

SEE RULE 102(1)**ARMED FORCES TRIBUNAL, KOLKATA BENCH****O. A. NO.44/2014****THIS 11TH DAY OF FEBRUARY, 2016****CORAM****HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)****HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)****APPLICANT(S)**

Subhas Chandra Das,
 Son of Late Sukdeb Chandra Das,
 Ex-employee of the Army Service Corps
 (Motor Transport) Centre (North),
 Paharpur, Gaya, Bihar-823 005, residing
 At Netaji Subhas Nagar, P.O. Ghola Bazar,
 District- North 24-Parganss.
 Pin – 743 170

-versus-**RESPONDENT(S)**

1. The Union of India,
 service through Secretary,
 Ministry of Defence, South Block
 New Delhi, Pin -110 011.
2. Principal Controller of Defence Accounts(Pensions)
 Allahabad.
3. The Director General of Personnel Services,
 Adjutant General's Branch (Petn.Cell/AG),
 Army Headquarter, DHQ Post office
 New Delhi – 110 011.
4. The Officer-in-Charge,
 (Sena Seva Corps Abhilekh(Yantrik Paribahan),
 ASC Records (MT),
 Bangalore -560 087.
5. The Officer Commanding and Reservist,
 Army Service Corps Centre, Gaya, Bihar,
 Pin – 823 002.
6. Brigadier, OIC Record,
 (Sena Seva Corps Abhilekh(Dakshin)
 ASC Records (South),
 Bangalore -560 007.
7. The Secretary,
 Department of Ex-Servicemen Welfare and Pension,
 Ministry of Defence, South Block,
 New Delhi – 110 011.

For the petitioner(s) : Ms. Soma Chowdhury (Bandhu), Advocate
Mr. Kushal Paul, Advocate

For the respondent(s) : Mr. Dipak Kumar Mukherjee, Advocate

ORDER

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

This is an application filed under Section 14 of the Armed Forces Tribunal Act, 2007 claiming pension.

2. Facts in brief giving rise to this application are that the applicant was enrolled in the Army Service Corps (Motor Transport) Centre (North), Paharpur, Gaya, Bihar on 10.05.1961 on 10/10 years terms of service. On completion of 10 years', he was released from colour service on 27.03.1971, as a reservist for a balance of 10 years. On completion of incumbency as reservist, the applicant applied for pension which was not granted, as according to the respondents Bangladesh war broke out in 1971, when advertisements were issued and announcements were made over All India Radio to reservists to return for active service with the military. The applicant was also called for duty by registered letter dated 24.10.1971 but he did not report for duty and, therefore, he was declared deserter on 29.10.1971 and was dismissed from military service on 26.05.1975 and thus was not entitled for pension.

3. Feeling aggrieved therewith, the applicant had filed O.A. No.41/2010 before this tribunal in which he had prayed for striking down the order declaring him a deserter along with order of dismissal and various orders denying him pension with a further prayer for grant of pension.

4. By filing affidavit-in-opposition the respondents have denied the applicant's claim on two grounds i.e. the application deserves to be rejected on account of delay and laches and the applicant was declared deserter on 29.10.1991 and was dismissed from military service on 26.05.1975 and thus was not entitled for pension. Accepting the respondents' defence this Tribunal had rejected the applicant's claim vide order dated 19.07.2011.

5. The above order passed by this Tribunal was assailed by the applicant before the Hon'ble High Court, Calcutta by filing WPCT No.98/2012. The Hon'ble High Court having found the payment of pension is a continuing cause of action held that delay should not defeat an applicant's claim for re-fixation of wages or payment of pension and that the consequential relief relating to arrears in such a case would normally be restricted to three years prior to the date of filing the writ petition and that there is no material on record to indicate that the order of dismissal was, in fact, communicated to the petitioner and thus the order of dismissal cannot be said to have taken effect without the communication of the same to the petitioner and set aside the aforesaid finding recorded by this Tribunal and allowed the writ petition with the following directions to the respondents; to re-consider the case of the petitioner for payment of pension for the service rendered by him with military; such re-consideration will be made in accordance with law; the petitioner will not be denied pension on the ground that he had approached the authorities belatedly and he was allegedly dismissed from service on 26.05.1975 in view of our observations above.

