**IN THE ARMED FORCES TRIBUNAL**

**( REGIONAL BENCH) KOLKATA**

APPLICATION NO:T.A.NO.60/2012

THIS 13TH DAY OF APRIL, 2015

CORAM : Hon’ble Mr. Justice Devi Prasad Singh, Member (Judicial)

 Hon’ble Lt.GeneralGautamMoorthy, Member (Administrative)

No.747221-N, Rank: Ex-Sgt Anadi Nandan Muklhopadhyay S/O Late Aban

Bhusan Mukhopadhyay. R/O AG-84, Sector-2,Salt Lake, Kolkata-700091,

West Bengal

……….…..Applicant

Versus

1. Union of India.Represented by the Secretary.Ministry of Defence. SenaBhawan

New Delhi.

 2. The Chief of the Air Staff, Air Head Quarters (VayuBhawan),New Delhi-110011

 3. Air Officer Commanding,Air Force Record Office, Subroto Park,

New Delhi-110011

 4. Principal Controller of Defence, Accounts(Pension),DraupadiGhat,Allahabad.

UP-211014.

…………..Respondents

**For the Petitioner: Mr.S. K Choudhury, Advocate**

 **For the Respondents: Mr.AnandBhandari,Advocate**

**O RDER**

**Per Justice Devi Prasad Singh, Member(Judicial)**

**Conspectus**

The instant application under Section 14 read with Section 15 of the Armed Forces Tribunal Act 2007( In short “the Act”) has been preferred by the applicant for grant of pension after Condonation of shortfall in service of 7 months 26 days in computing the qualifying service, which is admittedly of 15 years.

2.The brief facts given rise to the present controversy discussed hereinafter:-

3. The applicant was enrolled in Indian Air Force on 17 Nov 1992 inRadioFitter Trade.After completion of training, he was classified as Aircraftsman. After completing the Helicopter Training in 1995, the Applicant was posted in Air Force Station, Jammu in 1995.In 1997 he was promoted to the post of Corporal, then again promoted to the Rank of Sergeant in May 2006.

4. Mother of the applicant was suffering from serious emotional breakdown and on account of deteriorating condition for suffering from Neurosis problem with tendency to harm her own life,the applicant was suffering from mental pain and agony. The multiplying agony which the applicant was sufferingwas also because of his sister being persecuted by her in-laws and was likely to be divorced. The factual position seems to be not disputed. Under the compelling circumstances, the applicant submitted a letter dated 20 Nov 2006 to his Commanding Officer for premature retirement.He has also refused the UN assignment and sacrificed his career for the sake of his mother’s life and to mitigate his sister’s pain and agony.A copy of the letter dated 20 Nov 2006 has been filed as Annexure A-1.The Commanding Officer has forwarded hissuch representation along with own note. In consequence thereof the discharge order dated 27 Feb 2007 was passed by the competent authority. At the time of his discharge the applicant has served the Air Force for a period of 14 Years 04 Months 04 Days. The Copy of the discharge certificate dated 21 Mar 2007 has been annexed as Annexture-2. Since he had not completed the qualifying period of 15 years under Regulation 114 chapter III of the Pension Regulation of the Air Force, the applicant was denied the pension.

5.Being aggrieved the applicant has submitted a representation dated 02 May 2008

with a request to grant service pension after the condoning the shortfall in service. While submitting the representation the applicant had invited attention to Para 114 of Pension Regulation 1961 and the Ministry of Defence letter dated 14 Aug 2001 according to whichthe short fall in service for the purpose of service pension may be condoned by AOC, AFRO up to six months and by Air HQ upto 12 months. The application of the applicant was rejected by an order dated 22 May 2008 on the ground that he was discharged form service on 21 Mar 2007 on his own request and hence in view of the MoD letter dated 14 Aug 2001 he was not entitled to any pension. Further he was informed that the shortfall of serviceshall not be condoned being discharged on his own request. The applicant submitted another representation dated 23 Mar 2010, relying upon the decision dated 18 Mar 2010 of AFT, Kochi Bench in TA No 18/2009in case of Vinod Roy John vs. UOI and others. The applicant’ssaid representation was also rejected vide an order dated 16 Apr 2010.(Annexure A-7). It appears that relying upon another judgementdated 21 Apr 2010 in TA No 141/2009 by AFT, Chennai , another representation submitted by the applicant dated 22 Aug 2010 which was also turned down vide an order dated 20 Sep 2010. It appears that repeated representations were submitted by the applicant from time to time.Feeling aggrieved, the applicant had filed an application being OA No 311 of 2011 in the Principal Bench in New Delhi which was decided finally on 02 Feb 2012 permitting the petitioner to prefer a representation for Condonation of shortfall in service. The representation submitted by the applicant has been rejected. Hence the instant application has been moved.

