

COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. No. 872 of 2019

In the matter of :

Lt Col Dilip Ajwani (Retd) ... Applicant

Versus

Union of India & Ors. ... Respondents

For Applicant : Shri Anil Srivastava, Advocate

**For Respondents : Ms. Jyotsna Kaushik, Advocate with
Maj A.R. Subramaniam, Officer-in-
Charge, Legal Cell (Army)**

CORAM :

**HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)**

ORDER

Invoking the jurisdiction of the Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as 'AFT Act'), the applicant has filed this OA and the reliefs claimed in Para 8 read as under :

"(i) Call for the records including the instructions based on which the Respondents have passed order dated 07.04.2016 and all other orders denying pension to the Applicant consequent with

effect from his date of retirement ie 14.12.2005 and thereafter quash the same as well as withdrawing the increment to him.

- (ii) Direct the Respondents to restore the increment withdrawn by the Respondent No. 4 and also calculate and grant the service pension along with arrears to the Applicant with effect from 14.12.2005 with an interest on arrears @ 12 percent per annum by directing them to use the period of study leave as qualifying service for pension not withstanding proportionate cost of such study leave having been refunded by the Applicant.”*

BRIEF FACTS

2. The applicant was commissioned in the Regiment of Artillery in the Indian Army on 14.12.1985. While posted at Army HQ, Directorate of Military Intelligence, on 11.03.2002, the applicant applied for study leave of two years to

undertake Graduate Diploma in Geographic Information Science at Curtin University of Technology, Perth, Australia, and proceeded on study leave on 18.02.2003 to Australia along with his family. In July, 2004, the wife of the applicant, an Ex-Military Nursing Service Officer released from service in 1992, got a lucrative job offer and thus applied for permanent residency while she was staying with the applicant in Australia during the study leave. In February, 2005, the applicant after completion of study leave, returned to India. After coming back, the applicant got to know that as per the applicable instructions, as his wife had got the job and residency abroad, it would be appropriate if he applies for premature retirement (PMR) as the applicant did not get promotion earlier and there were no career prospects in service and he applied accordingly on 11.10.2005 for PMR. The said request was accepted on condition of his refunding the cost incurred by the Govt. during study leave as the applicant applied for retirement within a year only of having taken study leave, however as per the bond, he could not seek retirement within three years

of service after completion of study leave and he was required to be placed in reserve list for five years.

3. The applicant, therefore, deposited a sum of Rs.6,60,188/- by way of refund towards study leave expenditure incurred by the Govt. The applicant forwarded his pension documents to PCDA (P) Allahabad for release of Gratuity and pensionary benefits on 08.12.2005 and he was released from service on 14.12.2005. The CDA (O), Pune, vide letter dated 28.04.2006, informed the unit of the applicant that the applicant did not complete 20 years of qualifying service and thus he was authorized for retirement gratuity only. The respondents did not count the study leave of 2 years as qualifying service, which is illegal and unsustainable. Thereafter, SAO, CDA (O) Pune-I, vide letter dated 21.08.2006 informed the applicant that the increments given to him during study leave had been recovered and his pay was re-fixed. In 2012, the applicant approached the respondents, he was informed about the action taken against him as per instructions which were however not made available to the applicant.

4. Aggrieved by the above, the applicant filed an OA being O.A. No. 473 of 2013 before the Principal Bench of AFT seeking release of pension. The Principal Bench of AFT disposed of the said OA vide order dated 12.12.2014 and directed the respondents to find out the possibility of the entitlement of the applicant to have the benefits of his study leave to be counted as authorized leave and sanction the consequential benefits of pension. Accordingly, the applicant preferred an application to the respondents for grant of pension, which was rejected by the respondents vide letter dated 07.04.2016 impugned herein, on the ground that the applicant's case did not fall in the category of compassionate grounds and no justification was available for authorizing the study leave period from 18.02.2003 to 17.02.2005 to be counted for pensionary benefits. Aggrieved by the above, the applicant has filed the present OA and in the interest of justice, in accordance with Section 21(1) of the AFT Act, we take up the present OA.