6. In the alleged compliance of the above order of Hon'ble High Court the respondents have passed the order on 05.12.2013 (P17) rejecting the applicant's claim. It is this order which is under challenge before us. The applicant's case is that the order has not been passed by the respondent authorities in letter and spirit of the order passed by the Hon'ble High Court whereas the respondents' case is that the applicant's case has been reconsidered based on the service rendered by the applicant as directed by the Hon'ble High Court by keeping the dismissal factor apart, still he is not entitled for pension in terms of Para 132 of Pension Regulations as the applicant has less than 15 years of service in his credit. For granting service pension minimum mandatory 15 years' qualifying service is required. Having not completed 15 years of service the applicant is not entitled for pension.

7. Ld. counsel for the applicant would submit that as the Hon'ble High Court has directed the respondents to re-consider the applicant's claim for pension ignoring the order of dismissal, therefore, the applicant has certainly completed mandatory period of 15 years of service (10 years as regular service and 10 years as reservist) and thus is entitled for pension. But the respondents deliberately reiterating the same pleas as had been taken in O. A. No.41/2010 have denied the claim and the impugned order has not been passed in accordance with the direction issued by the Hon'ble High Court. Therefore, it deserves to be set aside and the applicant is entitled for pension.

8. On the other hand, Id. counsel for the respondents would contend; the applicant has prayed for service pension and not for reservist pension;

as per Regulation 132 the minimum period of qualifying service actually rendered and required for earning service pension is 15 years whereas the applicant has completed only 10 years of qualifying service and thus is not entitled for pension and the respondent authorities have passed the impugned order by assigning reasons and the O. A. itself is misconceived and deserves to be dismissed.

9. We have heard Id. counsel for the parties and perused the records. From the perusal of records it is clear as crystal that in substance the applicant's claim for grant of pension was based on 10/10 years of service (10 years colour service plus 10 years as reservist). The applicant's claim was denied by the respondents on the ground that he did not complete minimum pensionable service as per Regulation 132 and dismissed from service, he is not eligible for service pension. The grounds on which the applicant's claim was dismissed by the respondents as well as by this Tribunal have been set aside by the Hon'ble High Court vide order dated 30.04.2013. The respondents, for the reasons best known to them, have not challenged the order passed by the Hon'ble High Court and allowed the same to attain its finality. Moreover, allegedly the respondents have passed the impugned order in compliance of the Hon'ble High Court's order, by keeping the dismissal factor apart. Once the order of dismissal is ignored, by necessary implication it will be deemed that the applicant had completed his full tenure i.e. 10 years of regular service and 10 years as reservist and the provisions contained in Para.113A and 132 of the Pension Regulations for the Army, 1961(Pt. I) would be inapplicable, and as per Pension Regulation 155 the applicant would become entitled for grant of

reservist pension. In this regard Para.6 of the order of the Principal Bench in T. A. No.564/2010 (**Sh. Sadasiv Haribabu Nargund & Ors vs Union of India and Others**) is also relevant. The same is quoted hereunder:

“6. It is admitted position that petitioner when recruited in Indian Army, he was under an obligation to serve 9 years as regular service and 6 years as reserve service and that has to be counted for making 15 years for the purposes of qualifying service. The qualifying service for PBOR is 15 years. A similar matter when T.A. No. 564 of 2010 (Writ Petition (Civil) No. 6458 of 2009) Page 4 of 9 approached before Hon’ble Kerala High Court, Hon’ble Kerala High Court took a view that the respondent Union of India is bound to take into consideration the reservist service for grant of pension. Against this order an appeal was filed before the Division Bench which was dismissed as is clear from the judgment dated 31st May 2006 in W.P.(C) No. 29497 of 2004. In that judgment it has been mentioned that a similar order has been passed in earlier writ petitions also. In this connection, our attention was invited to the detailed judgments delivered by the Chennai Bench and the Kolkata Bench which have taken a view relying on the decision given by the Hon’ble Kerala High Court and the two decisions of the Division Bench of same Court held that reserve period is also liable to be counted for the purpose of pension. As a matter of fact, in the initial appointment given to the petitioner it was clearly mentioned that petitioner will have to serve 9 year as regular service and 6 years as reserve service. Subsequently the respondents cannot reverse the situation that since the appointment has been terminated, therefore, they are not entitled to count 6 years reserve service. The respondents are bound by principle of promissory estoppels, that once they made a representation and asked the other party to act on it and petitioner has served for 9 years as regular service and kept him in reserve service for 6 years, they cannot wriggle out of this on the moral ground that subsequently after China War their services were terminated also. This is clear breach of terms and conditions of appointment. Once respondents availed the services of petitioners for 9 years as active service and kept them on reserved service for 6 years they cannot go back. During the reserve period, the petitioners were called in 1962 emergency i.e. at the time of China War and all the petitioners alleged to have offered their services at the disposal of the respondents. Therefore, the respondents have fully utilised all the services of these petitioners i.e. 9 years T.A. No. 564 of 2010 (Writ Petition (Civil) No. 6458 of 2009) Page 5 of 9 regular service and summoned them during the 1962 China War also. Now it does not lie in the mouth of the respondents to turn back and say that since they have been terminated they are not entitled to get the benefit of reserved service. This is immoral and unjustified view and against the canons of principles of natural justice. We fail to appreciate that once the appointment has been given and petitioners have as per the terms of the appointment given their services to the respondents how can now they back and say that since we have terminated the services of the petitioners, we will not give them benefit of reserved service. This cannot be accepted and respondents cannot be permitted to take this plea”.

