions have also been made on behalf of the petitioners that by enacting law with retrospective effect, the legislature has no power to take away vested rights. The contention urged is that the rights created as a result of issue of writ of mandamus cannot urged is that the rights created as a result of issue of writ of mandamus cannot be taken away by enacting laws with retrospective effect. On the other hand, it was contended on behalf of the respondent-State that power of the legislature to enact law with retrospective effect

includes the power to take away vested rights including those which may be created by issued of writs. "

28. In the case of ***Chandra Vathi P.K. and others*** Vs. ***C.K. Saji and others***, 2004 SCC (L&S) 544, the Apex Court has ruled that unless rules are explicitly retrospective in nature, retrospectivity cannot be deemed on surmises. In the above context of the matter, the applicants, who have been treated Govt. servants in the light of the decision of the Apex Court in the case of ***M.M.R. Khan*** (supra) and reiterated in ***Chandrakant Jha's*** case (supra), that what all other admissible benefits bestowed from 1.10.1991. Applicants have continued with AAI till 26.4.1999 when the option has been extended to them for permanent absorption with terms and conditions which, inter alia, provides an option to pensionary benefits available to the Govt. servants, who opted and after about 2 years on 13.12.2001 an order passed absorbing them from 2.10.1991 and treated them deemed retired from 1.10.1991. With a result reckoning of service from 1983 to 1991, none of the applicants had completed 10 years service with DGCA as Govt. employee to be entitled for pro-rata pension. Once a decision has been taken in 1999 to absorb the applicants, till that date as per Section 13 (3) they have a right to be treated as Govt. servants and continued to be contributory to all retiral benefits till they are finally absorbed as regular employees of AAI. The option as per Section 13 (3) could not have a retrospective cutoff date, i.e., 1.10.1991 but should have been a prospective date, i.e., 26.4.1999, i.e., the date of the option which is the import of Section 13 (3) of the Act, ibid. It is also

pertinent to note that this option was sought under the above provision. In place of clear and unambiguous provision, grammatical and literal interpretation is the only mode. Moreover, the doctrine of reading down a provision cannot be resorted to when the provision is plain and unambiguous and legislative intents are clear. For the interpretation of statute, plain meaning must be observed and only when the doubt arises, the object of statute and its preamble can be seen. We are fortified in our conclusion on the strength of decision of the Constitutional Bench of the Apex Court in the case of ***Delhi Transport Corporation*** Vs. ***D.T.C. Mazdoor Congress***, 1991 SCC (L&S) 1213.

29. As per above, which is a binding precedent, The Act ibid has an object to regulate Civil Aviation activities and Section 13 provides for transfer of assets and liabilities of the Central Govt. to the Authority, which includes debts obligation, some of the money due to the Central Govt. and Section 13 (3) of the Act, ibid, decides the status of the employees on deputation and unless prospective decision is taken to absorb such employees, they maintain status of Govt. servants and lien on the Govt. with all rights accrued, the import of this Section is to protect status of deputationists and not to deprive them all the legitimate entitlements flown as a consequence on having their status as a Govt. servants. Any curtailment of their right by taking retrospective decision by inviting option, accordingly, would not be inconsonance with Section 13 (3) of the Act ibid.

30. As regards exercise of option by the applicants on their own volition and their having acquiesced and waived off their right is

concerned, it is trite law that fundament rights cannot be waived off by a Govt. servant. The Full Bench decision of this Tribunal in the case of ***R. Jambukeswaran and Ors.*** vs. ***Union of India and ors.***, 2004 (2) ATJ 1, while discussing the doctrine of acquiescence, observed that when a person is appointed necessarily with a passage of time gets certain rights. If no action is taken within a reasonable time, it would tantamount to acquiescence.

