

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O A No. 89 of 2012 and 96 of 2012

FRIDAY, THE 22ND DAY OF MARCH, 2013/ 1ST CHAITHRA, 1935

CORAM:

HON'BLE MR. JUSTICE SHRI KANT TRIPATHI, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

O.A.No.89 of 2012:

APPLICANT:

NO.1178553 N. EX.HAV. K.P.NANDA KUMARAN, AGED 71 YEARS,
ARTILLERY, KARUMATHIL HOUSE, P.O. KOTTAPADY,
GURUVAYOOR, THRISSUR DISTRICT, KERALA STATE,
PIN – 680 505.

BY ADV. SRI. RAMESH C.R.

versus

RESPONDENTS:

1. THE UNION OF INDIA, THROUGH THE
SECRETARY, MINISTRY OF DEFENCE (ARMY),
SOUTH BLOCK, NEW DELHI - 110001.
2. THE CHIEF OF ARMY STAFF, DHQ P.O.,
INTEGRATED HQRS., MINISTRY OF DEFENCE,
SOUTH BLOCK, NEW DELHI 110 001.
3. THE ADJUTANT GENERAL, AG'S BRANCH,
ARMY HEADQUARTERS, DHQ P.O., NEW DELHI 110011.
4. THE PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (PENSION),
DRAUPADI GHAT, ALLAHABAD, UTTARPRADESH -211 014.
5. THE OIC, ARTILLERY RECORDS, NASIK ROAD CAMP, NASIK,
MAHARASHTRA STATE, PIN 422 102 (APO Pin – 908803).

R1 TO R5 BY ADV. SRI. TOJAN J. VATHIKULAM, CENTRAL GOVT. COUNSEL

O.A.No.96 of 2012:

APPLICANT:

EX.NO.6808876, EX NAIK JOSEPH C.A., AGED 70 YEARS,
S/O.LATE SHRI M. ALICE, TINY SADANAM,
CHEMMAKAD P.O., PERINAD, KOLLAM, KERALA – 691 603.

BY ADV. SRI. T.R. JAGADEESH.

versus

RESPONDENTS:

1. THE UNION OF INDIA,
REPRESENTED BY ITS SECRETARY,
MINISTRY OF DEFENCE, SOUTH BLOCK,
NEW DELHI 110 011.
2. THE CHIEF OF THE ARMY STAFF,
INTEGRATED HEADQUARTERS (ARMY),
SOUTH BLOCK, NEW DELHI – 110 011.
3. OIC RECORDS, AMC RECORDS,
LUCKNOW – 226002.
4. THE PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (PENSION),
DRAUPATHI GARH, ALLAHABAD, U P – 211014.

BY ADV. SRI. P.J. PHILIP, CENTRAL GOVT. COUNSEL.

ORDER

Shri Kant Tripathi, Member (J):

1. In these two original applications a common question of law is involved, therefore, with the consent of the learned counsel for the parties, both the matters were heard together and are being disposed of by this common order.

2. Heard Mr.Ramesh C.R. and Mr. T.R.Jagadeesh for the applicants and Mr.P.J.Philip and Mr. Tojan J.Vathikulam for the respondents and perused the record.

3. By O.A.No.89 of 2012, the applicant, K.P.Nanda-kumaran, Ex Havildar No.1178553N, who had rendered 16

years and 325 days of service has prayed for a direction to the respondents to treat his total service as 17 years for pensionary benefits.

4. The other applicant, Joseph C.A., Ex.Naik No.6808876, had rendered 14 years and 311 service and by filing O.A.No.96 of 2012, he has also made a similar prayer for extension of his service to the extent of 15 years.

5. The relevant facts pertaining to each case are being stated separately as follows.

(i) The applicant in O.A.No.89 of 2012, Ex.Havildar K.P.Nandakumaran was enrolled in the Indian Army as a sepoy on 10.11.1962. He was discharged from the Army with effect from 1st October 1979 on completion of 16 years and 325 days of colour service and has been sanctioned pension vide Annexure A2 taking into account his total service as 16 years and as such the respondents excluded 325 days of additional service of the applicant because it was less than one year and there was no provision to round of 325 days as complete one year. The request made by the applicant to revise the pension

after rounding off of his service as 17 years was rejected by the authorities. So, he filed the instant O.A.