CONTENTIONS OF THE PARTIES

5. The learned counsel for the applicant submitted that the respondents committed grave error in excluding the period of study leave from qualifying service of 20 years for the only reason that the applicant was made to refund the pay and allowances and ignoring the directions of the Tribunal given in order dated 12.12.2014 passed in O.A. No. 473 of 2013 filed by the applicant earlier and they passed the order dated 07.04.2016 giving old grounds to deny the pension excluding two years study leave from qualifying service. The learned counsel further submitted that the respondents failed to consider the difference between the services required to be excluded from the qualifying service. The learned counsel for the applicant submitted that as the applicant was paid pay and allowances during the period of study leave, the payment of cost cannot be used to disqualify the service, and the applicant is entitled to all retiral benefits including pension as per instructions available and excluding the two years' period from qualifying service amounts to forfeiture of service for pension which is a punishment.

6. It is contended on behalf of the applicant that conditions of study leave are governed by Army Order 11/87, Army Instructions 42/82 and Army Instructions 16/92, all of which are compiled in the Army HQ Letter Nos. A/60010/GS/MT-9 dated 16.01.1996 and A/60010/GS/MT-9 dated October, 1999 and no such instructions contemplate such denial of due benefit of service even after cost of study leave was refunded. The learned counsel reproduced the applicant's undertaking given at Para 3(a) of the Appendix which is to the effect :-

"That I shall not seek permission to retire or resign the commission except on grounds of ill health or other compassionate grounds (if approved) within a period of three years after return to duty from study leave. In case of failure to serve during the compulsory liability period, I will be liable to reimburse the appropriate amount of pay & allowances including study leave allowances to the government."

and submitted that the applicant was duly permitted to retire prematurely by the respondents and as a pre-condition, he had already refunded the study leave expenditure to the Govt. and there was no pre-condition that premature

retirement will entail forfeiture of pension, neither the applicant had given an undertaking in this regard before proceeding on study leave. The learned counsel for the applicant submitted that the respondents, therefore, committed grave error in considering the period of study leave as non-qualifying service for pension. Referring to GoI, MoD letter dated 03.02.1998 Note (6) of Para 5 thereof relating to the specific issue, the learned counsel contended that as the applicant had already refunded the expenditure of study leave and considering the circumstances explained by the applicant for seeking PMR, the respondents ought to consider the case of the applicant and grant the relief as prayed for by the applicant. The learned counsel placed reliance on the order dated 01.02.2001 passed by the Punjab & Haryana High Court in a similar matter in the case of **Lt Col Manbir Singh Chaudhary Vs. Union of India and others**, whereby the Hon'ble High Court directed the govt. to release all retirement benefits including pension to the petitioner which was withheld considering the study leave as not qualified period for pension. It was further contended by

the learned counsel that in the earlier OA filed by the applicant, the Tribunal (PB) finding the action of the respondents unjustified, remanded back the matter to the respondents for consideration of the issues regarding grant of pension to the applicant and there is no provision provided in the Army Orders or Instructions which make the study leave as unauthorized leave for denial of pension. The learned counsel prayed that in view of the above circumstances, OA may be allowed.

7. *Per contra*, the learned counsel of the respondents justifying the action of the respondents, submitted that the applicant had given an undertaking as per Para 2(h) of the AI 42/82 that he will not normally seek permission to retire or resign except on grounds of ill health and other compassionate grounds within a period of three years after return to duty from study leave; that the applicant had applied for premature retirement on the ground of supersession and to look after aged parents and his application was accepted and approved subject to refund of study leave expenditure incurred by the govt. in terms of the

provisions contained in AI 16/92, which is an amendment to AI 42/82, thus the applicant did refund an amount of Rs.6,60,188/- towards study leave and other expenditures incurred by the govt. during the study leave period, and that the applicant was made fully aware of the consequences of the refunding of pay and other allowances incurred by the govt. It is also submitted on behalf of the respondents that Regulation 26(c) of the Pension Regulations for the Army, 1961 (Part-I) provides that all kind of leave shall qualify for pension, however, any period of leave without pay shall not qualify unless specifically authorized by the Govt.