31. In the decision of the Division Bench of Hon'ble Allahabad High Court in the case of ***Mani Kant Gupta and others*** Vs. ***State of Uttar Pradesh***, 2004(1) ATJ 349, in a case where seniority of the deputationists was finalized on an undertaking to forgo the benefit of past service, the following observations have been made:-

> "5. In S.I. Roop Lal v. Lt. Governor, AIR 2000 SC 594 : (2000 Lab IC 370) the Supreme Court has held when the employee of one department goes on deputation to another department and he is subsequently absorbed in that department he has to be given the benefit of the service in the parent department for the purpose of seniority etc. The Supreme Court has in that decision in fact gone to the extent of saying that if there is any executive order stating that the benefit of past service in parent department will not be given to a person who goes on deputation (and is subsequently absorbed) that executive order will be violative of Arts. 14 and 16 of the Constitution. From this decision it follows that if benefit of past service is not given it will violate Arts. 14 and 16.
>
> 6. In Basheshar Nath v. C.I.T., AIR 1959 SC 149 it was held by the Supreme Court that the fundamental right cannot be waived.
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> 7. In Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180 it was held by the Supreme Court that although an undertaking was given by the appellants before the High court on behalf of the hut and pavement dwellers that they did not claim any fundamental right to put huts on pavements or public roads and that they will not obstruct the demolition of the huts after a certain date, they could not be estopped from contending before the Supreme Court that the huts constructed by

> them on the pavements cannot be demolished because of their right to livelihood under Art. 21 of the Constitution. From this decision also it follows that a fundamental right cannot be waived, and there can be no estoppel.
>
> 8. In Mahavir Oil Mills v. State of J.&K., 1996 (10) JT SC 837 it was held that there can be no question of any acquiescence in matters affecting constitutional rights."

32. The three judges Bench of the Apex Court in the case of ***Bank of India and others*** Vs. ***O.P. Swarnakar and others***, 2003 SCC (L&S) 200, on the issue of contract of employees not to be covered by the Indian Contract Act, catena of decisions were relied upon and in a case of Nationalized Bank held that the offer for voluntary retirement would be an offer of a corresponding acceptance which involves decision making process and nationalized Bank has one organ and inimical right to deal with the chief relationship within themselves and their employees, proposal and option of voluntary retirement and consideration thereof was not treated as consideration. If an option in conformity with an agreement is a contract, the provision of Indian Contract Act would apply.

33. In the above backdrop, doctrine of waiver have been well defined by stating that in a contract one cannot aprobate and reprobate and one is not permitted to resile from earlier stand.

34. In the case of ***Union of India and others*** Vs. ***Wing Commander T. Parthasarathy***, 2001 (1) SCC 158, the Apex Court has held as follows :-

> "9. The reliance placed upon the so-called policy decision which obligated the respondent to furnish a certificate to the extent that he was fully aware of the fact that he cannot later seek for cancellation of the

application once made for premature retirement cannot, in our view, be destructive of the right of the respondent, in law, to withdraw his request for premature retirement before it ever became operative and effective and effected termination of his status and relation with the Department. When the legal position is that much clear it would be futile for the appellants to base their rights on some policy decision of the Department or a mere certificate of the respondent being aware of a particular position which has no sanctity or basis in law to destroy such rights which otherwise inhered in him and available in law. No such deprivation of a substantive right of a person can be denied except on the basis of any statutory provision or rule or regulation. There being none brought to our notice in this case, the claim of the appellants cannot be countenanced in our hands. Even that apart, the reasoning of the High Court that the case of the respondent will not be covered by the type or nature of the mischief sought to be curbed by the so-called policy decision also cannot be said to suffer any conformity (sic infirmity) in law, to warrant our interference".

35. This brings us to the issue of right to pension.

36. The Constitutional Bench of the Apex Court in the case of ***D.S. Nakara and others*** Vs. ***Union of India***, 1983 SCC (L&S) 145, as regards pension, observed as under:-

"20. The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad v. State of Bihar,* 1971 Supp SCR 634, wherein this Court authoritatively rules that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was

reaffirmed in *State of Punjab v. Iqbal Singh*, (1976) 3 SCR 360.

21. There are various kinds of pensions and there are equally various methods and there are equally various methods of funding pension programmes. The present enquiry is limited to non-contributory superannuation or retirement pension paid by Government to its erstwhile employee and the purpose and object underlying it. Initially this class of pension appears to have been introduced as a reward for loyal service. Probably the alien rulers who recruited employees in lower echelons of service from the colony and exported higher level employees from the seat of Empire, wanted to ensure in the case of former continued loyalty till death to the alien rulers and in the case of latter, an assured decent living standard in old age ensuring economic security at the cost of the colony.

22. In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from undeserved want was recognized and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered unto master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount (see *Retirement Systems for Public Employees* by Bleakney, p.33).

