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(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
TA NO. 189/2010

THIS 13TH DAY OF APRIL, 2016

CORUM

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

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S)

Ex-No. 1069143F DFR Prabhu Charan Das
S/o Shri Baidyanath Das
R/o Village – Kokidiha
P.O. – Naugaonhat
P.S. - Nauganhel
Dist. – Jagatsinghpuri
Orissa – 754113.

-versus-

RESPONDENT(S)

1. The Union of India,
Represented through the Secretary
Min of Defence, Government of India,
Ministry of Defence,
New Delhi – 110024.
2. Senior Record Officer for Officer-in-Charge
Armoured Corps Records
Ahmednagar – 414 002
3. The Commandant
70 Armoured Regiment
C/o 56 APO

For the petitioner (s)

Mr Uday Shankar Bhattacharyya, Advocate

For the respondents

Mr. S.K. Bhattacharyya, Advocate

ORDER

PER HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

1. This is a case transferred from Hon'ble High Court of Orissa vide their letter No. 19869 dated 03.09.2010 arising out of Writ Petition No. 10506/2007. In the Writ Petition the petitioner has challenged the order of the Respondents No. 3 i.e. Commandant 70 Armd Regt rejecting his premature discharge application vide 70 Armd Regt letter No. 1069143/PCD/A dated 24.04.2003.

2. Facts of the case are that the applicant, No. 1069143F Ex Dfr Prabhu Charan Das, belongs to Orissa and was enrolled in the Army on 17.12.1981. He was posted to 70 Armd Regt on 25.05.1983. On 01.06.98, he was posted on Extra Regimental Employment (ERE) to 1 Orissa Armd Sqn NCC Cuttack. Such tenure is normally for 2 years and is akin to deputation within the Army. But he received posting order No. 1196/99 dated 13.12.1999 after one and half years to revert to his regiment i.e. 70 Armd Regt which was located in Pathankot by 03.07.2000. Immediately on receipt of his posting order (on 30 Dec 99) he applied for extension of tenure by six months. The reason given for extension was that he was very badly affected by super cyclone that had hit Orissa in October 1999. However, he was granted one month leave-cum-posting and his leave was sanctioned upto 07.09.2000 i.e. to report on 08.09.2000. As he did not report on 08.09.2000 or thereafter, the unit after a period of 30 days conducted a Court of Inquiry and declared him a deserter w.e.f. 08.09.2000 in accordance with the policy on the subject. Apprehension Roll was issued then by the unit on 04.10.2000.

3. Earlier, the applicant on 01.05.2000 applied for premature retirement and the CO 70 Armd Regt in fact wrote to OC 1 Orissa Armd Sqn NCC to forward premature discharge application duly recommended. In the meanwhile, the applicant also filed a petition No. OJC 5768 of 2000 in the Hon'ble High Court of Orissa praying for six months extension or to accept his premature retirement request. Thereafter he filed another Misc Case No. 6073 of 2000 arising out the above mentioned OJC No. 5768 of 2000. On 11.12.2001, both the cases were disposed off by the Hon'ble High

Court of Orissa with direction to the Respondents to take an appropriate decision on the applicant's application for pre-mature retirement within a period of 3 months.

During this period the applicant continued to remain absent from duty. The Court Order was later referred to Army HQ DGMF (Pers) which vide their letter No. B/06013/1559/GS/MP (Pers) dated 04.03.2003 directed that *"all the options which are available to us under the Army Act and Army Rules to proceed against a person who is a deserter, should be invoked and also directed to dispose off application for premature retirement as per policy governing the subject at the earliest, within the time limit prescribed by the court"*.

4. 70 Armd Regt vide their letter No. 1069143/PCD/A dated 24.03.2003 (order under challenge) stated that the application in respect of the applicant's premature retirement is presently rejected and will be considered as per rules and regulations invoked on completion of the following pre-requisite conditions :-

- a) The applicant was declared deserter w.e.f. 08.09.2000 under Army Act Sec 106 read with Army Rule 183.
- b) The provision of AR 183, discharge of personnel subject to Army Rule shall not be retrospective.
- c) For calculation of entitlement of pensionary benefits, total period of service rendered by the applicant is required to be taken into account for calculation of aggregate service and period of absence needs to be regularized.
- d) Period of absence can be regularized only on his rejoining duty and after finalization of disciplinary case pending against the applicant with regard to his desertion w.e.f. 08.09.2000.**

5. The respondents filed a Miscellaneous case No. 3194 of 2002. This case was disposed off on 04.02.2003 by the Court declining to modify the order. The relevant para of the judgement is appended below :-

"Misc. Case No. 3194 of 2002

Heard Sri A Deo, learned Addl. Standing Counsel (Central) and Sri J.K. Rath, for the writ petitioner.

