

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A.NO.131 of 2017

THURSDAY, THE 12TH DAY OF OCTOBER, 2017/20TH ASWINA, 1939

CORAM:

HON'BLE MR. JUSTICE BABU MATHEW P. JOSEPH, MEMBER (J)

HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER (A)

MOHANAN. T., (EX. NK-2576731 W),
AGED 60 YEARS, S/O. P.K. THANKAPPAN (LATE),
DSC RECORDS, KANNUR,
RESIDING AT "PARAKULAM HOUSE, KOTTAMURY P.O., APPLICANT
THRIKODITHANAM, CHANGANACHERRY,
KOTTAYAM – 686 105.

BY ADVS. M/S. B. HARISH KUMAR & RENJU K.R.

Versus

1. THE DEPUTY DIRECTOR GENERAL,
DIRECTOR GENERAL DSC,
GENERAL STAFF BRANCH
INTEGRATED HQ OF MOD (ARMY),
WEST BLOCK - III, R.K. PURAM,
NEW DELHI - 110 066.

2. CHIEF RECORD OFFICER,
DSC RECORDS, MILL ROAD,
KANNUR, KERALA - 670 013.

..... RESPONDENTS

3. UNION OF INDIA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT (DEFENCE)
MINISTRY OF DEFENCE, NEW DELHI - 110 011.

BY ADV. SHRI. SAJEEV P., CENTRAL GOVERNMENT COUNSEL

O R D E R

VAdm.M.P.Muralidharan, Member (A)

1. The Original Application has been filed by Mohanan T, Ex Naik No.2576731W of Defence Security Corps (DSC), for issue of direction to the respondents to grant him second service pension for the services rendered by him in DSC after condoning the shortfall of 94 days of qualifying service.

2. The applicant was enrolled in the Army as Sepoy on 12 September 1977 and was discharged from service on 28 February 1995 on completion of 17 years and 170 days of qualifying service. He was granted service pension from the Army. Thereafter, he was enrolled in the DSC on 05 March 1999 and was discharged from DSC with effect from 30 November 2013 under Army Rule 13(3)III(i) on attaining the age of superannuation (Annexure A1).

3. Sri.B.Harish Kumar, the learned counsel for the applicant, submitted that the applicant who had re-enrolled himself in DSC after his service in the Army, was discharged from the DSC after he had rendered 14 years 08 months and 26 days of qualifying service (Annexure A1). The applicant was, however, denied service pension as he did not have full qualifying service of 15 years. The applicant on becoming aware that similarly placed personnel had been granted second service pension, after condoning shortfall of qualifying service in accordance with Regulation 44 of the Pension Regulations for the Army 2008, preferred a representation to the 2nd Respondent for similar benefit (Annexure A2). The request of the applicant was, however, rejected by the respondents stating that condonation of deficiency in qualifying service is not applicable for the grant of second service pension (Annexure A3). The learned counsel further submitted that the rejection was based on policy letter issued by Ministry of Defence, Department of Ex-servicemen Welfare dated 23 April 2012 (Annexure A4).

4. The learned counsel submitted that the claim of the applicant was not considered despite provisions of Regulation 44 of the Pension Regulations for the Army 2008, wherein deficiency in service of upto 12 months could be condoned by the competent authority. The learned counsel further submitted that this Tribunal, in **O.A.No.70 of 2015, Ex Naik N.Kuppa vs. Deputy Director General, DSC**, had held that the applicant therein, who was similarly placed, was eligible to be granted service pension for his service in DSC after condoning shortfall in qualifying service for pension. The learned counsel therefore prayed that the applicant be given similar benefit and be granted pension for his service in DSC after condoning the shortfall of 94 days in qualifying service.

5. The respondents submitted that the applicant, who was enrolled in the DSC after his service in the Army, had rendered 14 years, 08 months and 26 days of qualifying service. Since, he had not completed the mandatory 15

years of service for grant of pension, he was not granted the same as the Government policy on the subject denies condonation for grant of second service pension. Their stand on the subject based on the policy letter issued by Government of India, Ministry of Defence, Department of Ex-servicemen Welfare No.14(2)/2011/D(Pen/Pol) dated 23 April 2012 (Annexure A4), was as indicated in Annexure A3.

6. Legal Officer Captain Preeti Sharma, placing before us Government of India, Ministry of Defence Letter No.14(02)/2011-D(Pen/Pol) dated 20 June 2017, submitted that Regulation 44 of the Pension Regulations for the Army 2008 has since been amended. In addition to the existing three clauses of exclusion, a 4th clause has been inserted as item (iv), which reads as "an individual who is eligible for 2nd service pension for the service rendered by individual in respect of DSC". The respondents therefore contended that based on the amended Regulation 44, the shortfall in qualifying service for grant of second service pension from

DSC could not be condoned.

7. Heard rival submissions and perused records.

8. It is not disputed that the applicant is in receipt of pension for his service in the Army. It is also not disputed that the applicant who re-enrolled in the DSC, after his service in the Army was discharged under Army Rule 13(3)III(i) on attaining the age of superannuation of 57 years and had rendered 14 years 08 months and 26 days of qualifying service in the DSC.