23. As the present case is concerned with superannuation pension, a brief history of its initial introduction in early stages and continued existence till today may be illuminating. Superannuation is the most descriptive word of all but has become obsolescent because it seems ponderous. It genesis can be traced to the first Act of Parliament (in U.K.) to be concerned with the provision of pensions generally in the public offices. It was passed in 1810. the Act which substantively devoted itself exclusively to the problem of superannuation pension was Superannuation Act of 1834. These are landmarks in pension history because they attempted for the first time to establish a comprehensive and uniform scheme for all who we may now call civil servants. Even before the 19th century, the problem of providing for public servants who are

unable, through old age or incapacity, to continue working, has been recognized, but methods of dealing with the problem varied from society to society and even occasionally from department to department.

.....

29. Summing up it can be said with confidence that pension is not compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life of your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."

37. As regards cutoff date is concerned, in the above decision, the following observations have been made by the Apex Court :-

"53. The Court held that the Central Government cannot pick out a date from a hat and that is what it seems to have done in saying that a period prior to that date would not be deemed to be approved by the Central Government within the second proviso. In case before us, the eligibility criteria for being eligible for liberalized pension scheme have been picked out from where it is difficult to gather and no rationale is discernible nor one was attempted at the hearing. The ratio of the decision would squarely apply to the facts of this case.

.....

.....

58. Now if the choice of date is arbitrary, eligibility criteria is unrelated to the object sought to be achieved and has the pernicious tendency of dividing

an otherwise homogeneous class, the question is whether the liberalized pension scheme must wholly fail or that the pernicious part can be severed, cautioning itself that this Court does not legislate but merely interprets keeping in view the underlying intension and the object, the impugned measure seeks to subserve ? Even though it is not possible to oversimplify the issue, let us read the impugned memoranda deleting the unconstitutional part. Omitting it, the memoranda will read like this:

> At present, pension is calculated at the rate of 1/80th of average emoluments for each completed year of service and is subject to a maximum of 33/80 of average emoluments and is further restricted to a monetary limit of Rs. 1000 per month. The President is, now, pleased to decide that with effect from March 31, 1979 the amount of pension shall be determined in accordance with the following slabs.

If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalized pension scheme. The pension will have to be recomputed in accordance with the provision of the liberalized pension scheme, as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalized pension schema vague, unenforceable or unworkable."

38. If one has regard to the above, no cutoff date, which is arbitrary and does not pass twin test envisaged under Article 14 of the Constitution of India, i.e., intelligible differentia and nexus with the object sought to be achieved, the object of the Act, i.e. National Airport Authority Act, was never to deprive the applicants the deputationists' right already accrued to them before absorption. As such this cut of date of 1.10.1991 has been shown to be reasonable in the sense that whereas the employees of Civil Aviation had been

absorbed w.e.f. 2.10.1989, the different date for the applicants would not have been reasonable and once in ***Chandrakant Jha's*** case (supra) the date of treatment of Canteen employees as Govt. servants as on 1.10.191 has been a reasonable cutoff date, which serves object to avoid the differential treatment between absorbees, the aforesaid explanation is not only illogical and irrational but also arbitrary. Erstwhile employees of Civil Aviation and the applicants had been constituted a class, which are unequal as others have been Govt. employees while taken on deputation applicants who were declared as Govt. servants from 1983. The respondents have rightly exercised jurisdiction under Section 13 (3) of the Act ibid to absorb them from 1989 but the applicants who remained as Govt. servant till 1999 when option of absorption has been offered to them treating them as Govt. absorbees w.e.f. 1991 anterior in time at par with absorbees of Civil Aviation is still a differential treatment as in their cases where as the date of absorption is 2.10.1989, the applicants date of absorption would be 2.10.1991. Moreover, equality demands equal treatment. Reckoning of service of applicants till they are permanently absorbed as in the case of the employees of Civil Aviation, they were also employees of Govt. on their absorption prospectively. The treatment of absorption of the applicants retrospectively would not make these two categories of absorbees equal or same. As such meting out the same treatment by retrospective absorption would be an infraction to the provisions of Article 14 of the Constitution of India, what to talk of its application.