6.It appears that there is no dispute that under Regulation 121, the qualifying service of 15 years is necessary. The Regulation in 121 is reproduced as under:

*“unless otherwise provided for, the minimum qualifying regular service for a service pension is 15 years.”*

The Condonation of deficiency in service for eligibility for grant of pension is provided under regulation 114 which is reproduced as under:

*“ Except in the case of (a)*

1. *an individual who is discharged at his own request,*
2. *an individual who is eligible for special pension or gratuity under Regulation 144, or*

*( c ) an individual who is invalided with less than 15 years’ service, deficiency in service for eligibility to service pension or reservist pension or gratuity in lieu, may be condoned by a competent authority up to six months in each case.”*

7. The period of six months has been increased to one yearvide order dated 14 Aug 2001 in case a representation is sent to Service Headquarter. The relevant portion of the order dated 14 Aug 2001 is reproduced as under:

Sanction is hereby accorded in pursuance of MoD ID No. 34(3)/2001/D(O&M) dated 3rd August, 2001 for delegation of Administrative powers with the approval of RakshaMantri to the Service HQs in respect of the subjects indicated below :

1. (i) Division of family pension between eligible family members.

 (ii) Initial cases for award of Special Family Pension and ex-gratia for officers with concurrence from PCDA (Pension), Allahabad or the concerned CDA.

 (iii) Recovery from Pensionary benefit first charge being Public Fund dues thereafter Non-Public Fund dues from the residual benefits.

 (iv) Payment of dues to NOK of Deserters.

 (v) Condonation of shortfall in Qualifying Service for grant of Pension in respect of PBOR beyond six months and up to 12 months.

 (vi) Time bar sanction for filing appeals for Ordinary Family Pension, Special Family Pension, disability Pension etc., in respect of Officers and PBOR beyond 12 months.

 (vii) Grant of Ex-Gratia award to Cadets on death/disability within the Govt. approved terms and conditions.

 (viii) Pensionary award to Officers dismissed from Service otherwise than with disgrace / cashiered.

 (ix) Pensionary award to Officers who are discharged, called upon to resign or are retired.

 (x) Grant of pension to PBO dismissed from service.

 (xi) Grant of Disability to Offices.

 (xii) First appeal against rejection of Ordinary Family Pension, Special Family Pension, Disability Pension /Ex-Gratia award etc., to Officers and PBOR.

 (xiii) First claim for pension and gratuity submitted after 12 months from due date where Pension Sanctioning Authority is not satisfied with reasons for delay.

 (xiv) Implementation of judgments delivered by various Courts/CATs including those with financial implications where further appeal is not contemplated.

1. Approving Authority in the Service HQs in respect of the above subjects will be AG/COP/AOP/AOA as the case may be. Any further re-delegation of these powers will require prior approval of Ministry of Defence.

8.From the aforesaid provision it appears that shortfall up to six months may be condoned by subordinate authority and six months to one year may be condoned by Air HQ. Regulation 114 (supra) is confined only to the extent of shortfall of six months.

9. Mr. Choudhury, learnedcounsel for the applicant invited attention to the paramateria provisions contained in regulation 82(a) for the Pension Regulation of the Navyand Regulation 125(a) of the Pension Regulation of Army. It has been submitted that Regulation 82(a) of the Regulation of the Navy has been declared ultra vires by Bombay High Court in Gurmukh Singh vs. UOI and others in WP No 430/2005.

10.The SLP filed against the Judgment of Gurmukh Sing has been dismissed by Hon’ble Supreme Court vide order dated 23 Jul 2007 observing that Their Lordship did not find any cogent reason to interfere with the impugned judgment of the Hon’ble High Court. It has been submitted that with regard to the similar case for Indian Army the Hon’ble Supreme Court increased the discharge rate and granted the pension in a case decided vide order dated 20 Apr 2007 to WP No.4656/2003.

11.In another casebearing Civil Appeal no 9389/2014- UOI VS. Surendra SinghParmer the Hon’ble Supreme Court while considering the short fall held as under:

 *“….In view of the aforesaid provision, the respondent is also entitled to claim for Condonation of shortfall in qualifying service for grant of pension beyond six months. If the aforesaid power has not been exercised by the competent authority in proper case then it was within the jurisdiction of the High court or Tribunal to pass appropriate order directing the authority to condone the shortfall and to grant pension to the eligible person, which has been done in the present case and we find no ground to interfere with the substantive finding of the Tribunal. However as we find that the respondent was allowed to retire from service on 24 thJune, 1985 when the instruction dated 14 th Aug 2001 was not in existence, we hold that the respondent is entitled for such benefit from such date on which the said instruction came in to effect. The tribunal failed to notice the aforesaid fact but rightly declared that the respondent’s shortfall in service stands condoned. In the facts of the case, we are of the view that it should have been made clear that the respondent shall be entitled to benefit w.e.f. 14 th Aug 2001 and not prior to the said date. The order passed by the Tribunal stands modified to the extent above. The appeal stands disposed of with aforesaid observations.”*

12.It is vehemently urged by the Ldcounsel for the respondent that in view of the Regulation 114 and keeping in view the fact that petitioner had retired at his own request and applicant is not entitled for pension nor condonation of short fall of service. On the other hand the LdCounsel for the applicant submitted that even if the applicant had retired on his own request because of his family disturbances and compelling circumstances, his right to make a prayer for condonation of short fall shall not come to an end.

13.We have considered the argumentsadvanced by the Ld. Counsel for both sides at length and perused the relevant records. The arguments advanced by the applicant’scounsel to the effect that because he was discharged at his own request, his right to make a representation to condone the short fall of service seems to be correct. The discharge from service at own request is one thing and making a prayer for condonation of shortfall in service is other thing. In ordinary course a person discharge from service at his own request shall not be entitled for pension unless he or she have completed 15 years of service. The subordinate authority in view Pension Regulation 114 seems tohave no power to condone the short fall over six months but the order dated 14 Aug 2008 confers power on the Headquarter to condone the short fall. Being higher forum the Air HQ seems to have been given wide power to condone the short fall of one year for grant of pension. Such power should not be exercised mechanically. It shall be obligatory for the Air Headquarter to look into the matter after applying mind over the facts and circumstances and the reasons because of which an Army Personal(Air Force) had made a request for premature discharge.

14. In the present case while passing the impugned order dated 23 May 2012 the authority had dealt with the matter mechanically in spite of the fact that the Principal Bench AFT, New Delhi had permitted the applicant to represent his case . When a reference is made by a Court or Tribunal then the authority of the Army/Navy or Air Force should be cautious while discharging their obligation.

15. On perusal of the impugned order dated 23 May 2012, it is observed that the authority concern has not applied their mind but rejected their application keeping in policyfor the purpose in mind. The operative portion of the impugned order dated 23 May 2012 is reproduced below:

 *“……Now therefore , after taking in to consideration all the aspects of your request for consideration of 07 months and 26 days of shortfall in qualifying service and for grant of service pension dated 21 Feb 2012, and as there is no change in the existing policy, it has been decided by the competent authority that you are not eligible for grant of condonation of shortfall in qualifying service.”*

16. Whenever an order is passed by the court and decision is taken with regard to the condonation of short fall in service, then such decision should not be based on any policy but it must be taken into account keeping in view the compelling circumstances because of which the Air Force personnelmoved the application for premature discharge from the Air Force. The rejection of the representation on the basis of a policy is neither just nor proper. The Govt. order (supra) as well as the Regulation (supra) impliedly cast a duty on the competent authority to apply their mind to the factual material on record and it shall be necessary that a speaking and reason order assigning grounds on which the representation is rejected or allowed be passed. The rejection on the basis of a policy decision by the Army/Navy of Air Force authority shall be mechanical one and violateArticle 14 read with Article 21 of the Constitution of India; hence not permissible. Regulation (supra) and the order(supra) confers discretion to condone shortfall and that discretion must be exercised with justness and fairness and assigning reasons which is a part and parcel of Article 14.The rights like right to livelihood, qualityand dignity of life and other facetsof life are protected under Article 21 of the Constitution of India.

17. Regulation 121 starts with the word “Unless otherwise provided for” the minimum qualifying service would be 15 years. It means there may be circumstances or ground under which qualifying service may be reduced by the employer. That is why the respondent employer (Air Force) has been conferred jurisdiction to condon the shortfall up to one year. Whenever a discretion is conferred on authority touching the life and livelihood or quality of life, such discretion must be exercised in just and fair manner. The discretion may not be exercised mechanically under the garb of policy. No policy may be famed or order may be passed which may interfere with the right of authority to exercise discretion conferred by Regulation 114. The benefit flowing from Regulation 114 has salutatory mandate and it cannot be diluted by executive instruction.

