

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO :T. A NO.37 OF 2011

ON THIS 11th DAY OF OCTOBER, 2012

CORAM

HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)

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

**SHRI Banke Ray @ Rai,
Son of Late Ram Chandra Rai,
Resident of Village Rajaisi, P.O. Sultanpur West,
P.S. Mohiuddin Nagar,
District Samastipur.**

.....Appellant

-VS-

- 1. Union of India through
The Secretary , Ministry of Defence,
South Block,
New Delhi – 110 011.**
- 2. The Secretary, Ministry of Defence,
New Delhi – 110 011.**
- 3. Raj Bir Singh (Capt),
The Head Record Officer,
Bihar, Regiment Abilekh Karayalaya,
Danapur Cantonment -801 503.**
- 4. The Chief Controller of Defence Accounts
(Pensions) ,
Draupadighat,
Allahabad -211 014.**
- 5. The Commander-in-Chief, New Delhi.**
- 6. The Commanding Officer, Bihar Regiment Centre
Danapur Cantt.**

.....Respondents

For the applicant : Mr. P N Sharma , Advocate

For the respondents : Mr. Anand Bhandari , Advocate

JUDGEMENT AND ORDER

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

The applicant is an ex-Sepoy who was enrolled into the Army (10 BIHAR) on 8.6.1963 and was discharged on 1.7.1978. During the service period the applicant overstayed the annual leave (64 days leave from 11.4.1969 to 13.6.1969) that was granted to him by one year and 140 days; the absence period being from 14.6.1969 to 31.10.1970, when he rejoined his unit voluntarily. On account of such absence, the applicant, though discharged after 15 years of service, could not complete the qualifying service that is stipulated for earning pension, which according to Rule 132 of Pension Regulation For the Army, 1969 (Part I), as amended, is at least 15 years of service. Conclusively there was a shortfall of one year and 117 days of qualifying service which made the applicant ineligible to receive pension although he served in the Army for 15 years (8.6.1963 to 1.7.1978).

2. Being aggrieved for not receiving his pension, the applicant represented before the authorities in 1987 but his prayer for pension was rejected by Bihar Records, Danapur vide their letter dated 20.1.1987 (Annexure I to the TA). In the ibid letter the applicant was apprised that his absence without leave for one year and 117 days had to be deducted from his service period in accordance with Rule 122(iii) and (v) as per amendments to the said Regulation made by the Ministry of Defence vide their order dated 28.7.1962 (Annexure 10 to the TA).

3. After his plea was rejected, the applicant filed a writ petition before the Hon'ble Patna High Court being W.P No. 618 of 1989 (CWJC No. 12088/98). The Hon'ble Patna High Court in their judgement dated 14.10.1996 asked the authorities to reconsider the plea of the applicant and to consider the absence period of the applicant as 'on duty' since no rule

could be furnished before the Hon'ble High Court to justify its exclusion. In accordance with the said judgement, his case was to be reconsidered for grant of pension. Relevant portion of the *ibid* judgement is as under:-

"...4. The grievance of the petitioner, is highlighted by his counsel, that either 1 year 117 days is to be counted in service or the same is to be excluded. If the period of 1 year 117 days is to be excluded from the service period of the petitioner, it is to be excluded for all purpose including the counting of 15 years of tenure period. Further it is submitted by the counsel for the petitioner that the respondents have illegally deleted 1 year 117 days from the service of the petitioner, there be no such rule laid down by the respondents.

5. Having heard counsel for the parties, according to this Court, the respondents cannot discard the aforesaid period of 1 year 117 days in the matter of counting of service period of the petitioner on the ground that the petitioner was absent from duty during the aforesaid period. A person, even if remains absent unauthorisedly, the same cannot be treated to be in break in service till any specific rule is laid down for exclusion of such period for counting the service. The respondents herein has not been able to produce such rule before this Court. In this background, according to this Court, matter requires reconsideration.

6. Accordingly, the matter is remitted to the respondents. They are directed to consider the case of the petitioner for pension. If there is any bar under any statutory rule/law relating to counting of the period of absence, in that case the respondents will give the reason and communicate the same to the petitioner along with an extract of such law/rule. The matter is to be decided by the competent authority within a period of three months from the date of receipt/production of a copy of this order.