8. The learned counsel further contended that while disposing of the earlier OA being O.A. No. 473 of 2013 filed by the present applicant, the Tribunal (PB) took note of Regulation 26(c) of the Pension Regulations for the Army, 1961 and it was only partly allowed with a direction to the respondents to consider the case of the applicant to determine whether he is entitled to have the benefit of study leave as authorized leave and if the respondents decides the same in favour of the applicant, then he will be given all

consequential benefits and if otherwise, the govt. may pass a reasoned order with copy to the applicant who can challenge the same; and accordingly, the competent authority examined the case of the applicant and certain discrepancy was found in respect of the grounds taken by the applicant in the OA for seeking premature retirement i.e. that as the wife of the petitioner, an ex-Military Nursing Service Officer released from service in 1992 got permanent residency and a very lucrative job offer in Australia while staying with him during the study leave period; his wife and children stayed back in Australia even after completion of the study leave and the petitioner after coming back to India when learnt that his service was liable to be terminated as per applicable instructions since his wife having taken up the job and residency abroad, he applied for premature retirement from service on 30.09.2005. The learned counsel added that the grounds stated in the application for seeking premature retirement however were different; therefore, the competent authority observed that the applicant's case does not fall in the category of compassionate grounds and there was no

justification qua the relief prayed for. The learned counsel contended that the applicant had given an undertaking to return the leave salary and other expenses and thus he fell short of the mandatory requirement of 20 years of qualifying service due to non-counting of the study leave period, he is, therefore, not entitled to the relief and thus the OA may be dismissed.

ANALYSIS

9. We have heard the learned counsel for the parties and have perused the record produced before us.

10. In the present case, it is not in dispute that the applicant sought for premature retirement before completion of mandatory period of three years after return to duty from the study leave. It is also not disputed that the applicant's application seeking study leave was duly considered and approved by the respondents in terms of Para 42(h) of the Army Instructions Nos. 41-46 which provides to the effect that the *officer normally will not seek permission to retire or resign the commission **except on ground of ill-health and other compassionate grounds***, and accordingly, the

applicant retired from service on 14.12.2005 on grant of PMR. It is also an admitted fact that the applicant had refunded study leave expenditures and pay and allowance for the period from 18.02.2003 to 17.02.2005 to the govt. as a pre-condition towards seeking premature retirement before completion of three years of service after return from study leave. Now the question for our consideration in this case is whether the respondents are justified in their action of not counting the period of study leave availed by the applicant i.e. from 18.02.2003 to 17.02.2005 in respect of grant of pension which affected his pensionary benefits. In this regard, it is pertinent to refer to the relevant provisions of the Army Instructions 41-46 at Para 42, which deal with the study leave, which are reproduced as under :

“42. Study Leave Rules Regular Officers of the Army other than AMC, ADC, RVC and MF.

General

- 1. All Regular Officers will be eligible for the grant of extra leave known as study leave for pursuing special studies in India or ex-India under the conditions specified in para 2 below.***
- 2. Conditions for the grant of study leave-***

(a) Study leave will be admissible to officers of all Arms and Services.

(b) Study leave may be granted to an officer to enable him to undergo, in or outside India, a special non-academic course of study certified by the Army Hqrs as enhancing his usefulness as an Armed Forces Officer.

(c) Study leave ex-India will be ordinarily admissible for those non-academic courses only, which are not available at any University or Institution in India.

(d) Study leave shall not ordinarily be granted to an officer who has rendered less than 5 years service or who is due to retire from service within 3 years of the date of return to duty from leave.

(e) The maximum period of study leave will generally be upto 24 months. It may be extended by a period of two months annual leave (if not already availed) of the year in which study leave commences plus and additional two months furlough entitlement of the three years cycle spanning the study leave period, if so required by the specific study being undertaken. Furlough rates of pay will be admissible during furlough leave when granted. The maximum period of study leave, including annual leave and furlough, will be 28 months during the entire service of the officer.

(f) The study leave will be admissible not more than twice throughout the service subject to the overall 28 months limit, prescribed in (e) above.

(g) Study leave vacancies will be filled up.

(h) Prior to the grant of study leave under this AI, the officer will give an undertaking in writing that he will not normally seek permission to retire or resign the commission except on grounds of ill health and other compassionate grounds within a period of 3 years after return to duty.