(ii) In O.A.No.96 of 2012, the applicant joined the Army on 12.12.1962 and was discharged from service with effect from 18.10.1987 due to the disabilities, Varicose Veins and Low Back Ache. The Medical Board found the said disabilities aggravated by military service and assessed the same at 30% for two years. Accordingly, the applicant was sanctioned disability pension. The disability pension was extended upto 25.2.1991. The Re Survey Medical Board held in the year 1991 reduced the percentage of disability as nil for life with effect from 26.2.1991, therefore, the disability element of pension was stopped with effect from the said date. However, the service element of pension for 14½ years of service was granted. In this way, the applicant was short of 54 days so as to complete the tenure of service as 15 years. The request made by the applicant for grant of service pension after rounding off of the service as 15 years was rejected by the authorities. Hence, he filed the instant O.A.

6. Learned counsel for the respondents in both matters submitted that the scheme of rounding off of the service was introduced for the first time vide Government of India, Ministry of Defence letter No.B/38076/AG/PS4(a)/2190/A/ (Pension/Service) dated 6.8.1984 with effect from 28th June, 1983. A copy of the said letter has been filed as Annexure R2, wherein it has been provided that *"in calculating the length of qualifying service for the purpose of pensionary benefits, a fraction of a year equal to three months or above shall be treated as a completed one half year and reckoned as qualifying service for determining the amount of pension....."* It is further provided that the amendment will have effect from 28th June, 1983.

7. Learned counsel for the respondents next submitted that the applicants had retired prior to the commencement of the Government Letter dated 6.8.1984, therefore, they were not entitled to the benefits of the said letter.

8. Learned counsel for the applicants, in reply, submitted that Regulation 9 and Regulation 125 of the Pension

Regulations for the Army were already there, therefore, the respondents were not justified in not rounding off the fraction of a year's service (325 days and 311 days, respectively) of the applicants to the extent of completed one year. Counsel for the applicants next submitted that the Chennai Bench of the Tribunal extended the benefit of the aforesaid letter dated 6.8.1984 to pre 28.6.1983 retirees also, by the order rendered in OA No.37 of 2011 in **Capt.V.C.N.Kutty vs. Union of India and Others**, decided on 04.11.2011. The case before the Chennai Bench was, no doubt, of an officer who retired from the rank of Captain, but the position would not change in the present matter, as the benefit of the letter has been made applicable to all irrespective of the rank. The Chennai Bench applied the said letter with regard to an Officer who had retired prior to the commencement of the letter. The applicants cases also need to be examined on the line of same analogy.

9. No doubt, Regulation 125 of the Pension Regulations for the Army, 1961 is applicable in the matter of PBORs, which empowers the competent authority to condone the deficiency in service up to six months, which has now been made to one

year by an amendment. But, Regulation 125 of the Pension Regulations for the Army is of no help to the applicants in view of the fact that applicant in O.A.No.96 of 2012 (Joseph C.A.) was invalided out of service due to a disability noticed by the Medical Board and the other applicant, K.P.Nandakumaran (OA No.89 of 2012) was allowed discharge on having reached the stage at which discharge may be ordered under Rule 13 (3) III (i).

10. Regulation 125 of the Pension Regulations for the Army, 1961 reads as follows:

"125. *Except in the case of:*

*(a) an individual who is discharged at his own request,
or
(b) an individual who is eligible for special pension or
gratuity under Regulation 164;*

*(c) an individual who is invalided with less than 15
years service,*

*deficiency in service for eligibility to service pension or
reservist pension or gratuity in lieu may be condoned by a
competent authority up to six months in each case."*

In the matter of discharge on own request or invalidment from service with less than 15 years service, the provisions of Regulation 125 for condoning the deficiency in service for eligibility to service pension/reservist pension/gratuity in lieu thereof, is not applicable. In this view of the matter, the

applicants were not entitled to the benefit of Regulation 125 of the Pension Regulations for the Army. However, if the contention of the applicants that the Government letter dated 6.8.1984 was also applicable to pre 28.6.1983 retirees is accepted, they are entitled to the benefit claimed, but if the letter is held to be prospective, they have no case.

