**(SEE RULE 102(1))**

**ARMED FORCES TRIBUNAL , KOLKATA BENCH**

**APPLICATION NO : O. A NO. 63/2013**

**ON THIS 22ND DAY OF JANUARY, 2016**

**CORAM : HON'BLE JUSTICE N.K. AGARWAL , MEMBER (JUDICIAL)**
**HON'BLE LT GEN GAUTAM MOORTHY, MEMBER(ADMINISTRATIVE)**

Ajoy Kumar Basu, Ex Sergeant, Indian Air Force Service No.236038, Trade – RAD/OPR, Son of Late Ramabhusan Basu, residing at Flat No.2/3, Vidyasagar Niketan, Sector-I, Block-EA, Salt Lake City, Kolkata – 700 064

……Applicant

-VS-

1. Union of India, Service through the Secretary, Ministry of Defence, South Block, New Delhi – 110 001
2. The Chief of the Air Staff, Vayu Bhavan, New Delhi – 110 011
3. Officer-in-Charge, Pension and Welfare Department, (DP), AOIC, AF, Record Office, Subroto Park, New Delhi – 110 010
4. Officer-in-Charge, NEAS for AOC, AF, Central Accounts Office, Subroto Park, New Delhi-110 010
5. Section Officer, Govt of India, Ministry of Defence, Pension, A&AC, New Delhi – 110 010
6. The Principal Controller of Defence Accounts (Pension), Draupadighat, Allahabad, UP 211014
7. The Deputy CDA (AF), Subroto Park, New Delhi-110 010
8. The Secretary, National Ex-Servicemen's Coordination Committee, 14B, Ezra Mansions, 16N, Hemanta Basu Sarani, Kolkata -700 069

…. …. Respondents.

For the Applicant : Mr. Jagadish Ranjan Das, Advocate

For the respondents : Mr. S.K. Bhattacharyya, Advocate

**O R D E R**

**PER JUSTICE N.K. AGARWAL, MEMBER (Judicial)**

The applicant by this application filed under Section 14 of the Armed Forces Tribunal Act, 2007 has pray for grant of Pension.

2. The facts which are not in dispute are summarized hereunder:-

The applicant, Ajay Kumar Basu was enrolled in Indian Air Fore on 22nd September, 1960. After completion of his 9 years and 71 days Regular Service he was transferred to Regular Air Force Reserve on 1st December, 1969 for 5 years 294 days. He was finally discharged from the Indian Air Force w.e.f. 27-4-1973 under the provisions of Reserve Auxilliary Air Force Act and the Rules, 1953, Rule 38 (a) iv that "Services no longer required". He was paid an amount of Rs1830/- on account of Service Gratuity. However, the payment of pension was denied to him.

3. According to the applicant, the Hon'ble High Court of Kerala has passed a judgement on 31-5-2006 in W.P. (C ) No.29497 of 2004 wherein the applicant K.G. Thomas, Ex-Corporal was enrolled in the Indian Air Force on 23-8-1961 was released with Reserve liability period w.e.f. 23-8-1969 but since he did not have 15 years of qualifying service, pension was not granted by the Air Force Authorities/Pension Authorities, but the Hon'ble High Court of Kerala directed inter alia, that issue is no more res integra covered by two Bench decisions of Kerala High Court, i.e., (i) in WA No.1360 of 1999 and the (ii) in WA No.1392 of 1997 and in both the decisions it has been held that the reserve period is also liable to be counted for the purpose of pension and accordingly granted the pension to the applicant

and the respondents were directed to pay the full pension within 3 months counting the service liability period of 6 years and in failing which the applicant shall be entitled to get interest @ 18%. The applicant further stated that following the aforesaid order of the Hon'ble Kerala High Court, the applicant also approached the authorities concerned through their Union representative, but the authorities vide their reply dated 24th August 2012 had informed that "However, unfortunately Govt. policies have not been modified based on these judgements and the Reservist Pension were granted to only those who were applicants in the subject case. Hence the individual cannot be offered relief based on the judgement though the case is similar". According to the applicant, the respondents have wrongly denied him the Reservist Pension and the same be allowed in his favour with interest and cost.

4. On the other hand, according to the respondents the original service records of 236038 Ex-Sgt Ajoy Kumar Basu have been destroyed after its stipulated period of retention of 25 years in accordance with Section 6, Chapter XVIII of Regulation 1026 of Regulations for the Air Force; the applicant had a total combined regular and colour service of 12 years and 218 days (Regular + Reserve). Accordingly he was paid an amount of Rs,1,830/- on account of Service Gratuity; the pension of an ex-airman is governed by the Pension Regulations for the Air Force, 1961 (Part I); there is no provision in the Pension Regulations for the Air Force 1961 (Part I & II) for grant of pro-rata pensionary benefits to an Ex-Airman, who has not completed the minimum service of 15 years to earn Service Pension. The Judgement of Hon'ble High Court of Kerala in WP (C ) No. 29497 of 2004