9. As observed, in accordance with Reg. 267 of Pension Regulations 1961, an individual accepting reemployment in DSC, after his service in Army/Navy/Air Force and was in receipt of pension for such service, had such pension kept in abeyance till completion of DSC service. On release from DSC, the pension kept in abeyance or higher pension earned was payable. Based on

a revised policy of the government promulgated vide MoD letter No. PC-III to MF No. A/50592/DSC-2/54-C/D(GS-IV) dated 01 March 1983, the individual was given the option to continue to draw his pension or to cease to draw his pension and count the previous service for pension on release from DSC. Even those who continued to draw the previous pension, became eligible for a second pension from DSC on completion of 15 years of DSC service. The above and subsequent modifications were incorporated in Revised Pension Regulations 2008 as Regulations 174 to 176. Further Regulation 266 of 1961 and 173 of 2008 specify that unless there are specific Regulations in the Chapter for DSC, Regulations for PBOR of the Army would apply. The aspect of condonation of deficiency in service to earn pension was common to all PBOR including DSC and was governed by Regulation 125 of 1961 and now vide Regulation 44 of 2008.

10. The question as to whether a person can claim second service pension, condoning the shortfall in his

second service, even when he is in enjoyment of pension for his previous service had been examined by this Tribunal in **Ex Naik Kuppa** (supra). The respondents had denied condonation for second service pension in case of **Ex Naik Kuppa** (supra) based on Government of India, Ministry of Defence, Department of Ex-servicemen Welfare letter No.14(2)/2011/D(Pen/Pol) dated 23 April 2012 (Annexure A4). The relevant portion of the Government letter by which condonation of shortfall in qualifying service for second service pension was being denied to DSC personnel, being relevant is re-produced below:

The matter regarding condonation of shortfall in service towards second service pension in respect of DSC (Defence Security Corps) personnel raised by ADGPS vide their No.B/46453/AG/PS-4(Legal) dated 9th March 2012 has been examined in this department. It is conveyed that the intention behind grant of condonation for deficiency of service for grant of service pension is that the individual must not be left high & dry but should be made eligible for

atleast one pension. On the principle that no dual benefit shall be allowed on same accord, it is clarified that no condonation shall be allowed for grant of 2nd service pension.

11. Considering the various aspects involved in the issue, this Tribunal had held as follows:

6. Chapter VIII of the Pension Regulations for the Army Part I, 2008 deals with the grant of pensionary awards to personnel of the DSC. Regulation 173 under the said Chapter states thus:

“The grant of pensionary awards to personnel of the Defence Security Corps shall be governed by the same Regulations as are applicable to Personnel Below Officer Rank of the Army, except where they are inconsistent with the provisions of the Regulations in this chapter”.

So much so, it is crystal clear that if there is no provision in the chapter which is inconsistent with the Regulations applicable to PBOR of the Army, the service personnel in the DSC for the grant of pensionary awards to them will be governed by the same provisions applicable to the PBORs of the Army. We notice that in Chapter VII there is no regulation for condonation of

deficiency in service. Undoubtedly the Regulation applicable to PBOR of the Army over condonation of deficiency in service covered under Regulation 44 (previous Regulations 2008) has to be followed in the case of service personnel of DSC. Regulation 44 reads thus:

"44. The deficiency in service for eligibility to pension/gratuity may be condoned upto 12 months in each case by competent authority except in the case of :-

- (i) an individual who is discharged at his own request;
- (ii) an individual who is invalided with less than 15 years of service.
- (iii) Who is eligible for special pension or gratuity under these Regulations".

7. In the regulations applicable to service personnel of DSC or those applicable to PBOR of the Army in the Pension Regulations 2008 there is no prohibition, even impliedly, barring condonation of short fall in deficiency of service to claim second service pension. So, where service personnel of DSC can legitimately seek eligibility to pension/gratuity condonation of short fall upto a period of 12 months in the qualifying service, in the

absence of a statutory prohibition the application of Regulation 44 cannot be denied to them on the ground that it applies only for first service pension and not to second service pension.”

12. This Tribunal observing that in the absence of any bar or interdiction to earn second service pension in the statutory provisions, a Government letter to over-rule the provisions could not be sustained, had held the applicant therein, eligible for condonation of the shortfall in his qualifying service to earn pension for DSC service, in addition to the pension for service in the Army. The respondents have now placed before us Government letter dated 20 June 2017, which amends Regulation 44 by inserting an additional clause. The relevant portions of the letter are re-produced below:

“Condonation of deficiency in service for eligibility of service pension has been mentioned in Rule 125 of Pension Regulation Part-I 1961 (Rule 44 of Pension Regulation Part-I 2008). This rule is applicable in all cases except the case mentioned

under the Rule 125 of Pension Regulation Part-I 1961 (Rule 44 of Pension Regulation Part-I 2008). Deficiency in service for eligibility of Service pension or Reservist pension or Gratuity in lieu may be condoned by competent authority up to 12 months as mentioned in GOI, MoD letter No. 4684/DIR(PEN/2001 dated 14th August, 2001.