(i) If an officer chooses to resign his commission before the completion of the stipulated period of service after return from study leave, excepting on grounds mentioned in (h) above, he shall be required to refund the actual amount of leave salary, study allowance, cost of fees, travelling and other expenses, if any, incurred by Government of India and the actual amount, if any, of the cost incurred by other agencies such as foreign Government, foundations and Trusts."

On perusal of the above provisions, particularly Para (h) and (i), we find that there is requirement of giving an undertaking of not seeking retirement before completion of three years' period after return from study leave and if this is violated then there is a provision of refunding the entire pay and study leave expenditure, which condition the applicant had

complied with in the instant case. However, there is no condition or provision with regard to the reckonable period regarding pensionary benefits in the said Instructions nor does it state that the study leave period will not be counted towards pensionary benefits under any circumstances.

11. Moreover, when the earlier OA filed by this very applicant was disposed of on 12.12.2014, this Tribunal (PB) took note of the relevant provisions of Army Instructions dated 01.07.1982, which have been reproduced in the preceding para, observed as under :

“11. We are of the considered opinion that indisputably, the study leave was sanctioned to the petitioner and none of the Army Instructions or the Army orders says that the study leave itself shall become the unauthorized absence automatically upon breach of the condition (h) of the Army Instructions No. 42. When there is a specific penalty provided in the same order, that penalty itself is to be treated as sufficient punishment/consequence of the breach committed by the army personnel. In Clause (i) of the Army Instructions No. 42, the consequence of the breach is given which refers to refund of the actual amount of the leave salary, study allowance, cost of fee, travelling and other expenses, if any, incurred by the Government of

India and the actual amount, if any of the cost incurred by other agencies such as foreign Government, Foundation and Trust. The same is the position in Paragraph 21 of the Army Order 11/87, that is, reimbursement of the proportionate cost to the Government i.e. leave salary and study allowance.”

In that order, the AFT, PB opined that the applicant was duly sanctioned study leave and none of the Army Instructions or the Army Orders provides that the study leave itself shall become unauthorized absence automatically upon breach of the condition. It was also observed that when there is a specific penalty provided in the same order, that penalty itself is to be treated as sufficient punishment/consequence of the breach committed by the army personnel and there is consequence of such breach i.e. refund of the actual amount of leave salary, study allowance, cost of fee, travelling expenses and other expenses, available in clause (i) of AI 42 and the similar conditions are provided in Para 21 of the AI 11/87 also. It is pertinent to mention that the applicant had already complied with the above provisions of refunding the

study leave salary and allowance and other expenses to the Government.

12. Further, the Principal Bench of AFT, New Delhi, in its order dated 12.12.2014, referred to Clause (d) of Regulation 19 of the Pension Regulations for the Army, 1961 Part-I (2008), which is same as Rule 26(c) of the Pension Regulations for the Army, 1961, which reads as under :

“(d) Periods of leave - All kinds of leave including study leave. Any period of leave without pay shall not, however, qualify unless specifically authorized by Government.”

It was observed that the discretion vested with the Government to treat all kinds of leave including study leave as qualifying and authorised leave for pension, however, the applicant's case *qua* pension was considered and decided by the competent authority of the government and not decided by the government itself. The applicant was approved retirement from service and as a consequence, he had already returned all the benefits which he took from the Government *qua* the study leave.

13. With regard to the contention of the respondents that the applicant had given an undertaking, the Principal Bench of AFT had already observed vide order dated 12.12.2014 in O.A. No. 473 of 2013 that the said undertaking cannot deprive him from taking benefit of law and the same is no bar against the Government which can decide the case of the individual on merits irrespective of such undertaking. Accordingly, the respondents were directed to decide whether the applicant is entitled to have the benefit of his study leave as authorized leave. However, the competent authority, vide the impugned order dated 07.04.2016, decided not to count the study leave period as qualifying service. On perusal of the same, we find that the respondents have taken a ground for deciding against the applicant that the applicant sought premature retirement in order to take care of his aged parents and thus on compassionate ground, his application was approved, whereas in the earlier OA filed, he stated that his wife, who is an ex-Military nursing officer and released from service in 1992, applied for permanent residency and thereafter got a lucrative job in Australia and his children

also stayed back in Australia, even after the applicant's completion of study leave and that is why he took premature retirement. In this regard, though the statement made in the O.A. No. 473 of 2013 by the applicant was different from the reason mentioned by the applicant at the time of seeking premature retirement, the same cannot detract from the factum that the applicant needed to take care of his aged parents and his family including his children, and he had no future prospects in the service as per Annexure-R1, application dated 20.09.2005 of the applicant seeking premature retirement as placed on the record of O.A. No. 473 of 2013 which we considered it essential to requisition and peruse before pronouncement of orders herein. The contents of the said application are to the effect :

"SECTION II

(Request of the Officer indication specific reason)

1. I request that I be permitted to proceed on premature retirement from service on the grounds given in the succeeding paragraphs.