This is an application by the opp. parties for modification of the order/judgment dated 11.12.2000 in O.J.C. No. 5768 of 2000. The writ petitioner

had prayed for a direction to the opp. parties, either to grant extension of his service for a period of six months or in the alternative to accept his application for premature retirement already submitted to the appropriate authorities.

A Bench of this Court, by the aforesaid order, while declining to direct grant of extension of deputation, considering the pendency of petitioner's application for premature retirement, directed the opp. parties to take an appropriate decision on the application of the petitioner for premature retirement within three months.

In this Misc. Case, modification of the order is sought to the extent that, the petitioner should be directed to join in his duty at 70 Armoured Regiment, whereafter his case for premature retirement would be considered. It is stated that petitioner's application 1.5.2000 for premature retirement was recommended by opp. Party no.3 to opp. party no. 5 the parent unit of the petitioner for consideration. The petitioner was required to join the unit and he having failed to report as per direction he has been declared a deserter. It is the case of opp. party no. 5 that unless he joins the parent unit, he cannot be discharged nor his Pension Papers can be prepared in terms of the rules inasmuch as in terms of the provisions of the Army Rule discharge cannot be retrospective.

Having heard learned counsel for the parties and regard being had to the tenor of this petition, we do not find any reason to modify the order. What has been directed is for consideration of the petitioner's application obviously the consideration has to be in accordance with law and not de hors the law. The petitioner is governed under the Army Act and the Rules and, therefore, the opp. parties are to proceed in accordance thereof and the order does not prevent them from exercising the powers thereunder. No Rule has been pointed out which prevents consideration of an application on its own merit in accordance with the Rules governing the field. The petition for modification, therefore, is misconceived.

In the result, we dismiss this Misc. Case being devoid of merit. Since the application for modification is rejected, the application shall be considered and decision taken within two months hence."

6. Earlier the petitioner was requested to rejoin duty for processing his pension document vide Armd Corps Records Telegrams of 22.02.2002 and 08.03.2002 and 70 Armd Regt Telegram of 28.02.2002 but he did not rejoin duty and hence his period of absence could not be regularized. The petitioner also filed a Contempt Application No. OC RMC 363 dated 03.02.2002 against the respondents for not granting him premature retirement. Based on this, respondents stated that the petitioner had not reported to the Regt for discharge drill and hence on 03.08.2007 the Hon'ble Court passed an order to drop the contempt proceedings but permitted the petitioner to challenge the order of 24.04.2003 i.e. order of rejection of premature discharge.

7. The counsel of the petitioner submitted that earlier on 30.12.99 the request for an extension of tenure for 6 months in the case of the petitioner was not considered favourably by the respondents although 2 other similarly placed jawans i.e. Sep Gangadhar Swain of 86 Armd Regt and Sep Umakanta Dasbabu whose application for

E.R.E. tenure were favourably considered and the extension was granted by the competent authority. He further added that since the application for extension of E.R.E. tenure was not allowed inspite of an exceptional circumstances, the petitioner was compelled to submit an application for premature retirement on 01.05.2000 which was strongly recommended by the Officer Commanding 1 Armd Sqn NCC by his letters dated 02.05.2000 and 21.06.2000. He stated that as the petitioner had no other alternative he filed a Writ Petition OJC No. 5768 of 2000 before the Hon'ble High Court, Orissa praying for grant of extension in favour of the petitioner for a period of 6 months or to accept the premature retirement application and to extend all retirement benefits.