7. This writ petition is disposed of with the aforesaid observations/directions."

4. In response to the *ibid* judgement of the Hon'ble Patna High Court, the applicant was served with a speaking order of the Records of the Bihar

Regiment, Danapur Cantt. On 10.5.2000 (Annexure 9 to the TA). In the said speaking order, the OIC, Records has reiterated that there was no provision to count the period of absence which is one year 140 days (14.6.1969 to 31.10.1970) on account of absence without leave, as pensionable service. Therefore, as stated in the speaking order the applicant was falling short of one year 117 days from completing 15 years of mandatory qualifying service to make him eligible to receive pension. Accordingly, the authorities further submitted in the said speaking order that he was not entitled to pension as per the existing rules. Extracts of such rule (Rule 122 and 132 of Pension Regulation for Army) have been attached with the speaking order dated 10.5.2000 in the annexure 9 to the TA.

5. That apart the OIC, Records has also stated in the said speaking order that the matter was referred to the CCDA(P) who then was the pension sanctioning authority to obtain their views. They also relying on the same very rule have submitted that the applicant was not eligible to receive pension since his total eligible service comes to only 13 years and 5 days after discounting the period of absence on account of absence without leave.

6. The CCDA (P) further stated in their communication dated 19.4.1999 (attached to Annexure 9 of the TA) that the applicant was initially enrolled under terms of service of seven years colour service and 8 years reserve liability. As per records maintained with them they submitted that his term of engagement was revised as per his option wherein he was required to serve for 17 years (i.e. 15 plus 2) in accordance with the provisions of Army instructions 1/S/76.

7. The applicant having found that the Military authorities, despite observations of the Hon'ble Patna High Court did not grant him any pension appealed before the Hon'ble Patna High Court again (CWJC No. 9621 of 2005) with a plea that the earlier Patna High Court order had not been complied with by the authorities. The Hon'ble Patna High Court however vide their order dated 7.3.2011 transferred the writ application to this Tribunal since as the AFT Act, 2007 the case was now within the jurisdiction of the AFT,

Kolkata. The said case renumbered as TA 87 of 2012 came up for hearing on 8.10.2012.

8. In the said application, justifying that the contents as mentioned earlier, the applicant has prayed that the impugned order (Annexure 9 to the TA) be quashed and the applicant be sanctioned his service pension as eligible to him. During oral submission, Mr. P N Sharma, learned counsel for the applicant emphasized all the points that were submitted by him through various annexures to the TA. He especially emphasized that the applicant was punished for being absent without leave and therefore this period of absence for one year and 140 days should be regularized and treated as "in service" so as to make him eligible for pension. In this connection he again brought our attention to para 4 of the ibid judgement of the Hon'ble Patna High Court (Annexure 2 to the TA). According to the learned counsel the respondents have illegally deleted one year and 117 days of service of the petitioner which should be restored for the purpose of counting the pensionable service. He also brought to our notice that in case due to some assumed calculation the applicant was indeed falling short of pensionable service, then in that case, he should have been allowed to serve for that many years longer thus giving him an opportunity to complete 15 years of mandatory service for being eligible for pension. He therefore prays that the entire actions by the respondents was illegal and against natural justice. The learned counsel for the applicant also submitted that the applicant never took any leave subsequent to rejoining from being AWL. Therefore he prayed that mercy be given to him by counting such unavailed leave period to discount the period of absence. According to his argument, Mr. Sharma, the learned counsel vehemently prayed that the applicant should be given pension and right to earn his livelihood in return of many years of service which is more than 15 years to the Army.