39. The Constitutional Bench of the Apex Court in the case of ***Delhi Transport Corporation*** (supra), wherein the issue was unconscionable treatment in terminating permanent employees of Delhi Transport Corporation regarding contract of service, following observations have been made:-

> "281. The trinity of the Constitution assure to every citizen social and economic justice, equality of status and of opportunity with dignity of the person. The State is to strive to minimize the inequality in income and eliminate inequality in status between individuals or groups of people. The State has intervened with the freedom of contract and interposed by making statutory law like Rent Act, Debt Relief Act, Tenancy Act, Social Welfare and Industrial Laws. All these Acts and Rules are made to further the social solidarity and as a step towards establishing an egalitarian socialist order. This Court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, this Court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules and conditions when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position either to "take it or leave it" and if it finds to be so, this Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions."

40. As regards the issue whether respondents imposed unconstitutional and unconscionable condition, the following observations have also been made by the Apex Court in the aforesaid case:-

"286. In *Brojo Nath case*, (1986) 3 SCC 156, after elaborate consideration of the doctrine of "reasonableness or fairness" of the terms and conditions of the contract vis-a-vis the relative bargaining power of the contracting parties this Court laid down that the principles deducible from the discussion made therein is in consonance with right or reason intended to secure socio-economic justice and conform to mandate of the equality clause in Article 14. the principle laid was that courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power .... It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction.

287. In today's complex world of giant corporations with their vast infrastructural organisations the State through its instrumentalities and agencies has been entering into almost every branch of industry and commerce and filed of service, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances

Public policy whether changeable"

41. As regards public policy, the following observations, which are relevant to be highlighted, are as follows:-

"282. In *Brojo Nath case*, (1986) 3 SCC 156, Madon, J. elaborately considered the development of law relating to unfair or unreasonable terms of the contract or clauses thereof in extenso and it is

unnecessary for me to traverse the same grounds once over. The learned Judge also considered the arbitrary, unfair and unbridled power on the anvil of distributive justice or justness or fairness of the procedure envisaged therein. The relevant case law in that regard was dealt with in extenso in the light of the development of law in the Supreme Court of United States of America and the House of Lords in England and in the continental countries. To avoid needless burden on the judgment, I do not repeat the same reasoning. I entirely agree with the reasoning and the conclusions reached therein on all these aspects.

Whether State can impose unconstitutional conditions

283. The problem also could be broached from the angle whether the State can impose unconstitutional conditions as part of the contract or statute or rule etc. In 1959-60) 73 *Harvard Law Review*, in the Note under the caption 'Unconstitutional Condition' at pages 1995-96 it is postulated that the State is devoid of power to impose unconstitutional conditions in the context that the power to withhold largesse has been asserted by the State in four areas i.e. (1) regulating the right to engage in certain activities; (2) administration of government welfare programme; (3) government employment; and (4) procurement of contracts. It was further adumberated at pages 1602-03 thus:

> "The sovereign's constitutional authority to choose those with whom it will contract for goods and services is in effect a power to withhold the benefits to be derived from economic dealings with the government. As power enables the government to control many hitherto unregulated activities of contracting parties through the imposition of conditions. Thus, regarding the government as a private entrepreneur threatens to impair constitutional rights..... The government, unlike a private individual, is limited in its ability to contract by the Constitution. The federal contracting power is based upon the Constitution's authorisation of these acts 'necessary and proper' to the carrying out of the functions which it allocates to the national government. Unless the objectives sought by terms and conditions in government contracts requiring the surrender of rights are constitutionally authorized, the conditions must fall as ultra vires exercise of power."

Again at page 1603, it is further emphasized thus:

> "when conditions limit the economic benefits to be derived from dealings with the government to those who forego the exercise of constitutional rights, the exclusion of those retaining their rights from participation in the enjoyment of these benefits may be violative of the prohibition, implicit in the due process clause of Fifth Amendment and explicit in the equal protection clause of the Fourteenth Amendment against unreasonable discrimination in the governmental bestow of advantages. Finally, disabling those exercising certain rights from participating in the advantages to be derived from contractual relations with the government may be a form of penalty lacking in due process. To avoid invalidation for any of the above reasons, it must be shown that the conditions imposed are necessary to secure the legitimate objectives of the contract, ensure its effective use, or protect society from the potential harm which may result from the contractual relationship between the government and the individual."

284. Professor Guido Calabresi of Yale University Law School in his "*Retroactivity, Paramount Power and Contractual Changes*" (1961-62) 712 Yale Law Journal 1191, 1196, stated that the government can make contracts that are necessary and proper for carrying out any of the specific clauses of the Constitution or power to spend for general welfare. The Federal Government has no power, inherent or sovereign, other than those specifically or explicitly granted to it by the Constitution. At page 1197, it is further stated thus:

> "The government acts according to due process standards for the due process clause is quite up to that task without the rule. Alterations of government contracts are not desirable in a free country even when they do not constitute a 'taking of property or impinge on question of fundamental fairness of the type comprehended in due process. The government may make changes, but only if war or commerce require them and not on the broader and more ephemeral grounds that the general welfare would be served by the change. Any other rule would allow the government to welch almost at will."

285. These principles were accepted and flowed by the Andhra Pradesh High Court in V. Raghunadha Rao v. State of A.P., (1988) 1 ALT 461, dealing with A.P. Standard Specification Clauses 11, 29, 59, 62(b) and 73 and declared some clauses to be ultra vires of Articles 14, 19(1)(g) and 21 of the Constitution and Sectiions 23 and 27 of the Contract Act.

286. In *Brojo Nath case*, (1986) 3 SCC 156, after elaborate consideration of the doctrine of "reasonableness or fairness" of the terms and conditions of the contract vis-a-vis the relative bargaining power of the contracting parties this Court laid down that the principles deducible from the discussion made therein is in consonance with right or reason intended to secure socio-economic justice and conform to mandate of the equality clause in Article 14. the principle laid was that courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power .... It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction.

287. In today's complex world o giant corporations with their vast infrastructural organisations the State through its instrumentalities and agencies has been entering into almost every branch of industry and commerce and filed of service, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances

Public policy whether changeable

288. This Court also angulated the question from the perspective of public policy or contract being opposed to public policy. The phrases "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. It is valued to meet the public good or the public interest. What is public good or in the public interest or what would be injurious or harmful to the public good or the public interest vary from time to time with the change of the circumstances. New concepts take place of old ones. The transactions which were considered at one time as against public policy where held by the courts to be in public interest and were found to be enforceable. Therefore, this Court held in Brojo Nath case, (1986) 3 SCC 156, that "there has been no well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy."

289. Lord Wright in his *Legal Essays and Addresses* (vol. III, pages 76 and 78) stated that public policy like any other branch of the common law ought to be and I think is, governed by the judicial use of precedents... If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true, but the same is true with the principles of the canon law generally; Lord Lindley held *Janson v. Driefontein Consolidated Mines Ltd.*, 1902 AC 484, that "a contract or other branch which is against public policy i.e. against the general interest of the country is illegal".

290. In Anson's Law of Contract (24th edn. by A.G. Guest at page 335) stated the scope of variability of public policy attune to the needs of the day and the march of law thus:

> "At the present time, however, there is an increasing recognition of the positive function of the courts in matters of public policy : 'The law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it,' Some aspects of public policy are more susceptible to change than others, though the policy of the law has, on certain subjects, ben worked into a set of tolerably definite rules. The principles applicable to agreements in restraint of trade, for example, have on a number of occasions been modified or extended to accord with prevailing economic conditions, and this process still continues."

291. In *Law of Contract* by G.H. Treitel (7th edn. at page 366) on the topic 'scope of the public policy' it is stated thus:

> "Public policy is a variable notion, depending on changing manners, morals and economic conditions. In theory, this flexibility of the doctrine of public policy could provide a judge with an excuse for invalidating any contract which he violently disliked .... On the other hand, the law does adapt itself to change in economic and social conditions, as can be seen particularly from the development of the rules as to contracts in restraint of trade, separation agreements and marriage brokerage contracts. This flexibility of the doctrine of public policy has often been recognized judicially. Thus Lord Haldane has said : 'What the law recognises as contrary to public policy turns out to vary greatly from time to time.' Rodriguez v. Speyer Bros., 1919 AC 59,79 And Lord Denning has put a similar point of view. 'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.' Enderby Town F.C. Ltd. v. Football Association Ltd., 1971 Ch 591, 606 The present attitude of the courts represents a compromise between the flexibility inherent in the notion of public policy and the need for certainty in commercial affairs."

292. From this perspective, it must be held that in the absence of specific head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public practice or rules that are derogatory invent new public policy and declare such practice or rules that are derogatory to the Constitution to be opposed to public policy. The rules which stem from the public policy must of necessity be laid to further the progress of the society in particular when social change is to bring about an egalitarian social order through rule of law. In deciding a case which may not be covered by authority courts have before them the beacon light of the trinity of the Constitution and the play of legal light and shade must lead on the path of justice, social, economic and political. Lacking precedent, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution.