which was filed by Ex Corporal K.G. Thomas and the order dated 17th May, 2010 passed by this Tribunal were decided on the merits of the cases applicable to the petitioner/applicant therein and ought not to be held to have any universal application in a generalised manner. During the course of argument, Mr. S.K. Bhattacharyya, the learned counsel for the respondents referring to Regulation 136 for Air Force submitted that in order to be eligible for Reservist Pension, an individual is required to serve for 15 years of combined colour and reserve qualifying service (regular + reserve + recalled). It has further been contended that the applicant had been paid Rs1830/- as gratuity in lieu of pension. Pension as defined in Art 366 (17) of the Constitution, "means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund". As the pension includes gratuity and the applicant had already been paid gratuity in lieu of pension, therefore no question arises for grant of pension to the applicant. The learned counsel for the respondents has further contended that as the applicant has not completed 15 years of qualifying service, he is not entitled for Reservist Pension.

5. By placing reliance upon the Judgements of Hon'ble Supreme Court's in (i) **State of Haryana and Others vs Charanjit Singh and Others (2006) 9 Supreme Court Cases 321** and (ii) in **Ramesh Singh vs Union of India (2008) 5 Supreme Court Cases 173**, Mr. Bhattacharyya, the learned counsel for the respondents also submitted that the applicant has not

challenged the report of the Pay Commission and as such the applicant cannot be granted pension as prayed for in the O.A.

6. We have heard the learned counsel for the parties and perused the records.

7. Before adverting to the facts of the case, it would be appropriate to deal with certain orders passed by the Principal Bench of Armed Forces Tribunal and Regional Benches of Armed Forces Tribunal, Kolkata and Kochi. By applying the doctrine of estoppels and holding once respondents availed the Services of Petitioners for nine years as active service & kept them on Reserve Service for six years they cannot go back. The Principal Bench in T.A. No.564 of 2010 **(Sh. Sadasiv Haribabu Nargund & Ors vs Union of India and Others)** allowed the petition, observed in paragraph 6 as under :

> "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".

8. Vide order dated 17-5-2010, this Bench in case of **Nripati Bhusan Sengupta vs Union of India and Ors ( TA No.7 of 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 allowed the reservist pension. The relevant paragraphs 9 & 10 of the Orders are as under :

"9. Under such circumstances, we are of the opinion that the petitioner did not lose his six years reservist service simply because

he was called again by the Air Force authority and in the process rendered further 332 days of service. In our considered opinion the authority should consider that the petitioner completed fifteen years of qualified service after the expiry of six years reservist period and the authority should allow the pension to the petitioner accordingly as per Rules.

10. Learned Advocate for the respondents argued that the claim of the petitioner cannot be considered by the authority because of the lack of papers. According to him as per Rules, after 25 years, the service particulars of an Air Force person would be automatically destroyed. True there is such provision in the Regulation and as such we do not disbelieve that after 25 years, since the retirement of the petitioner, the service documents concerning him were destroyed. However, it appears from the A/O that the respondent had admitted that Long Roll of the petitioner is still available and from there it can be ascertained as to when he joined and for how much period he was in the regular service and when he was transferred to the reservist category. It is further stated that from the Long Roll it can be ascertained that the petitioner was recalled and rendered further service of 332 days while he was in the reserve list. So for the purpose of granting a reservist pension to the petitioner, all the necessary particulars are available with the authority from the Long Roll, concerning the petitioner. As such, we do not find any justification in this argument of the respondent that because of lack of service particulars, the case of the petitioner could not be processed. In our considered opinion, the authority concerned has certainly shown step motherly attitude in the case of the petitioner which is not befitting for the Defence Forces. Be that as it may, since it appears that the petitioner has completed 15 years of qualified service, we are of the opinion that he is entitled to get pensionary benefit, as claimed in this case."

9. This Bench in case of **Ganesh Chander Singh vs Union of India and Oths** also reiterated the same view.

10. However, Armed Forces Tribunal Kochi while deciding OA Nos 96, 60 of 2010, 75 of 2011, 98 & 99 of 2012 vide its order dated 31st May, 2013 in a case where it was not clear whether or not the applicants were transferred to regular Air Force Reserve category in accordance with Sections 4 and 5 of the Reserve and Auxiliary Air Forces Act, 1952 declined to grant reservist pension to the applicants holding, "reserve liability is one thing and to transfer a person in Regular Air Force Reserve is another thing.

There may be a liability to serve in the Regular Air Force Reserve due to the terms of engagement or otherwise, but the liability by itself does not confer any right on the individual to claim the benefit of being a Reservist in the Regular Air Force Reserve for pension purposes. The individual has to prove further that apart from the Reserve liability, he was transferred to the regular reserve in terms of Section 5 of the Act". In this process the orders of the Armed Forces Tribunal, Regional Bench, Kochi as also the decision of the Principal Bench of AFT as well as the decisions as rendered by Kolkata Bench are distinguishable.