11 Learned counsel for the respondents tried to submit that in the matter of **V.Kasturi vs. Managing Director, State Bank of India, Bombay and another**, (1998) 8 SCC 30, the Apex Court did not extend the benefit of the amended provisions of such retirees, who were non-pensioners, therefore, the applicants herein were also not entitled to the benefit of the Government Letter dated 6.8.1984 as they were also non-pensioners on the date of commencement of the benefit conferred by the said letter. In the matter of **V.Kasturi** (supra), the Apex court propounded the principle that if an employee at the time of retirement is not eligible for earning pension and stand outside the class of pensioners and subsequently by an amendment of the relevant pension rules any beneficial umbrella of pension scheme is extended to cover

a new class of pensioners and by then the erstwhile non-pensioners must have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such a scheme; the erstwhile non pensioner who had retired prior to the advent of such extended pension scheme can claim benefit of such a new extended scheme. But if the scheme is prospective only the old retirees non pensioners cannot get the benefit of such a scheme, even if they survive such new scheme and they will remain outside its sweep.

12. In the present matter, the applicants are not non-pensioners. The applicant Joseph.C.A was granted disability pension which included service element as also disability element and as such he was a pensioner on the date of commencement of the Government letter dated 6.8.1984. Similarly, the other applicant, K.P.Nandakumaran, is also in receipt of pension with effect from the date of his retirement for 16 years of service excluding the 325 days colour service rendered beyond 16 years. In this way, both the applicants were also pensioners on the date of commencement of the

Government letter dated 6.8.1984. The contention of the respondents that the applicants were non-pensioners has no substance and as such the claim of the applicants cannot be denied on the basis of the principles laid down in **V.Kasturi's** case (supra) because in that case the claimants were non-pensioners.

13. The pensioners, both pre and post 20.6.1983 retirees, as held by the Apex Court in **D.S.Nakara vs. Union of India**, (1983) 1 SCC 305 form a homogeneous class. Therefore, the benefit extended by the Government letter dated 6.8.1984 which was in the form of liberalisation was also liable to be extended to the applicants. A discrimination or classification only on the basis of date of retirement was not permissible. The observations of the Constitution Bench in **D.S.Nakara vs. Union of India and Ors.**, (1983) 1 SCC 305, are being reproduced as follows:

46. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational

principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension ? One retiring a day earlier will have to be subject to ceiling of Rs.8,100 p.a. And average emolument to be worked out on 36 months salary while the other will have a ceiling of Rs.12,000 p.a. and average emolument will be computed on the basis of last ten months average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalizing the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore the classification does not stand the test of Article 14.

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65. *That is the end of the journey. With the expanding horizons of socio-economic justice, the socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria: 'being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of being in service on the specified date and retiring subsequent to that date' in impugned memoranda, Exhibits P-1 and P-2, violates Art. 14 and is unconstitutional and is struck down. Both the memoranda shall be*

*enforced and implemented as read down as under: In other words, in Exhibit P-1, the words: "that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date" and in Exhibit P-2, the words: **"the new rates of pension are effective from 1st April 1979 and will be applicable to all service officers who became/become non-effective on or after that date."** are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible. Let a writ to that effect be issued. But in the circumstances of the case, there will be no order as to costs."*

14. The position would have been different had the applicants been non-pensioners on the date of commencement of the letter dated 6.8.1984. But the position has materially changed only because they were pensioners on the date of such commencement.

15. In view of the aforesaid, we find sufficient merit in the Original Applications, therefore, both the Original Applications are liable to be allowed. So far as the question of arrears of service element of pension is concerned, it is liable to be restricted to the period of three years prior to the institution of the O.A., as laid down by the Apex Court in **Union of India and Ors. vs. Tarsem Singh**, (2008) 5 SCC 648.

16. The Original Applications are allowed. The respondents are directed to extend the benefit of Government Letter dated 6.8.1984 to the applicants with effect from 28.6.1983 and accordingly issue amended PPO in their favour. The arrears of the service element of pension will however be restricted to the period of three years prior to the institution of the O.A. The respondents are accordingly directed to pay the arrears of pension within four months, failing which the unpaid amount will carry a simple interest at 8% per annum payable to the applicants by the respondents.

17. No order as to costs.

18. Issue free copy of this order to both sides.

19. Let a copy of this order be placed on the record of the connected case.

Sd/-
LT. GEN. THOMAS MATHEW,
MEMBER (A)

Sd/-
JUSTICE SHRI KANT TRIPATHI,
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary