Indore, dated 06/04/2018

Shri L. C. Patne, learned counsel for the petitioner.

Shri Umesh Gajankush, learned Deputy Advocate General for the respondent/State.

The petitioner before this Court, who is aged about 85 years, is a pensioner of the State of Madhya Pradesh and is aggrieved by order dated 11/01/2017 passed by District Education Officer, Ujjain by which the claim of the petitioner for grant of family pension after her death to her disabled daughter, has been rejected.

02- The facts of the case reveal that the petitioner was an Assistant Teacher in the School Education Department. She has worked from 02/07/1968 till 31/12/1992 and she is receiving regular pension. The aforesaid facts are undisputed facts. The petitioner is having unmarried disabled daughter aged about 64 years and as unmarried disabled daughter is not able to earn her livelihood, the petitioner being a widow mother has submitted an application under Rules 47 of the Madhya Pradesh Civil Services (Pension) Rules, 1976 for including the name of her daughter for grant of family pension after her death. She has submitted an application in the prescribed format (Annexure-P/6) on

25/08/2014.

03- Undisputedly, there was again a certificate issued by the State Medical Board which is also on record (Annexure-P/7) wherein the total disability in respect of the daughter of the petitioner is 70% approximately. She is completely blind and mentally retarded person with moderate *loco motor* disability. The certificate has been issued by the District Hospital (under Rule 4 of the Rules framed under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995). Not only this, even the Head of the Department and Professor of Department of Psychiatry, R.D.Gardi Medical College, Ujjain has given a certificate certifying the disability as 69% and again it has been certified that the girl in question is mentally retarded.

04- The Block Education Officer Ujjain, Education Department has recommended the case of the petitioner for grant of family pension to the daughter of the petitioner after the death of the petitioner and he has verified all the certificates submitted by the petitioner. Inspite of the repeated representation to the authorities, as nothing was done, the petitioner was forced to file a writ petition and the same was registered as WP No.7371/2016(S)

and this Court by an order dated 03/11/2016 has directed the respondents to pass a final order in respect of the petitioner's claim.

05- The District Education Officer, Ujjain has rejected the claim of the petitioner based upon some executive instructions issued by the State of Madhya Pradesh dated 04/02/2016 and the reason assigned in the rejection order is that no certificate has been filed to establish that the girl in question has acquired disability before completing the age of 25 years.

06- The petitioner has again submitted a representation and the respondents have not accepted the claim of the petitioner and in those circumstances, the present petition has been filed.

07- A detailed and exhaustive reply has been filed by the State Government and it has been argued before this Court that the petitioner is certainly a pensioner and petitioner's daughter is certainly a disabled daughter having 69% disability. The respondents have stated that the petitioner has not established that the daughter of the petitioner has acquired disability prior to completion of the age 25 years, and therefore, once the aforesaid fact has not been established before the authorities, they have rightly rejected the claim of the petitioner *vide* impugned order

dated 11/01/2017.

08- The respondents have further stated that in light of the circular issued by the State Government read with Rule 47 of Madhya Pradesh Civil Services (Pension) Rules, 1976, no case for interference is made out in the matter.

09- Heard learned counsel for the parties and perused the record and the matter is being disposed of at motion hearing stage itself with the consent of the parties.

10- Undisputedly, the petitioner before this Court is a retired pensioner aged about 85 years. It is again undisputed fact that the petitioner's daughter is a mentally retarded child and at present she is aged about 64 years. There is no family member to look after the mentally retarded daughter except the petitioner, as the petitioner herself is a widow. The daughter of the petitioner is mentally retarded, she is suffering 69% disability and apart from the aforesaid disability, she is completely a blind person. A certificate is also on record and there is no dispute about the fact that the petitioner's daughter is mentally challenged person and is a special child, who is also completely blind.

11- The Block Education Officer, Ujjain has verified all the certificates, he has personally seen the girl in question and after

recording his satisfaction has issued a certificate which is on record. However, the satisfaction of the Block Education Officer, even though, he has certified that the girl is mentally retarded has got no meaning once the Medical Board has certified that the girl in question is mentally retarded, and is a special child, who is completely blind.