8. The counsel stated that the Writ Petition was disposed off by directing the respondents to take an appropriate decision on the petitioner's application for premature retirement within a period of 3 months from the date of communication of the order. Therefore, the question of desertion of the petitioner w.e.f. 08.09.2000 does not and/or cannot arise at all in view of the said orders passed by the said Hon'ble High Court, Orissa and as such the respondents were biased and did not apply their mind fairly following Army Act and Army Rules including the principles of natural justice and fair play. He further added that the intentional delay in the said application for premature retirement was not attributable to the petitioner but it was wholly attributable to the respondents. The counsel also brought out that the respondents did not take any steps for disposal of the application for premature retirement within a reasonable period of time and on the other hand the respondents moved an application being Misc. Case No. 3194 of 2002 for modification of the said order of 11.12.2000 passed by O.J.C. 5768 of 2000 before the Hon'ble High Court, Orissa and the Hon'ble High Court dismissed the said application of the respondents being devoid of merit and directed them to consider the application of the petitioner and to take decision within two months but they did not take any steps. The counsel also admitted that a representative from the said Regt met the petitioner in his house in Orissa on 07.03.2002 and all necessary pension documents were collected and signatures were obtained from the petitioner for granting pensionary benefits. He stated that to declare the petitioner as a deserter in the impugned letter dated 24.03.2003 was illegal, deliberate and nonest in view of the

orders passed by Hon'ble High Court of Orissa in the said writ petition and in view of the application dated 01.05.2000 for premature retirement. He also added that the petitioner never submitted an application for premature discharge as alleged. There seems to be dichotomy in the pleadings of the counsel. In this aspect of the pleadings of the counsel he also stated that the petitioner was not served any notice for holding the Court of Inquiry (COI) at any point of time. The petitioner had no knowledge of any COI which according to him violated the mandatory provisions of Section 105 and 106 of the Army

Act and Army Rule 17 read with Section 20 of the Army Act as well as in violation of the Army Rules 180 and 184 and therefore, the order of desertion and the subsequent impugned letter is nonest and liable to be set aside. He also asserted that the respondents authority suppressed material facts and first time disclosed that the petitioner was dismissed from service only in their affidavit of opposition on 16.09.2011. He added that the dismissal order had not yet been served to the petitioner and no opportunity for hearing was given to him. He stated that telegrams had never been served to the petitioner and the question of initiation of disciplinary case does not arise.

9. The respondents on the other hand have stated that while no extension was granted to the petitioner in the year 2000, he was granted leave-cum-posting which was to expire on 07.09.2000. However, even after the expiry of the period of sanctioned leave neither he rejoined the unit nor was any representation received for extension and therefore, in accordance with the procedure invoked, the petitioner was declared deserter from 08.09.2000.

10. In so far as the application for premature retirement is concerned, the counsel for the respondents stated that the applicant was to be on waiting list as per seniority and thereafter the petitioner filed a case for extension of 6 months or to accept his premature retirement. He also stated that the petitioner filed Misc Case 6073 of 2000 and both cases were disposed off on 11.12.2001 with direction upon the respondents to take appropriate decision on the application of premature retirement within a period of 3 months. Consequently the respondents filed Misc. case No. 3194 of 2002 which was disposed off as quoted in Para 5 supra. The facts of the case have been brought out in

Para 3 supra. Other issues brought out by the respondents are with the petitioner's factual position with regard to destruction of his house, number of family members and bypassing the channel of reporting.

11. We have gone through the facts of the case and it is evident that had the case of the petitioner been considered sympathetically on extreme compassionate grounds for extension of 6 months tenure at 1 Orissa Armoured Sqn, NCC in view of the circumstances that the petitioner's house was destroyed due to super cyclone specifically in the District of Jagatsingpur at Orissa being his Home District, the question of desertion by the applicant and subsequent dismissal from service would not have arisen.

12. However, it is apparent that the respondents had considered the case of the petitioner for premature retirement sympathetically in May 2000 itself. In this connection letter of Col Amarjit Singh, Comdt 70 Armd Regt to Col MR Mohanty, OC 1 Armd Sqn NCC is reproduced below :-

*“Col Amarjit Singh
Commandant*

*70 Armoured Regiment
C/o 56 APO*

7228/A

21 Jun 2000

- 1. Please ref your DO letter A/18/2000 dated 08 Jun 2000.*
- 2. You are requested to arng to fwd premature disch application duly recommended in r/o 1069143F Dfr PC Das to enable us to consider his case for premature disch accordingly.*

*Col M R Mohanty (Engr)
OC 1 (O) Armd Sqn NCC
Old Secretariat Building
Cuttack – 753001.”*

13. However, the petitioner perhaps under a false impression that he had approached the Hon'ble High Court of Orissa and that his case for pre-mature application for discharge would be considered favourably even without him joining the unit, did not take any steps to join the unit and therefore, the unit could not proceed to process his papers as he remained absent without leave. After period of 30 days, the

unit conducted a Court of Inquiry (COI) and declared him a deserter. Thereafter, it is seen that numerous attempts were made by the respondents for processing his pension documents vide Telegrams dated 22.02.2002, 28.02.2002 and 08.03.2002 and even sent one representative to his house and got the signatures of the applicant in the pension documents. However, for reasons best known to him, the petitioner did not report back to 70 Armoured Regiment. The respondents stated that period of absence needed to be regularized which could be possible only if the petitioner reported for duty which would have taken place only after the finalization of disciplinary case pending against him with regard to desertion.