10. This Bench in case of **Nripati Bhusan Sengupta vs. Union of India and Ors** in T. A. No.07/2010 decided on 17.05.2010 placing its reliance

upon a decision of High Court of Kerala in W.P (C) 29497/04 dated 31-5-2006 and also a decision passed by the Division Bench of High Court of Kerala in W.A. No.1392 of 1997 and in case of **Ajoy Kumar Basu, Ex-Sergeant, IAF vs. Union of India & Ors.** in O.A. No.63/2013 vide order dated 22.01.2016 also reiterated the same view.

11. Thus the applicant was entitled for grant of pension and the order impugned is per se illegal and cannot be termed as speaking and reasoned order and that the same has been passed in accordance with the direction issued by the Hon'ble High Court. Submissions made by the respondents' counsel that the applicant has claimed service pension and not reservist pension is also devoid of substance inasmuch as the applicant's claim from the beginning was based on 10/10 years of service and not on the basis of 10 years regular service. Respondents have also denied the claim treating the applicant's claim as 10/10 years of service.

There are different classes of pensions and different conditions govern their grant. Pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field. Further the pension is not an ex gratia payment but it is a payment for the past service rendered. In this context, the Hon'ble Supreme Court in the matter of **Kerala State Road Transport Corporation v. K.G. Varghese [(2003) 12 Supreme Court Cases 293]** has observed in paragraphs 12 and 20 as under:

"12. Before we deal with their respective contentions, it is necessary to appreciate the concept of pension. There are different classes of pensions and different conditions govern their grant. It is almost in the nature of deferred compensation for services rendered. There is a definition of pension in Article 366(17) of the Constitution of India, 1950 (in short the

'Constitution'), but the definition is not all pervasive. It is essentially a payment to a person in consideration of past services rendered by him. It is a payment to a person who had rendered services for the employer, when he is almost in the twilight zone of his life".

"20. From the aforesaid analysis three things emerge: (i) that pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field, (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey day of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement. That is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure".

The reservist pension is also one among different classes of pension. Merely because in the application the words 'service pension' in place of 'reservist pension' are used or the application is not happily worded, will not and cannot forfeit the applicant's legitimate claim.

12. During the course of arguments, the respondents also tried to argue that the order passed by this Tribunal in O. A. No.41/2010 was appealable before Hon'ble Apex Court and the Hon'ble High Court should not have interfered in the aforesaid order. The aforesaid argument cannot be countenanced inasmuch as it was for the respondents to approach the Hon'ble Apex Court challenging the order of the High Court but the same has not been done. Moreover, allegedly, they passed the impugned order in compliance of the order of the Hon'ble High Court and, therefore, they cannot justify the impugned order on the aforesaid grounds.

13. For the reasons mentioned above, we are of the considered opinion that the applicant is entitled for reservist pension. Accordingly, the application is allowed. The order impugned dated 05.12.2013 (P-17) is quashed. Respondents are directed to work out the pension of the

applicant by taking into account the fact that the applicant has completed the necessary mandatory period of 15 years by counting both the period of regular as well as reservist service for grant of pension. The applicant shall not be entitled to arrears excepting last three years before the date of filing the writ petition before the Hon'ble High Court. The arrears of pension shall carry an interest of 6% per annum. The order shall be complied with within 3 months from the date of receipt of the copy of this order. No order as to costs.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice N. K. Agarwal)
Member (Judicial)