12- The relevant rules which provide for grant family pension as contained under Rule 47 of the Madhya Pradesh Civil Services (Pension) Rules, 1976, reads as under:-

> "**Rule 47 (6)** The period for which family pension is payable shall be as follows:-
>
> (i) in the case of a widow or widower, up to the date of death or remarriage whichever is earlier;
>
> (ii) in the case of a son, until he attains the age of 21 years; and
>
> (iii) in the case of an unmarried daughter, until she attains the age of 24 years or until she gets married, whichever is earlier:
>
> provided that if the son or unmarried daughter of a Government servant is suffering from any disorder or disability of mind or is physically crippled or disabled so as to render him or her unable to earn a living even after attaining the age of (25 years) the family pension shall be payable to such son or unmarried daughter for life subject to the following conditions, namely:-
>
> (a) If such son or unmarried daughter is one among two or more children of the Government servant, the family pension shall be initially payable to the minor children in the order set out in sub-rule (6) of this rule until the last minor child attains the age of (25 years), as the case may be, and thereafter the Family Pension shall be resumed in favour of the son or unmarried daughter suffering from disorder or disability of mind or who is physically crippled or disabled and shall be

payable to him/her for life.

(b) If there are more than one such son or unmarried daughter suffering from disorder or disability of mind or who are physically crippled or disabled, the family pension shall be paid in the following order, namely:-

(i) Firstly to the son, and if there are more than one son, the younger of them will get the family pension only after the lifetime of the elder;

(ii) Secondly, to the unmarried daughter, and if there are more than one unmarried daughters, the younger of them will get the family pension only after the lifetime of the elder;

(iii) The family pension shall be paid to such son or unmarried daughter through the guardian as if he or she was minor;

(iv) Before allowing the family pension for life to any such son or unmarried daughter, the sanctioning authority shall satisfy that the handicap is of such a nature as to prevent him or her from earning his or her livelihood and the same shall be evidenced by a certificate obtained from a medical officer not below the rank of a Civil Surgeon setting out, as far as possible, the exact mental or physical condition of the child;

(v) The person receiving the family pension as guardian of such son or unmarried daughter shall produce (every five years) a certificate from a medical officer not below the rank of Civil Surgeon to the effect that he or she continues to be physically crippled or disabled."

Based upon the aforesaid statutory provision of law which provides for grant of family pension to unmarried daughter until she attains the age of 24 years and a son until he attains the age of 21 years and in case of the son or unmarried daughter of government servant, is suffering from disorder or disability of mind or is disabled or he is not able to earn livelihood, he is entitled for

family pension life long. The requirement under the Rule is that the disability of a child should be certified by Civil Surgeon and the Civil Surgeon is also required to certify that the special child is not in a position to earn his livelihood. In the present case, disability report is on record as Annexure-P/7 in which the status of the daughter of the petitioner reflects that she is a special child with 69% disability and completely blind girl and the certificate of Civil Surgeon is also on record (Annexure-P/8) certifying that she is not in a position to earn her livelihood. The certificate has been duly signed by the Civil Surgeon and in those circumstances, the case was forwarded to the Block Education Officer.

13- The State Government has made an attempt to justify its conduct placing heavy reliance upon a circular dated 04/02/2016 (Annexure-R/1) issued by the Finance Department, and the same reads as under:-

"मध्यप्रदेश शासन
वित्त विभाग
वल्लभ भवन–मंत्रालय भोपाल

क्रमांक : एफ 9–2/2016/नियम/चार भोपाल, दिनांक 4/2/2016

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, ग्वालियर,
समस्त संभागीय आयुक्त,
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,

मध्यप्रदेश ।

विषय– शारीरिक/मानसिक रूप से अक्षम पुत्र/पुत्री को परिवार पेंशन देने बावत्।

संदर्भ– वित्त विभाग का ज्ञापन कमांक एफ बी–6/2/92/नियम/चार दिनांक 8/4/1993 एवं आर.बी.25/11/97/पीडब्ल्यूसी/चार दिनांक 27–2–1997.

म.प्र. सिविल सेवा (पेंशन) नियम 1976 के नियम 47(6) के अनुसार सेवानिवृत्त /मृत शासकीय सेवकों के विकलांग पुत्र/पुत्री को परिवार देय होने का प्रावधान है परंतु यह किस प्रकार की विकलांगता एवं किस उम्र में विकलांगता होने पर देय होगी के संबंध में स्पष्टता नहीं है।

2/ अतः शासन द्वारा निर्णय लिया गया है कि सेवानिवृत्त/मृत शासकीय कर्मचारियों के पुत्र/पुत्री के 25 वर्ष की आयु पूर्ण करने तक होने वाली विकलांगता पर परिवार पेंशन की पात्रता होगी।

3/ शेष शर्तें यथावत रहेंगी।

मध्यप्रदेश के राज्यपाल के नाम
से तथा आदेशानुसार

(अनिरूद्ध मुकर्जी)
सचिव
मध्यप्रदेश शासन, वित्त विभाग''

14- The respondents have placed heavy reliance on paragraph No.2 of the aforesaid circular and their contention is that unless and until it is established that the person has acquired disability up to the age of 25 years, he will not be entitled for family pension.

15- In the considered opinion of this Court, the aforesaid reasoning assigned in the circular is an absurd reasoning, an executive instruction cannot supercede the statutory rules framed in exercise of powers conferred to this Court under proviso to

Article 309 of the Constitution of India.

16- By the aforesaid circular, the entire effect of the proviso to Rule 6 has been given a complete go by. The object of Rule 47(6) of Madhya Pradesh Civil Services (Pension) Rules, 1976 is to ensures that the disabled child, whose parents are no more, does not starve after death of the government servant or after the death of the pensioner, as he was dependent upon the government servant or upon the pensioner. It is really unfortunate that such kind of negative approach has been adopted by the State Government in the present case.

17- In the present case, a substantial question of law has to be decided, *inter-alia*: “Whether, the executive instructions can be over-ride the Statutory Rules depriving the petitioner's daughter for grant of disability pension”.

18- Rule 46(6) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 is very clear on the subject. It entitles the petitioner's daughter who is a disabled child to receive pension after the death of her mother and the executive instructions dated 04/02/2016 as interpreted by the State Government provides that government servant has to establish that the disability was in existence in respect of the child in question before he has attained

the age of 25 years. Rules 46(6) does not provide for any such embargo.

19- It is very settled preposition of law that when the action of the State or its instrumentalites is not as per the Rules / statutory provisions, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid. In the case of **Sirsi Municipality Vs. Cecelia Kom Francis Tellis**, the Supreme Court has held that “the ratio is that the rules or the regulations are binding on the authorities” (AIR 1973 SC 855). The apex Court in the aforesaid case has held as under:-

> **“**The Hon'ble Supreme Court, in Sukhdeo Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr. (1975 AIR 1331), has observed as under:
>
> The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restrictions on the employer and the employee with no option to vary the conditions.... In cases of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies... the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by declaring (action) in violation of rules and regulations to be void. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute." (Emphasis added).

20- The Hon'ble Apex Court has considered time and again the scope of issuing the executive orders. A Constitution Bench of the Hon'ble Supreme Court, in **B.N. Nagarajan v. State of Mysore** reported in **(1967) ILLJ 698 SC**, has observed as under:-

> "It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by thai Act or the Rules and it cannot, in exercise of its executive powers under Article 162 of the Constitution, ignore or act contrary to that Rule or the Act."

21- The Hon'ble Supreme Court in **Sant Ram Sharma v. State of Rajasthan and Ors.** reported in **(1968) IILLJ 830 SC**, has observed as under:-

> "It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed." (Emphasis added).
>
> The law referred to above has consistently been followed and it is settled proposition of law that the Authority cannot issue the orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. (Vide Commissioner of Income Tax v. A. Raman & Co. [1968] 67 ITR11 (SC); Union of India & Ors v. Majji Jangammya and Ors., [1977] 2 SCR 28; Ramendra Singh and Ors. v. Jagdish Prasad and Ors. [1984] 2 SCR 598; P.D. Agrawal and Ors. v. State of U.P. and Ors. [1987] 3 SCR 427; Beoper Sahayak (P) Ltd. v. Vishwa Nath [1987] 3 SCR 496; Paluru Ramkrishananiah and Ors. v. Union of India and Ors. (1989) IILLJ 47SC; and Comptroller & Auditor General of India and Ors. v. Mohan Lal Mehrotra and Ors. (1992) I LLJ 335 SC.**"**

22- The Hon'ble Supreme Court, in **Naga People'**

Movement of Human Rights v. Union of India and Ors. reported in **AIR 1998 SC 465**, has held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are consistent with the said provisions.

23- In **C. Rangaswamaiah and Ors. v. Karnataka Lokayukta and Ors.** reported in **[1998] 3 SCR 837**, the Hon'ble Supreme Court held that executive instructions can be passed even for creating the post so long as they remain consistent with law/rules. In **Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhera** reported in **AIR 1999 SC 3084**, the Hon'ble Supreme Court observed that in absence of statutory rules, appointments can be made on the basis of executive instructions but there is no scope of deviation of rules, if the same exist.

24- In light of the aforesaid it can be safely gathered that executive instructions cannot amend or supercede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law as held by the Constitution Bench of the Hon'ble Supreme Court in

State of U.P. and Ors. v. Babu Ram Upadhyaya reported in **1961 CriL J773**; and **State of Tamil Nadu v. M/s. Hind Stone etc.** reported in **[1981] 2 SCR 742**.

25- In the case of **Union of India v. Sri Somesundram Vishwanath** reported in **AIR 1988 SC 2255**, the Hon'ble Apex Court has observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

26- In the case of **Ram Ganesh Tripathi v. State of U.P.** reported in **AIR 1997 SC 1446**, the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed, being dehors the rules.

27- The Rajasthan High Court in the case of **Ashok Kumar Vs. State of Rajasthan and Ors.** reported in **2000 (2) WLN 574** has taken a similar view relying upon the aforesaid judgments and has held that executive instructions cannot supercede the statutory rules. In the present case, Rules have

been framed in exercise of proviso to Article 309 of the Constitution of India and executive instructions issued by the Finance Department under the signatures of the Secretary, Finance Department will no way supercede the statutory provision on the subject.

28- The apex Court in the case of **The Distt. Registrar, Palghat and Others Vs. M. B. Koyakutty and Others** reported in **(1979) 2 SCC 150** has held that the executive instructions should be subservient to the statutory provisions. Paragraph No.22 of the aforesaid judgment reads as under:-

> **"**22. There can be no quarrel with the proposition that if the statutory rules framed by the Governor or any law enacted by the State Legislature under Article 309 is silent on any particular point, the Government can fill up that gap and supplement the rule by issuing administrative instructions not inconsistent with the statutory provisions already framed or enacted. The Executive instructions in order to be valid must run subservient to the statutory provisions. In the instant case, however, it could not be said that there was a gap or a void in the statutory provisions in the matter of promotion from the cadre of Lower Division Clerks to that of Upper Division Clerks.**"**

29- The apex Court in the case of **State of Madhya Pradesh and Another Vs. M/s. G. S. Dall and Flour Mills** reported in **1992 Supp (1) SCC 150** has held that the executive instruction can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory

provisions or whittle down their effect.

30- The apex Court in the case of **Union of India and Another Vs. Ashok Kumar Aggarwal** reported in **(2013) 16 SCC 147** has again dealt with the executive instructions. Paragraph No.58, 59 and 60 of the aforesaid judgment reads as under:-

> **"**58. A Constitution Bench of this Court while dealing with a similar issue in respect of executive instructions in Sant Ram Sharma Vs. State of Rajasthan & Ors., AIR 1967 SC 1910, held:
>
> > "7. ... It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed."
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> 59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/ executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide: Union of India & Ors. v. Majji Jangammayya & Ors., AIR 1977 SC 757; P. D. Aggarwal & Ors. v. State of U. P. & Ors., AIR 1987 SC 1676; Paluru Ramkrishnaiah & Ors. v. Union of India & Anr., AIR 1990 SC 166; C. Rangaswamaiah & Ors. v. Karnataka Lokayukta & Ors., AIR 1998 SC 2496; and JAC of Airlines Pilots Association of India & Ors. v. The Director General of Civil Aviation & Ors., AIR 2011 SC 2220).
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> 60. Similarly, a Constitution Bench of this Court, in Naga People's Movement of Humant Rights v. Union of India., AIR 1998 SC 431, held that the executive instructions have binding force provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.**"**

It has been held that the executive instructions are subservient to the statutory provisions and can be issued only to

supplement the statutory rules and not to supplant them.