Public policy can be drawn from the Constitution

293. Sutherland, in his *Statutes and Statutory Construction* (3rd edn. volume 3 paragraph 5904 at pages 1310132) has stated that the most reliable source of public policy is to be found in the federal and State constitutions. Since constitutions are the superior law of the land, and because one of their outstanding features is flexibility and capacity to meet changing conditions, constitutional policy provides a voluable aid in determining the legitimate boundaries of statutory meaning. Thus public policy having its inception in constitutions may accomplish either a restricted or extended interpretation of the literal expression of a statute. A statute is always presumed to be constitutional validity. Likewise, where a statute tends to extend or preserve a constitutional principle, reference to analogous constitutional provisions may be of great value in shaping the statute to accord with the statutory aim or objective.

Article 14 sheds the light to public policy to curb arbitrariness

294. In Basheshar Nath v. CIT, 1959 Supp 1 SCR 528, held that Article 14 is founded on a sound public policy recognized and valued in all States and it admonishes the State when it disregards the obligations imposed upon the State.

295. In E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, Bhagwati, J. (as he then was) the genus while Article 16 is a specie. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 16 and 16 is equality and inhibition against discrimination. "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. In *Maneka Gandhi case*, (1978) 1 SCC 248, it was further held that the principle of reasonableness, while legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article

14 like a brooding omnipresence. In *Ramana* case, (1979) 3 SCC 489, it was held that it is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions namely, rational relation and nexus the impugned legislative or executive action wiould plainly be arbitrary and the guarantees of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be of legislature or of the executive or of an "authority" under Article 12, Article 14, "immediately springs into action and strikes down such State action and strikes down such State action". In fact, the concept of reasonableness ad non-arbitrariness pervades the entire constitutional scheme and is a golden tread which runs through the whole of the fabric of the constitution.

296. In *Olga Tellis case*, (1985) 3 SCC 545, it was held that the Constitution is not only paramount law of the land but also it is a source of sustenance of all laws. Its provisions are conceived in public interest and are intended to serve public purpose. Therefore, when the provisions of an Act or Regulations or Rules are assailed as arbitrary, unjust, unreasonable, unconstitutional, public law element makes it incumbent to consider the validity thereof on the anvil of interplay of Articles 14, 16(1), 19(1)(g) and 21 and of the inevitable effect of the impugned provision on the rights of a citizen and to find whether they are constitutionally valid.

Interplay of Articles 14, 16(1), 19(1)(g) and 21 as guarantors of public employment as a source of right to livelihood

297. It is well settled constitutional law that different articles in the chapter on Fundamental Rights and the Directive Principles in Part IV of the constitution must be read as an integral and incorporeal while with possible overlapping with the subject matter of what is to be protected by its various provisions particularly the Fundamental Rights."

42. In nutshell, any unconscionable term, which encroaches upon the fundamental right of the Govt. servants, inclusion of an option and cutoff date shall have to be treated as against public policy and

under Section 23 of the Contract Act, 1972 an illegal contract forbidden by law.

43. In ***The Government of Tamil Nadu and others*** vs. ***M. Ananchu Asari and others***, 2004 (1) SC SLJ 28, wherein issue was whether the cutoff date fixed by the Government for the purpose of entitlement to pension of the erstwhile Transport Department employees who were later on absorbed in Transport Corporations, is constitutionally valid, the following observations have been made by the Apex Court :-

> "11. In writ petition No.6969 of 1990, the l.earned single Judge held that the cutoff dated fixed by the Government in G.O. MS No.1028 was illegal and left it to the Government to fix a fresh cutoff date taking into consideration the services of the writ petitioners. In the second writ petition also another learned single Judge of the High Court declared the fixation of cutoff date as 1.5.1975/14.9.1975 as illegal and arbitrary and directed the Government to fix the cutoff dated afresh within the stipulated time. At the same time it was indicated in the judgment that the date on which the options were finally called for, i.e., 20.6.1982 would be the appropriate date for determining the eligibility to pension. On appeal, the Division bench of the High Court while affirming the judgments in the two writ petitions, concurred with the view expressed by the learned Judge in the latter case as regards the fixation of cutoff date with reference to the exercise of options in the year 1982. The Division Bench observed thus:
>
> > ".....We are of the view that the cut-off date fixed as 1.5.1975 for the purpose of computing the terminal benefits of the erstwhile Government servants who came to be subsequently permanently absorbed in the various Government Undertakings, particularly State Transport Undertakings, proceeded on an artificial basis.....
> >
> > **********
> >
> > .....It is only subsequently, in the year 1982, that such employees were asked to finally exercise their option, either way, and various