9. The respondents in their counter affidavit have generally accepted the factual aspects of the case. In their said counter affidavit, the respondents have primarily relied on the contents of the following Pension

Regulation for the Army to impress that the applicant was never eligible for pension in accordance with the existing Rules quoted below:-

"EXTRACT OF PENSION REGULATION FOR THE ARMY 1961 (Part I)

SERVICE QUALIFYING FOR PENSION AND GRATUITY

122 (a) *All service from the date of appointment or enrolment/transfer for man's service to the date of discharge shall qualify for pension or gratuity with the exception of :-*

- (i) Any period of service on a temporary establishment or for which a special rate of pay is granted on the understanding that no pension is admissible.*
- (ii) Any period of service rendered before reaching the age of 17 years.*
- (iii) Any period of unauthorized absence unless pay and allowances are admitted for the period of absence;*
- (iv) Any period of absence without leave which is regularized as extraordinary leave without pay and allowances.*

Minimum qualifying service for pension

132. *The minimum period of qualifying service (without weightage) actually rendered and required for earning service pension shall be 15 years.*

AMENDMENT TO PENSION REGULATIONS FOR THE ARMY – PART I

Regulation 122

Insert the following as new Sub-clause (v) and (vi) of clause (a) and renumber the existing sub-clauses (v),(vi) and (vii), (viii) and (ix) respectively.

- (v) Any period of absence without leave which is regularized as extraordinary leave without pay and allowances.*

(vi) *Any period intervening between the date of dismissal/discharge/release and that if its cancellation which is requalrised as extra ordinary leave without pay and allowances.*

(M of D letter No. 10(4)/60/ii/295-S/D(Pension/Services) dated 20th July, 1962).

123. Forfeiture of service for certain offence

(i) desertion, vide section 38 of the Army Act.

(ii) Fraudulent enrolment, vide Section 43(a) of the Army Act, shall forfeit the whole of his prior service towards pension of gratuity upon being the convicted by Court Martial of the offence.

(b) A person who has forfeited the service under the provisions of the preceding clause but has not been dismissed shall on completion of and period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity."

10. The respondents in para 4 of their counter affidavit have mentioned that there was no provision that the applicant could be sanctioned pension without completing the laid down minimum pensionable service of 15 years in accordance with Pension Regulation Para 132. The respondents stand by their speaking order dated 10.5.2000 (impugned order) submitting that they have considered all avenues available within the Rules but were not in a position to sanction any pension to the applicant. They further mentioned that the Hon'ble Patna High Court in their order had directed them to reconsider the case of the petitioner for pension in accordance with the law and the existing rules which has been dutifully done by them.

11. In addition to all other aspects including advice of the CCDA(P) was also impressed upon by the respondents who being the pension sanctioning authority had also opined that the applicant could not be given any pension since he did not have qualifying

service of 15 years and Regulation 132 of PRA 1961 did not permit. The absence period of one year and 140 days (14.6.1969 to 31.10.1970) had to be deducted from his pensionable service in accordance with the provisions of Rule 122 of the PRAA, 1961.

12. Besides contesting on the points of eligibility and deduction his absence period from service, the respondents in para 18 of their counter affidavit have brought in another aspect which is that the individual was advised in 1st July, 1978 subsequent to his retirement to enroll himself into Defence Security Corps (DSC) with a view to earn his service pension. However, he, according to them, had refused such an offer as per a letter sent by the applicant on 10.10.1979. The relevant portion of the counter affidavit in this regard are as under:

"... In addition to the above the individual was apprised about the facts at the time of his retirement wef 01 Jul 78 with a advise to re-enrol himself into Defence Security Corps to serve for another one year and 140 days to complete his 15 years service with a view to earn his service pension but he refused to accept this proposal vide his unwilling certificate signed on 01 Oct. 1979."

13. Mr. Anand Bhandari, learned counsel appearing for the respondents placed before us the contents of the Rules and Regulations as mentioned earlier besides bringing in the fact that the applicant had refused an offer to join DSC. Therefore, according to him, under the existing rules, they are not in a position to grant him any pension.

14. We have considered the affidavits and documents submitted by both the parties and also gone through the relevant Rules of Pension Regulations for the Army 1961 Part I as brought before us. We have also heard the oral submissions made by both the Ld Counsels in detail.

15. We find that the applicant had put in more than 15 years service in the Army (08.06.1063 to 01.07.1978). Therefore, by virtue of total service he completed a statutory requirement of 15 years to qualify for pension. However, it is also a known un-disputed fact that the applicant was indeed absent without leave for a very long period which is for 1 year and 140 days (14.06.69 to 31.10.1970).