31- In the case of **State of Haryana Vs. Mahendra Singh and Others** reported in **(2007) 13 SCC 606**, it has been held by the apex Court that executive instructions cannot prevail over the statutory rules. A similar view has been taken by the apex Court in the case of **DDA and Others Vs. Joginder S. Monga and Others** reported in **(2004) 2 SCC 297** and it has been held that executive instructions if they are in conflict with statutory provision, the statutory provision will prevail and in absence any conflict both will prevail.

32- In the case of **Accountant General, State of Madhya Pradesh Vs. S. K. Dubey and Another** reported in **(2012) 4 SCC 578**, the apex Court in paragraph No.31, 33 and 39 has held as under:-

> **"**31. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the Legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State Executive is coextensive with that of the State Legislature.
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> 33. The Constitution Bench of this Court in *Lalit Mohan Deb (1973) 3 SCC 862* (para 9; pg. 867) said :
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> > "9. It is true that there are no statutory rules regulating the selection of Assistants to the selection grade. But the absence of such rules is no bar to the Administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject.....".

> In Union of India and another v. Central Electrical and Mechanical Engineering Service (CE&MES) Group 'A' (Direct Recruits) Association, CPWD and others16, this Court held that the executive instructions could fill in gaps not covered by rules but such instructions cannot be in derogation of the statutory rules.
>
> 39. I am of the considered view that there is no difference in the legal position in a case where power conferred on the State Government for framing rules has been exercised but such rules remain silent on certain aspects although it had power to make rules with regard to those aspects and in the situation where no rules have been framed in exercise of the power conferred on it, insofar as executive power of the State is concerned. The power that vests in the State Government in Section 30(2) to carry out the provisions contained in Section 16(2) does not take away its executive power to make provision for the subjects covered in Section 16(2) for which no rules have been framed by it. The exercise of such power by the State Government, obviously, must not be inconsistent with the constitutional provisions or statutory provision in Section 16(2) or the State Rules framed by it. In the present case, the exercise of power by the State Government by issuance of the order dated April 5, 2002 does not suffer from any such vice.**"**

In the aforesaid case, the apex Court has held that executive instructions can fill in gaps not covered by rules but such instruction cannot be in derogation of the rules.

33- The apex Court in the case of **Joint Committee of Air Line Pilots' Association of India (ALPAI) and Others Vs. Director General of Civil Aviation and Others** reported in **(2011) 5 SCC 435** in paragraphs No.17 and 20 to 23 has held as under:-

> **"**17. The CAR 2007 is neither a statute nor a subordinate legislation. Provisions contained in Section 4A, 5 & 6A of the Act 1934 and Rules 42A & 133A of the Rules 1937, make it evident that the same are merely executive instructions which can be termed as "special directions". The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. (Vide: State of

M. P. & Anr. v. M/s. G.S. Dall & Flour Mills (1992) supp. (1) SCC 150.

20. Thus, an executive order is to be issued keeping in view the rules and executive business, though the executive order may not have a force of law but it is issued to provide guidelines to all concerned, who are bound by it.

21. In Union of India & Anr. v. Amrik Singh & Ors., AIR 1994 SC 2316, this Court examined the scope of executive instructions issued by the Comptroller and Auditor General for making the appointments under the provisions of Indian Audit and Accounts Department (Administrative Officers, Accounts Officers and Audit Officers) Recruitment Rules, 1964, and came to the conclusion that the Comptroller and Auditor General of India had necessary competence to issue departmental instructions on matters of conditions of service of persons serving in Department, being the Head of the Department, in spite of the statutory rules existing in this regard. The Court came to the conclusion that an enabling provision is there and in view thereof, the CAG had exercised his powers and issued the instructions which are not inconsistent with the statutory rules, the same are binding for the reason that the provision in executive instructions has been made with the required competence by the Comptroller and Auditor General.