employees exercised their option also. For instance, in respect of Pallavan Transport Corporation, the said date within which such options have to be exercised appears to have been fixed finally by a letter dated 20.6.1982 and in respect of other Corporations, it would depend upon the option called for before they were finally absorbed as employees of the Corporations, which have come into existence. Till the respective employees have exercised their options on their volition, they must be considered to continue in service as Government employees only, in view of the fact that the actual exercise of option by different employees may be on different dates and to have uniformity among group or category of workers pertaining to a particular Corporation, the date on which the options were called for finally, or the last date within which the options were to be exercised, once and for all finally, may be taken up as the relevant criteria in fixing the cut-off or crucial date for determination of the terminal benefits....."

12. The learned senior counsel for the appellants has urged that for all practical purposes, the process of absorption of deputed employees was completed by 1.5.1975 by which date even the State Transport Department got disbanded. Our attention was drawn to the fact that pursuant to the promulgation of the rules known as 'The Paliavan Transport Corporation Longevity Pay Scheme and Conditions of Service Rules' which came into force on 1st May, 1975, options were called for from the employees on deputation from Government Departments. The option form enclosed to the Memorandum dated 29.5.1975 issued by the Managing Director of PTC Ltd. required the employees to declare that they voluntarily opted to serve in the PTC Ltd. and accordingly relinquished all their rights vis-à-vis Tamilnadu State Transport department and that they were willing to get absorbed permanently in the said Corporation subject to the service put in the State Transport permanently in the said Corporation subject to the service put in the State Transport Department being carried over to PTC Ltd, with pay scales, accumulated rights for gratuity, provident fund, pension etc. Accordingly, the respondents exercised their options in 1975 itself and the process of absorption had thus completed during that year. Having regard to this background, there is nothing arbitrary in the policy decision fixing the cutoff date for eligibility pension as 1.5.1975. the learned senior counsel then contended that the relevance and the rationality of fixation of the

crucial date as 1.5.1975 cannot be faulted merely because one more opportunity was given to exercise options were exercised in February, 1982, according to the learned counsel for the appellants is based on incorrect appreciation of facts. The Financial repercussions have also been stressed by the learned senior counsel.

13. We find it difficult to accept the contentions advanced by the appellants' counsel. The learned counsel has not disputed the proposition that the cutoff dated fixed by the Government for the purpose of conferring the pensionary benefits cannot be arbitrary or whimsical. Even according to the appellants, the date of permanent absorption in the service of the Corporation is a material date and it is in the light of that factor that the cutoff date was fixed as 1.5.1975. The stand taken in the counter affidavit filed on behalf of the Government of Tamilnadu in writ petition No.6969 of 1990 is that the writ petitioners were absorbed in the Kattabomman Transport Corporation with effect from 1.5.1975 on the basis of the options exercised by them and that their deputation ended on 30.4.1975. That is how the choice of the date 1.5.197 is sought to be justified. In other words, the fixation of cutoff date is sought to be linked up with the completion of the process of absorption. A perusal of G.Os. 1028 and 250 would also make it clear that the Government wanted to fix the date for pensionary entitlement to coincide with the date of permanent absorption. The criterion cannot be said to be irrational or irrelevant. But, the question is whether this factual premise that the process of absorption took place in the year 1975 is correct. Viewed in the light of G.O.MS. No.284 dated 30.1.1980 and the subsequent actions taken by the Management of the State Transport Undertakings, it cannot be said with certitude that the process was competed by April, 1975, the pertinent question would be why fresh options were directed to be called for in the year 1980 and actually called for in January, 1982 and thereafter? G.O.MS No.284 dated 30.1.1980 clearly stipulates that fresh options shall be obtained from the Government servants working in various Corporations/Boards. The Corporations/Boards were requested to decide the question of absorption of Government servants "on the basis of the terminal benefits indicated in the G.O." The sanction of pension and terminal benefits was made dependent upon the acceptance of options. Specific reference has been made in the G.O. to the Transport Department employees. This G.O. gives an unequivocal indication that the Government itself regarded that the process of abortion was not compete and that a final