11. Now, we shall examine the facts and circumstances of the present case in the light of afore mentioned pronouncements. Admittedly, the applicant has served for 9 years 71 days of active service. Thereafter, he was transferred for a further period of 5 years 294 days in regular Air Force Reserve. He was called on 15-12-1971 to IAF, i.e. during Indo Pak War in 1971, but on 18-12-1971 the same was cancelled without assigning any reason. He was discharged from Air Force Service on 27-4-1973 on the ground of "Services no longer required". Thus, in the light of decision of Hon'ble High Court of Kerala and other decisions rendered by the Principal Bench of Armed Forces Tribunal and by this Bench (supra), the entire period of Service is to be counted including the 9 years and 71 days of Regular Service and 5 years 294 days of Reserve period for the purpose of pension. Thus, if both are counted, the applicant becomes entitled for payment of pension as he then completes 15 years of qualifying service, which is the precondition for grant of pension. Because of his arbitrary

discharge from the Air Force on 27-4-73, the applicant could not complete his Reserve Period of 5 years and 294 days.

12. We are in respectful agreement with the aforesaid decisions of the Hon'ble High Court of Kerala, the Principal Bench and of this Bench (supra) and in our opinion the applicant is entitled for grant of Reservist Pension.

13. So far as the view taken by the Regional Bench, of Armed Forces Tribunal, Kochi in OA Nos 96, 60 of 2010, 75 of 2011, 98 & 99 of 2012 is concerned, the same is not applicable in the facts and circumstances of the present case in-as-much as the Regional Bench, Kochi in aforesaid cases, was dealing in cases in which it was not clear whether or not the applicants were transferred to regular Air Force Reserve category, whereas this is an admitted position in the present case that the applicant was transferred to Regular Air Force Reserve after completion of 9 years & 71 days of active service in the Air Force. Moreover, when the Regional Bench of Armed Forces Tribunal, Kochi was in disagreement with the ratio of law as laid down by the Hon'ble High Court of Kerala, Principal Bench of Armed Forces Tribunal and this Bench, then it should have referred the matter to a Larger Bench instead of taking a different view, as held by Apex Court in paragraph 18 in the matter of **Union of India vs G.S. Grewal** (**AIR 2014 Supreme Court 3494)** which is as under :

> **18**. Mr. Radhakrishnan is perfectly justified in his argument that the only course open to the Chandigarh Bench, which passed the impugned order, was to refer the matter to the larger Bench when it wanted to charter a different course than the one adopted by the Principal Bench in Major General S.B. Akali's case (supra). In Sub-Inspector Rooplal & Anr. v. Lt. Governor through Chief Secretary, (2000) 1 SCC 644, this Court had settled this very issue in the following manner:

12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court in the case of Tribhovandas [pic]Purshottamdas Thakkar v. Ratilal Motilal Patel, AIR 1968 SC 372, while dealing U.O.I.& Ors vs G.S.Grewal on 28 May, 2014 with a case in which a Judge of the High Court had failed to follow the earlier judgment of a larger Bench of the same Court observed thus:

"The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in Pinjare Karimbhai case, (1962) 3 Guj LR 529 and of Macleod, C.J., in Haridas case, AIR 1922 Bom 149(2) did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in Bhagwan v. Ram Chand, AIR 1965 SC 1767".

14. The other points as raised by Mr. Bhattacharyya, the learned counsel for the respondents are also devoid of merit. Admittedly, in para 2 (j) of the Affidavit in Opposition the amount of Service Gratuity has been paid to the applicant in accordance with Rule 128 and not in accordance with Rule 136 of the Air Force Pension Regulation 1961 Part I. Rule 128 deals with

payment of Service Gratuity, whereas Rule 136 deals with Reservist Pension and also gratuity in lieu of Pension. Thus, the operational area of both are different as per respondent's case. The Service Gratuity has been paid to the applicant under Rule 128, whereas Pension has not been paid as he did not qualify for it by completing 15 years of qualifying service. When according to the respondents, pension is not payable, then no question arises for payment of gratuity in lieu of pension. The stand taken by the respondent is contrary to the stand taken by them in their pleadings which cannot be countenanced. Ratio of Charanjit's case and Ganesh Chandra Singh's case (supra) as relied upon by the learned counsel for the respondents, are also not applicable in the facts and circumstances of the present case. In-as-much as they deal with the doctrine of equal pay for equal work and they have nothing to do with regard to payment of Reservist Pension.

15. 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".

16. We are of the considered opinion that the applicant is entitled for the Reservist pension. Accordingly, the application is allowed. The respondents are therefore directed to work out the pension of the applicant by taking into account the fact that applicant has rendered 9 years 71 days of regular service followed by 5 years and 294 days of reserve period and necessary orders be issued for grant of pension accordingly. The applicant shall not be entitled to entire arrears except last three years preceding the date of filing of this application before this Bench. The arrears of pension shall carry an interest of 12% per annum. The order is required to be complied with within 3 months from the date of receipt of the order. No order as to costs.

(Lt Gen Gautam Moorthy)
Member(Administrative)

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

tkb