22. Thus, it is evident from the above that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable thereunder.

23. This Court in State of U.P. & Ors. v. Hirendra Pal Singh etc., JT (2010) 13 SC 610, considered a large number of judgments particularly in Firm A.T.B. Mehtab Majid & Co. v. State of Madras & Anr., AIR 1963 SC 928; B. N. Tewari v. Union of India & Ors., AIR 1965 SC 1430; Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors., AIR 1986 SC 515; West U.P. Sugar Mills Association & Ors. v. State of U. P. & Ors., AIR 2002 SC 948; Zile Singh v. State of Haryana & Ors., (2004) 8 SCC 1; and State of Kerala & Anr. v. Peoples Union for Civil Liberties, Kerala State Unit & Ors., (2009) 8 SCC 46, and came to the conclusion that once the old rule has been substituted by the new rule, it stands obliterated, thus ceases to exist and under no circumstance, can it be revived in case the new rule is held to be invalid and struck down by the Court, though position would be different in case a statutory amendment by the Legislature, is held to be bad for want of

> legislative competence. In that situation, the repealed statutory provisions would revive automatically.**"**

The apex Court in the aforesaid case has held that executive instructions cannot run contrary to statutory provision or whittle down their effect.

34- In the case of **S.Sivaguru Vs. State of Tamil Nadu and Others** reported in **(2013) 7 SCC 335**, the apex Court while again dealing with executive instructions has held that executive instruction cannot supplant statutory rules.

35- In the case of **Lok Prahari Vs. State of Uttar Pradesh and Others** reported in **(2016) 8 SCC 389** the apex Court in paragraphs No.39 and 44 has held as under:-

> **"**39. There is one more and most important reason for which the 1997 Rules cannot be said to be legal. The 1981 Act deals with the salaries and perquisites to be given to all the Ministers, including the Chief Ministers. The said provisions are statutory, but the 1997 Rules are not statutory and they are only in the nature of executive instructions. If there is any variance in statutory provision and executive instruction, the statutory provision would always prevail. This is a very well-known principle and no further discussion is required on the subject. When the 1981 Act enables the Chief Minister to have residential accommodation only during his tenure and for 15 days after completion of his tenure, the 1997 Rules providing for an accommodation for life to the Chief Minister cannot be said to be legal and valid. For this sole reason, validity of the 1997 Rules cannot be upheld.
>
> 44. There cannot be any dispute that when the rules and regulations or executive institutions are contrary to any statutory provision, the statutory provision would prevail and the rules or executive institutions, so far as they are contrary to the statutory provisions, would fail.**"**

In the aforesaid case, it has been held that in case

executive instructions are contrary to any statutory rules, statutory provision shall prevail and the executive instructions, so far as they are contrary to the statutory provision, would fail.

36- The apex Court in the case of **Narinder S. Chadha and Others Vs. Municipal Corporation of Greater Mumbai and Others** reported in **(2014) 15 SCC 689** has declared the executive instructions as *ultra vires* which were contrary to the statutory provisions. Thus, it can be safely gathered that executive instructions which are not in consonance with the statutory provision are void *ab initio.*

37- In the present case, the circular issued by the State Government is certainly contrary to the rules framed by the State Government on the subject depriving the petitioner's daughter of her valuable right to receive pension and therefore, it deserves to be quashed by this Court.

38- The Hon'ble Justice G. P. Singh in “Principle of Statutory Interpretation (Tenth Edition)”, while dealing with delegated legislation has dealt with circulars and notifications which are issued by governments and has observed that circulars or instructions which have no statutory backing do not amount to law and cannot dilute or override the effect of a constitutional or

statutory provision. (See: Municipal Corporation of Amritsar v. Senior Superintendent of Post Offices Amritsar Division, (2004) 3 SCC 92; Rampal Kundu Vs. Kamal Sharma, (2004) 2 SCC 759).