> exercise of calling for and accepting the offers should be gone through, may be, in view of the change of criteria in regard to the terminal benefit. As already noticed, G.O. No. 378 was issued on 18.4.1975, it was kept in abeyance on 22.8.1978 and thereafter G.O. No.284 was issued on 31.3.1980. Thus, the terms and conditions of absorption did not take final shape till then. Moreover, even if the respondents had submitted the option forms in the year 1975 for the purpose of availing the Longevity Pay Scheme or otherwise, there is nothing on record to show that the said options were treated as final for all purposes. No material has been placed either before the High Court or before this Court to establish that the respondents' deputation came to an end by 1.5.1975 and that they were absorbed into Corporation's service from that date. Above all, the more important point is that nothing has been said in the counter-affidavit filed by the State Government before the High Court as to why fresh options were provided for by G.O. No.284 and called for by the Corporation in the year 1975 itself. The counter-affidavit merely contains as assertion that State Transport Department employees were absorbed into the Transport Corporation with effect from 1.5.1975 by accepting the options. In the counter, not even a reference has been made to G.O. No.284 and the options exercised pursuant thereto. The reason for calling for fresh options has not been spelt out even in the S.L.P. The factual assertion in the counter-affidavit therefore remains unsubstantiated.
>
> 14. Having regard to these facts and circumstances, we cannot accept the plea of the appellants that the absorption did in fact take place in the year 1975. In this situation, the justification sought to be made out for fixing the cutoff date as 1.5.1975 loses its ground in which case the finding of the High Court that the date was arbitrarily fixed cannot be assailed."

44. The above ratio has applicability in all fours to the present case.

45. As regards finality of option is concerned, applicants though exercised their option which has deprived right of qualifying service to be reckoned for pensionary benefits on objection by way of their representation though filed after the option exercised but before the

decision was taken to absorb the applicants on 13.12.2001 would clearly establish that the option, which was unconscionable terms, applicants, who were in a position to be exploited, as being low paid employees, were forced to exercise it and on their objection, the respondents have not passed any order, cannot be treated to be a willful and voluntary exercise of option.

46. One more aspect of the matter, which is required to be adjudicated is that without prejudice to establishment of right of the applicants for reckoning period from 1991 to 1999 as a qualifying Govt. service for the purpose of pensionary benefits as a Govt. servant and treatment of the option exercised as effective from 28.4.1999 with deemed regularization on absorption yet the Apex Court in its judgment dated 13.10.1994 in the case of ***Federation of All India Central Govt. Canteen Employees and Another*** (supra) while dismissing the Writ Petition accorded liberty to the applicants to approach CAT. In OA No.572 of 1996, which was preferred by ***Federation of All India Central Govt. Canteen Employees and another***, the Tribunal has allowed reckoning of entire service of the applicants therein towards qualifying service. The aforesaid decision has been implemented pending Writ Petition by the Ministry of Personnel vide OM dated 8.11.2000 by deciding to treat the entire service of the Canteen employees as qualifying service. In that event, service rendered by the applicants till they were absorbed prospectively would have to be reckoned as well as their entire services as Canteen employees towards qualifying service for pensionary purposes being similarly circumstanced. No differential

treatment can be imparted as per Constitution Bench decision of the Apex Court in the case of ***K.C. Sharma and others*** Vs. ***Union of India and others***, SLJ 1998(1) SC 54.

47. Applicants cannot be discriminated in the matter of policy decision by the Govt. with the similarly situate, and this differential treatment is an infraction to Articles 14 and 16 of the Constitution of India as equality in law is paramount and holds the field.

48. In the result, for the foregoing reasons, the present OA is allowed. Orders dated 13.12.2001 and 23.3.2003 are set aside. Respondents are directed to treat the applicants as absorbed employees from 26.4.1999 and service rendered earlier would have to be reckoned as a service rendered with the Govt. In that conspectus, applicants are entitled to all retiral benefits and other consequential benefits, which would be disbursed to them within three months from the date of receipt of a copy of this order. No costs.

S. Raju

(SHANKER RAJU)
MEMBER (J)

V.K. Majotra

(V.K. MAJOTRA)
VICE CHAIRMAN (A)

18.3.05

/ravi/