16. Be that as it may, we also notice from the records that the applicant after such long period of being absent without leave was punished summarily with 14 days of RI as awarded by his Commanding Officer (Para 7 of counter affidavit). It appears to us that the leniency of punishment was perhaps on account of substance and merits of the case justifying the period of absence. Therefore, the leniency and magnanimity by the authorities should have been correctly exhibited by them while deciding on his discharge without earning pensionable service.

17. We fail to understand as to why was the applicant discharged on 01.07.1978, knowing fully well that he was under completing 15 years of qualifying service that would make him eligible for pension. In normal case he should have been allowed to serve for another 1 year and 4 months so that his total qualifying service would have accumulated up to 15 years. As per normal terms and service of a Sepoy. His service could have been easily extended upto 2 more

years after 15 years in this case. Strangely, however, he was not even allowed to serve for 15 years of qualifying service. There is no record to show that the applicant left the service of his own accord or on account of any other exigencies like medical etc. Therefore, in our opinion the authorities at that point of time discharge him prematurely although they in Para 4 of their counter affidavit have submitted that the discharge was on completing his contractual period. Factually he did not even serve for full 15 years of his qualifying service because the period of absence without leave was deducted.

18. There is a provision under Rule 124 and 125 of the Pension Regulations for the Army by which a shortfall upto 1 year can be condoned by appropriate administrative authorities. The rules are as under:-

"Condonation of an interruption of service

124. *Upon such conditions as it may think fit to impose, a competent authority may condone interruptions of service in the case of a person whose pension is sanctionable by an authority subordinate to the President as under :-*

(a) *When proposed pension exceeds Rs. 25/- P.M. – interruption not exceeding a period of 12 months in all.*

(b) *When proposed pension is Rs. 25/- per month or less – all interruptions whatever duration."*

19. Having applied our mind to the case in its entirety, our considered view is that authorities were unduly harsh and not legitimate to execute discharge of the applicant before he could complete a minimum of 15 years of eligible service for pension. Even after that, despite observation/direction given by Hon'ble Patna High Court in their order dated 14.10.1996 (Annexure II), the authorities did not take any steps to condone the shortfall in pensionable service so that the injustice done to him could have been undone to some extent.

20 We fully appreciate the constraints of rules (Pension Rule 124 of Pension Regulation for Army, 1961, as amended) upon the authorities with regard to condonation of shortfall in pensionable service beyond 12 months. The authorities after having discharged him on 1.7.1978 offered him an option to apply for a service in DSC. This, to our mind, was an offer of illusion to cover up their own inaction by not allowing him to serve longer upto 2 more years. Considering his disciplinary award on account of overstay after leave during service, it was practically not feasible for the DSC to accept him as a fresh recruit. Having perhaps understood the implications, the applicant refused to opt for DSC. Be that as it may, the authorities were rather harsh and uncaring by not allowing the applicant to serve for some more time so as to complete 15 years of reckonable service for pension.

21. The Government is a benevolent employer and the Army, in particular, is known for its focus on welfare of its own soldiers. We however find in this case that the benevolent employer has turned harsh by now allowing his employee, the applicant in this case, to complete his pensionable service. In view of the above some compassion deserves to be bestowed upon the applicant while deciding this case as a special measure.

22. In view of the discussions made above, we allow the TA No. 37/2011 with following directions :-

- a) The shortfall in service for counting for absence of 1 year and 140 days be condoned as a special case for reasons discussed ibid and the applicant should be considered as if he has completed 15 years of reckonable pensionable service making him eligible for pension.
- b) The applicant shall be paid his pension as would be applicable to him on completion of 15 years of service including other retirement benefits as relevant and applicable. Pension shall be payable from the date when he approached the Hon'ble Patna High Court through his writ petition No. 618 of 1989 in October, 1989. The admissibility of pension and its arrears will thus be calculated from 01 November, 1989 onwards.
- c) In consideration to sub para (a) above, Bihar Regiment Centre letter dated 10.05.2000 (Annexure 9) stands quashed.

d) These orders shall be implemented within 90 days of receipt of this order. For any delay beyond 90 days the payment shall attract an interest of 9% per annum.

with

23. The application is thus disposed of on contest but without cost.

Plain copies be handed over to both the parties.

(Lt. Gen. K P D Samanta) *KS*

Member (Administrative)

(Justice/Raghunath Ray)

Member (Judicial)