2. Supercession.

(a) I am a regular (ex NDA) permanent commissioned officer of Dec 1985 batch, who has not been empanelled by the No 4 Selection board. This has resulted in my supercession.

(b) Subsequent to implementation of AV Singh Committee report, my present rank is Lt Col (Substantive) wef 16 Dec 2004. However, as per policy, my seniority in the rank of Lt Col is fixed below that of all officers who were already Lt Col (Selection Grade), under the erstwhile promotion policy. Hence, I shall continue to remain junior to all such officers who are otherwise junior to me in service. I reckon, even though I am not finally superceded post implementation of AV Singh committee report, I shall continue to suffer the loss and disadvantages of a superceded officer. Since I don't have any future prospects in Indian Army as also I do not wish to serve under junior officers as the same is causing tremendous mental strain, embarrassment and humiliation, I may be permitted to proceed on premature retirement.

3. Domestic Responsibilities

(a) My parents are aged about 72 years and 71 years respectively. They are staying all alone and there is no family member to look after them. Due to old age they are suffering from hypertension (medical documents of Railway empanelled hospital enclosed). Also since my father retired from Railway and is earning pension more than Rs. 7,000, hence not dependant on me. The medical problems and absence of family member is causing them depression as well.

(b) My parents need continued medical attention.

(c) In view of my parents persisting health problems, I have not been able to perform my duties to my entire satisfaction.

4. I request that I be permitted to proceed on premature retirement at the earliest."

Hence, it is only on compassionate grounds that the applicant sought for premature retirement. The respondents, after due examination of his case, sanctioned the premature retirement to the applicant and consequently, the applicant had already refunded the leave salary, study leave expenditure etc. to the Govt. and thus complied with the conditions of seeking premature retirement before completion of three years' service after return from study leave. In this regard, we may refer to the verdict of the Hon'ble High Court of Punjab and Haryana in the case of ***Lt Col Manbir Singh Chaudhary Vs. Union of India and others [2001 SCC OnLine P&H 167]***, wherein the petitioner thereof sought premature retirement before completion of the three years' period after return from study leave on compassionate grounds and was denied pension as his service during the study leave period was not counted as qualifying service for

pension. The Hon'ble High Court in Paras 13 and 14 observed as under :

"13. Faced with this difficulty, the learned counsel appearing on behalf of the respondents invited my attention to paras 9 and 18 of the written statement and stated that the petitioner gave the wrong dates in the application form seeking premature retirement and, therefore, the respondents have been misled on the written representation made by the petitioner. It was also submitted by Mr. Sehgal that while granting premature retirement to the petitioner the Government took into consideration that the petitioner is a superseded officer and he may not get a chance for further promotion.

14. In my opinion, the submissions raised by the learned counsel for the respondents go against the Government, Mr. Sehgal wanted to convey as if the Government had no responsibility to discharge and everything had to be done by the petitioner. I have already stated above that some corresponding duties are always upon the respondents to verify the contents of the application, otherwise there will a chaos in the working of the Government. Supposing a person completes 10 years of service as against the required service of 20 years and makes a false application seeking premature retirement, would the Government remain silent and not try to verify the contents of the application. The answer of this Court is in negative. The Government must work

with the responsibility. It cannot remain a silent spectator. The entire service record of the petitioner was with the respondents and the petitioner could legitimately take into his head that since he has concealed the true facts, therefore, the Govt. might have invoked that power before passing the order of premature retirement."

Accordingly, the writ petition was allowed and the respondents were directed to release pension, gratuity and other consequential benefits. In the case at hand also, the respondents, after examining the application for PMR of the applicant, duly sanctioned the premature retirement. The applicant, as per relevant provisions, complied with the pre-condition of seeking premature retirement before completion of the stipulated period after return from study leave.