39- The petitioner is aged about 85 years has made to run from pillar to post for her legitimate right of family pension in respect of her daughter in light of Rule 47(6) of the Madhya Pradesh Civil Services (Pension) Rules, 1976. Inspite of there being a of categoric provision, on a frivolous ground based upon circular dated 04/02/2016, her claim has been rejected. In fact the circular is not in consonance with Rule 47(6) of the Madhya Pradesh Civil Services (Pension) Rules, 1976, and therefore, this Court is of the opinion that the circular deserves to be quashed and is accordingly quashed.

40- The respondents are directed to incorporate the name of the petitioner's daughter as forwarded by the petitioner alongwith all relevant documents entitling the daughter to receive pension after the petitioner's death.

41- The Supreme Court of India in the case of **Deokinandan Prasad Vs. The State of Bihar and Others** reported in **1971(2) SCC 330** has held that payment of pension does not depend upon the discretion of the State; but, on the other

hand, the payment of pension is governed by the Rules and a government servant coming within the Rules is entitled to claim pension. In the instant case the, petitioner is entitled for pension and as per Madhya Pradesh Civil Services (Pension) Rules, the daughter of the petitioner is also entitled for pension being a disabled child.

42- The State Government is not doing any charity by paying pension to the petitioner or by paying pension to the disabled daughter. It is their legitimate right and it cannot be curtailed by executive fiat.

43- The Supreme Court in the case of **Francis Coralie Vs. Union Territory of Delhi** reported in **(1981) 1 SCC 608** and **Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.** reported in **1985 SCC (3) 545** interpreted the Right to Life as Right to Dignity, which is integral when it comes to the question of pension. Gone are the days when retirees depended on their offerings in their old age waiting for the final call to come. In last few years the human life expectancy has increased at an exponential rate. Hence, people after their retirement focus on enjoying their lives to a certain level of bare minimum needs. Elaborating on life with dignity, the apex Court opines that life does

not amount to mere animal existence or physical life but existence with dignity and therefore, the denial of pension is contrary to the constitutional rights guaranteed to the petitioner and her daughter under the Constitution of India.

44- The apex Court in the case of **Francis Coralie Vs. Union Territory of Delhi** reported in **(1981) 1 SCC 608** in paragraph No.7 has held as under:-

> **"**Now obviously, the right to life enshrined in Article 21 can not be restricted to mere animal existence. It means something much more than just physical survival. In Kharak Singh v. State of Uttar Pradesh Subba Rao J. quoted with approval the following passage from the judgment of Field J. in Munn v. Illinois (1877) 94 US 113 to emphasize the quality of life covered by Article 21: "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world." and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first Sunil Batra case (supra). Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.**"**

45- It is reiterated that in light of the aforesaid case, the

right to life enshrined under Article 21 cannot be restricted to mere minimal existence depriving the petitioner's daughter of her legitimate right to receive pension.

46- The apex Court in the case of **D.S. Nakara & Ors. Vs. Union of India** reported in **1983 AIR 130**, has observed that pension is a right; but not a bounty or gratuitous payment. It has been further observed that payment of pension does not depend upon discretion of the Government but it is governed by the rules and a government servant coming within those rules is entitled to claim pension.

47- The Supreme Court has further held that pension payable to a government employee is earned by rendering long and efficient service and it is social-welfare measure rendering socio-economic justice by providing economic security in old age of those who toiled ceaselessly in the hey-day of their life. Pension as a retirement benefit is in the consonance with and in furtherance of the goals of the Constitution. The petitioner's daughter undisputedly, a mentally retarded child, is entitled to receive disabled pension and therefore, respondents are directed to take all possible steps in the matter enabling the daughter to receive pension after the petitioner's death. The exercise be

concluded within 30 days from today.

48- In the present case a widow lady, who is aged about 85 years, has been subjected to great harassment by the State Government. She was fighting for her valuable rights and she was fighting for a special child. She has been forced to visit this Court twice, and therefore, this Court of the opinion that the petition not only deserves to be allowed but deserves to be allowed by imposing exemplary cost on the State Government.

49- Resultantly, the writ petition stands allowed with a cost of Rs.1,00,000/- to be paid by the State Government. The impugned order dated 11/01/2017 also set aside.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

vibha / *Tej*