

SEE RULE 102 (1)
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A. 47/2015

THIS DAY 29th JUNE, 2016

CORAM

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

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

APPLICANT(S)

Smt. Bela Mukherjee,
Wife of Late CPL B S Mukherjee,
Residing at – A/20, Amarabati Defence
Colony, P.O-Durgapur, District :
Burdwan (W.B.),
Pin 713214.

Versus

RESPONDENT(S)

- 1. Union of India, Service**
Through the Secretary,
Ministry of Defence (Air Force),
South Blok,
New Delhi- 110 011.
- 2. The Chief of the Air Force Staff**
Integrated, Head Quarter, Ministry of
Defence (Air Force),
South Block,
New Delhi- 110 011.
- 3. The Secretary, Department of**
Ex-Serviceman Welfare & Revision,
Ministry of Welfare,
South Block,
New Delhi – 110 011.
- 4. The Officer-in-Charge**
Air Force Record Officer,
Subrata Park, New Delhi-10010.
- 5. The PCDA(Pension)(Air Force)**
Allahabad (U.P.), Pin-211014.

For the Applicant(s) : In person.

For the Respondent(s) : Mr. Anand Bhandari.

O R D E R

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

1. This is an application under section 14 of the Armed Forces Tribunal Act, 2007.

This application has been filed by the widow of late CPL B.S. Mukherjee praying for

quashing the impugned letters being annexures P-10 and P-13 and the order being annexure P-16. The applicant's deceased husband was enrolled in the Indian Air Force on 01.09.1951 and discharged from regular service on 01.09.1960 with rank CPL and Service No. 209455. He was transferred to reserve with effect from 01.09.1960 and, thereafter, joined Durgapur Steel Plant on 27.03.1961. He was called during sudden Chinese aggression on 04.12.1962 and was finally discharged from the service of Indian Air Force on 13.09.1963 and thereafter discharged from service as his services are no more required, as per the Discharge certificate. The applicant states that the total qualifying service of her deceased husband is 12 years 13 days which includes Regular, Reserve and Called up service and which also enable the applicant to be eligible for pension. The applicant states that her deceased husband had received only Rs. 1092/- as gratuity without any pension. Thereafter, the applicant moved from pillar to post for getting the family pension but all are in vain. The applicant states that due to inaction on the part of the respondents and after availing all her remedies provided under the law, she filed her first application being OA No. 7/2015 which was dismissed with liberty to file afresh. Accordingly, the applicant filed the instant application.

2. During the course of arguments both the parties have confined their arguments regarding entitlement of Late Soldier for payment of Reservist pension and, accordingly, entitlement of applicant for grant of family pension.

3. It is admitted position that the Late Soldier when recruited in the Indian Air Force he was under an obligation to serve 9 years as regular service and 6 years as reserve service that that has to be counted for making 15 years for the purpose of qualified service.

4. 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.

5. Mr. Bhandari would submit that as per information available in the Long Roll, 209455 Ex-CPL B.S. Mukherjee was enrolled in the Indian Air Force on 1.9.1951 for a term of 9 years regular and 6 years reserve service. He was transferred to reserve on 1.9.1960 after completion of 9 years of regular service. During reserve period he was called up for active service on December 4, 1962 and finally discharged from service on September 13, 1963 under the clause "service no longer required". Thus he had rendered total service (regular + reserve + recalled) of 12 years and 3 days. A reservist who is not in receipt of a service pension and whose period of engagement for regular service was extended, and whose qualifying service is less than the total period of engagement but not less than 15 years may, on completion of period of engagement or earlier discharge from the service for any cause other than his own request, be granted reservist pension at the above rate or gratuity in lieu. Therefore, he is not entitled for reservist pension. However, gratuity amount of Rs. 1092/ has been paid.

6. We have heard the applicant Smt. Bela Mukherjee in person and the learned counsel for the respondents at length and perused the records.

7. Before advertng 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 Others** also reiterated the same view.

10. Now, we shall examine the facts and circumstances of the present case in the light of aforementioned pronouncements. Admittedly, the applicant has served for 9 years of regular service. Thereafter, he was transferred for a further period of six years in regular Air Force reserve period. He was called during sudden Chinese Aggression on 4.12.1962 and, thereafter, he was discharged from service on 13.9.1963 on the ground of "service no longer required". Thus, in the light of decisions of the Hon'ble High Court of Kerala and other decisions rendered by the Principal Bench of Armed Forces Tribunal and also by this Bench, the entire period of service is to be counted including 9 years of regular service and 6 years of reserve period for the purpose of pension.

11. 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.

12. 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”.

13. In view of above, we are of the considered opinion that the deceased Soldier was entitled for Reservist Pension and after his demise the applicant is entitled for family pension.

14. Accordingly, we allow this application and direct the respondents to calculate the Reservist Pension of the deceased Soldier after taking into consideration his reserve liability and, accordingly, calculate the family pension and the same be paid to the applicant. However, if any gratuity was paid to the applicant then that amount may be adjusted against her pension. The applicant will be entitled to get arrears for last three years preceding to the date of filing of this application (01.06.2015). The family pension of the applicant shall be worked down within a period of three months from the date of receipt of a copy of this order. The applicant is entitled to simple interest at the rate of 6% per annum on the amount of arrears and the same be paid within the period mentioned above.

15. With the above, the application stands disposed of.

16. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be supplied to the parties, after observing requisite formalities.

(Lt Gen Gautam Moorthy)
Member (Administrative)

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