14. We now advert to the issue whether the study leave period would be counted as qualified service period for pensionary benefits. We have carefully perused the provisions with regard to study leave provided in AI 41-46. We have also gone through the provisions of the AO 11/87, which contains the conditions of grant of study leave, admissibility, Submission of Applications, Approval of Study

Leave, Sanction of Study Leave, Actions Prior to Commencement of Study leave, Actions during Study Leave, Surrender of Study Leave after Commencement, Termination of Study Leave and Final Report. Thereafter, the Appendices were also attached to the aforesaid Army Order, such as, Appendix 'A'-Arms and Services; Appendix 'B'- Specialised Subjects; Appendix 'C'- Undertaking; Appendix 'D' – Adverse Career Certificate; Appendix 'E'-Commencement of Study Leave Report; Appendix 'F'- Six Monthly Feed Back, Appendix 'G'-Termination of Study Leave and Appendix 'H'-Final Report were also examined. On perusal of the aforesaid Army Instructions and the Army Order referred to above, we have not come across any clause pertaining to the condition of forfeiture of service or to the effect that on seeking premature retirement before completion of three years of return from the study leave, the period of study leave will not be counted as qualifying service in respect of the grant of pension and consequential benefits. The only condition in this regard is refund of all study leave expenditure and leave

salary to the govt. and in the instant case, the applicant had complied with that condition.

15. As regards the Regulation 26 *qua* Qualifying service for pension at clause (c) of the Pension Regulations for the Army, 1961 (Part-I), the said clause reads as under :

“Qualifying service for pension

26. The following periods of service qualify for pension :—

(a) & (b) xxx xxx

(c) Period of leave – All leave including Study leave. Any period of leave without pay shall not, however, qualify unless specifically authorized by Government.

(d) to (g) xxx xxx”

From the above, it is clear that study leave is included in the period of service which qualifies for pension. However, it is also provided therein that any leave without pay shall not qualify unless specifically authorized by government. In this regard, we may observe that admittedly in the case at hand, the applicant was granted study leave for a period of two years and it is an admitted position that he was paid leave salary for the said study leave period and it is not the case

that the applicant was sanctioned study leave of two years without pay. In our view, after complying with the consequences of seeking premature retirement by refunding the entire leave salary and expenditure of study leave to the govt., depriving the applicant by not counting the period of study leave for calculation of period for pensionary benefits tantamounts to punishing him twice/more than once for the same cause, which leads to 'double jeopardy' to the applicant.

16. Moreover, in the speaking order dated 07.04.2016 (impugned herein) passed in compliance of the order dated 12.12.2014 of the Principal Bench of AFT in an earlier OA (OA 473 of 2014) filed by the applicant, the respondents have not shown any clause which permits them to delete the period of study leave from the qualifying service rendered by the applicant in respect of the pension, and with regard to the ground taken by them on the different reasons given by the applicant for seeking PMR, we have already deliberated upon this point hereinbefore.

17. In view of the above, we are of the considered view that the respondents ought to have considered the case of the applicant on the basis of the totality of all the facts and circumstances for taking a decision. After consideration of all the facts and circumstances and relevant provisions of the Army Order, Army Instructions as well as the Pension Regulations for the Army, 1961 (Part-I), it is directed that the period of study leave of the applicant herein be considered as qualifying service with regard to the grant of pension and consequential benefits to the applicant.

CONCLUSION

18. In view of the aforesaid analysis, the OA 872 of 2019 is allowed. The respondents are directed to grant pension and consequential benefits taking into account the period of study leave of two years, with effect from 14.12.2005 i.e. the date of retirement.

19. Accordingly, the respondents are directed to sanction and issue necessary PPO to the applicant within three months from the date of receipt of copy of this order, *failing*

which, the applicant shall be entitled to interest @ 6% per annum till the date of payment.

20. There is no order as to costs.

Pronounced in open Court on this 26 day of July, 2024.

[REAR ADMIRAL DHIREN VIG]
MEMBER (A)

[JUSTICE ANU MALHOTRA]
MEMBER (J)

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