14. So after the completion of 3 years from the date of desertion (08.09.2000) he was dismissed under Army Act Section 20(3) on 20.10.2003 by the Competent Authority i.e. Officiating Commandant Armoured Corps Centre and School, Ahmednagar in accordance with the rules and policy on the subject.

15. We have seen and understood both sides of the issue. In the petitioner's case it is apparent that he did suffer a lot and his house was destroyed due to super cyclone and requested ab-initio only for 6 months extension. The respondents did not grant 6 months extension. He then applied for pre-mature retirement and around the same time was issued with movement order to rejoin his unit albeit with one month leave. The applicant did not do so and filed O.J.C. 5768 of 2000 in the Hon'ble High Court of Orissa wherein he pleaded his unit be directed to grant him 6 months extension or premature retirement. By the time the case came up for hearing and the judgment pronounced, 6 months period for extension requested for had already lapsed and so the Hon'ble High Court vide Order dated 11.12.2001 disposed the Writ Petition directing the respondents to take appropriate decision on his application for premature retirement within a period of 3 months. In addition the relevant portion of the judgement of Misc Case No. 3194 of 2002 is reproduced at Para 5 supra also directed the same action to the respondents.

16. Therefore, it is very clear that in essence two directions were given by the Hon'ble Judges :-

(a) The petitioner was directed to report to his unit.

(b) The unit had to grant him premature retirement.

17. As action at Sub Para 16 (a) above did not take place, action at Sub Para 16(b) also could not take place. In the meanwhile the clock was ticking and 3 year period of absence came about on 07.09.2003. Hence in accordance with the procedure the applicant was dismissed from service on 20.10.03. It is evident that had the applicant reported to unit at any time during this period before his dismissal in compliance of the orders of the Hon'ble High Court of Orissa, the unit would have been legally bound to have him discharged from service after regularizing his absence.

18. Given these circumstances, this appears to be a case of an exceptional situation that had arisen due to a combination of circumstances that caused this impasse. Para 113(a) of the Pension Regulations allows for pension for dismissed persons in exceptional cases. Para 113 of Pension Regulations is reproduced below :-

"Individuals Dismissed/Removed or Discharged under the Army Act

113. (a) *An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.*

(b) *An individual who is removed from service under Army Act, Section 20, may be considered for the grant of pension/gratuity at the rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. The competent authority may, however, make, if considered necessary, any reduction in the amount of pension/gratuity on the merits of each case.*

(c) *An individual who is discharged under the provision of Army Act and the rules made thereunder remains eligible for pension or gratuity under these Regulations.*

Note : *Those discharged from service due to misconduct, corruption, lack of integrity or moral turpitude are not normally eligible for gratuity, but they may be sanctioned gratuity in exceptional cases at the discretion of the President at a rate not exceeding that for which they are normally qualified.*

19. Admittedly even in a case of dismissal the pensionary benefits can be granted to the applicant under Pension Regulations 113 (a). Certainly the applicant has not been dismissed due to misconduct, corruption, lack of integrity or on any moral turpitude but because of his misplaced apprehension and due to non grant of extension of six months by the respondents though applicant was entitled therefor in the fact situation of the case. Therefore, in our opinion this appears to be an exceptional case in which the pensionary benefit can be granted to the applicant and for which he is also entitled under Pension Regulations 113 (a).

20. Considering the above aspect of the matter without disturbing the order impugned we direct the respondents to consider applicant's case for grant of pensionary benefits under Rule 113 (a) of the Pension Regulations in the light of observations made herein above. The entire exercise is to be completed within 3 months on receipt of copy of this order.

21 With the aforesaid directions, the application stands disposed off. No orders as to cost.

21. Plain copy of the order, duly countersigned by the Tribunal Officer, be supplied to the parties concerned after observing requisite formalities.

(Lt Gen Gautam Moorthy)
Member (Administrative)

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