18. That apart it is also well settled under provision of law that whilepassingan order, the administrative or quasi-judicialauthoritieshave to assign reasons. The reason is the pulse beat of Articles 14. It is settled proposition of law that even in administrative matters, the reasons should be recorded and it is incumbent upon the authorities to pass a speaking and reasoned order. In KumariShrilekhaVidyarthi& Others Vs. state of UP and Others, AIR 1991 SC 537, the Apex court has observed as under:-

“Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whing or caprice of the men to whom the governance the entrusted of the time being. It is the trite law that “be you ever so high, the laws are above you”. This is what a man in power must remember always.

19. In Life Insurance Corporation of India Vs. Consumer Education and research centre (1995) 2 SCC 480 the Apex court observed that the state or its instrumentality must not take any irrelevant or irrational factor into consideration or appear or arbitrary in its decision. “Duty to act fairly” is part of fair procedure invisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the Public interest. Same view has been reiterated by the Supreme Court in Mahesh Chandra vs. Regikonal Manager UP Financial Corporation &Ors., AIR 1993 SC 1935 ; and Union of India Vs. M. L. Kapoor, AIR 1974, SC 87.

In State of West Bengal vs. Atul Krishna Shaw &Anr., 1991 (Supplement) 1 SCC 414, the Supreme Court observed that ”given of reason is an essential element of Administration of Justice. A right to reason is, therefore, an indispensable part of sound system of Judicial review”.

20.In S. N. Mukherjee Vs. Union of India, AIR 1990 SC 1984, it has been held that the object underlying the Rules of natural justice is to prevent mis-carriage of justice and secure fair play in action. The expending horizon of the principal of natural justice provides for requirement to record reason as it is now regarded as one of the Principal of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reason for its decision.

21.In Krishna Swami Vs. Union of India &Ors., AIR 1993 SC 1407, the Apex court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that “reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of

The maker was activated and actuated and there rational nexus and syntheses with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21”.

22. Similar view has been taken by the Supreme Court in Institute of Chartered Accountants of India Vs. L. K. Ratna&Ors., (1986) 4 SCC 537 ; Board of Trustees of the Port of Bombay Vs. Dilip Kumar RaghavendranathNadkarni&Ors., AIR 1983 SC 109. Similar view has been taken by the Court in Rameshwari Devi Vs. State of Rajasthan &Ors., AIR 1999 Raj. 47. In Vasant D. Bhavsar Vs. Bar Council of India &Ors., (1999) 1 SCC 45, the Apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions and based. Similar view has been reiterated in M/s. Indian Charge Chrome Ltd. &Anr. Vs. Union of India &Ors., 2003 AIR SCW 440 ; Secretary, Minikstry of Chemicals & Fertilizers, Government of India VS. CIPLA Ltd. &Ors., (2003) 7 SCC 1 ; and Union of India &Anr. Vs. International Trading Co. &Anr., (2003) 5 SCC 437.

23.Even otherwise also merely by referring to some policy decision does not meet out the requirement of law (Article 14).The authority should have indicated how and what manner the policy comes in the way to condon the shortfall.

24. The impugned order suffers from vice of arbitrariness since no justified

reason hasbeen assigned. Merely reference to policy decision of the Air Force

without discussing the grounds does notseem to justify the impugned order.The authority should have applied their mind to the compelling circumstances because of which the applicant had obtained premature discharge from the Air Force. While considering the representation also it shall be necessary for the authority to take into account that parameteria provisions contained in other Regulationswhich has been struck down by court (Supra).Since paramateria provision has been struck down by the Hon’ble Bombay High Court and by virtue of dismissal of the SLP by the Hon’ble Supreme Court it attains finality.

25. The Application is allowed.The order dated 23 May 2012 is set aside. The

respondents / competent authority is directed to reconsider the applicant’s representation for condonation of shortfall in service keeping in view the observation in the body of the present order expeditiouslysay within a period of three months from the date of the receipt of the certified copy of the order.

26. The respondents are further directed to consider the amendment of the Regulation 114 keeping in view of the Bombay High Court Judgments whichattains finality because of dismissal of SLPbyHon’ble Supreme Court.

 The application is allowed accordingly.

The original documents may be returned to the respondents with proper receipt.

A plain copy of the order may be given to concerned parties upon observance of usual formalities.

(Lt Gen GautamMoorthy) (Justice Devi Prasad Singh)

Member (Administrative) Member (Judicial)