2. Representations of the ex-servicemen who have been granted Service pension from Army side and re-employed in DSC are received for condonation of deficiency in service for the 2nd service pension from DSC. The matter has been examined and decided that condonation of deficiency in qualifying service is to be accorded on merit and in the deserving cases to make individual eligible for at least one service pension. Condonation of deficiency in qualifying service for grant of 2nd service pension in respect of DSC personnel has no merit.

3. It is conveyed that the intention behind condonation of deficiency in service for grant of service pension is that the individual must not be left high & dry but should be made eligible for at least one service pension. In view of above, it is clarified that no condonation shall be allowed for grant of second service pension.

4. The Pension Regulation for the Army shall stand amended by inserting item "(iv) an individual who is eligible for 2nd service pension for the service rendered by individual in respect of DSC" below Regulation 44 of Pension Regulation for the Army Pt-I (2008).

13. As can be observed, the Department of Ex-servicemen Welfare, under the Ministry of Defence, has now converted their earlier policy letter of 23 April 2012 (Annexure A4), into an amendment of Reg.44, based on the same rationale that no condonation shall be allowed for grant of second service pension as the intention behind condonation of deficiency was to ensure that no individual is left high and dry, and is eligible for at least one pension. As brought out earlier, the governing clause in the letter at Annexure A4, had been examined and struck down by this Tribunal in **Ex Naik Kuppa** (supra) vide Order dated 30 November 2015. While it is not so explicitly stated, it is apparent that the amendment to Regulation 44 now incorporated vide letter of 20 June 2017, is to provide a

statutory provision to a policy which had been legally held as untenable. We therefore need to examine whether this sub-regulation is ultra vires and deserves to be struck down.

14. Prior to examining the aspect of condonation for second service pension, we would like to examine the primary issue involved i.e, condonation of deficiency in minimum qualifying service for earning pension. The minimum qualifying service for earning service pension for JCOs and other Ranks, had been specified as 15 years under Reg.132 of the Pension Regulations for the Army 1961, as well as in the revised Pension Regulations for the Army 2008 under Reg.47. While Reg.125 of 1961 Regulations, provided for condonation of deficiency in service for pension upto a period of six months, it was enhanced to one year, vide Ministry of Defence letter No.4684/DIR(Pen)/2001 dated 14 August 2001 and has been incorporated in Reg 44 of Pension Regulations 2008.

Essentially the persons who were being denied condonation, were those individuals who were discharged at their own request, individuals eligible for special pension and those being invalided out with less than 15 years of service. As observed, special pension was admissible for personnel who were discharged in large number in pursuance of the Government policy of reduction of strength of establishment of the Armed Forces or of re-organisation or disbandment of a particular unit or establishment. As regards personnel invalided out, they were eligible for disability pension or Invalid Pension. Therefore the Regulation essentially denied condonation to individuals who were discharged at their own request.

15. This Tribunal in **TA.No.18/2009, Vinod Roy John vs. Union of India & Ors.**, held Reg 125(a) of 1961 Regulations, denying condonation for those who seek voluntary retirement as illegal and void and declared that condonation is permissible even in case of individuals who

were discharged at their own request based on the principles enunciated by the Honourable Apex Court in **D.S. Nakara & Others vs Union Of India , (1983) 1 SCC 305.** It is also observed that Reg 82(a) of Pension Regulations for the Navy which is pari materia to the old Reg 125(a) and new Reg 44 of the Army has been declared ultra vires by the Hon'ble Bombay High Court in **Gurumukh Singh & Ors. vs. Union of India & Ors, 2007 (1) Bombay CR 893.** The Hon'ble High Court of Delhi in **Surender Singh Parmar vs. Union of India, WP(C).No.12507 of 2004,** held a similar view. In both the judgments the concerned Regulation was declared as ultra vires and violative of Article 14 of the Constitution of India. As observed by the Hon'ble Apex Court in the case of **Union of India & Anr. vs. Surender Singh Parmar, (2015) 3 SCC 404,** there was no challenge to the said decisions in that case. Therefore, it has been held that even a person who had sought discharge at his own request, prior to completion of the minimum qualifying

service of 15 years, was eligible for condonation of deficiency in service.

16. Chapter I of the Pension Regulations for the Army 2008 specifies the broad Regulations which control and govern grant of pension. Reg.6 provides for limitation of number of pensions and being relevant is re-produced below:

“Limitation on Number of Pensions:

6. Except where otherwise specifically provided for, an individual shall not earn more than one pension under these Regulations for the same service or post at the same time or for the same continuous service.

17. As observed, the Regulation only specifies that an individual shall not earn more than one pension for the same service or post at the same time or for the same continuous service. In case of the applicant, the first pension was for his service in the Army and the second pension being sought is for his service in DSC. In our view,

they are two different services and therefore it does not come under the limitation of pensions under Reg.6. Our view is fortified by the fact that Regulation 175 of 2008, provides for a second pension from DSC, for those who serve 15 years or more in DSC.

18. It is also observed that personnel discharged from Armed Forces with a pension, who join another service from where they become eligible for pension on completion of specified period of service, are being granted dual pension. Further, the earlier Government rules denying dual family pension, have been liberalised vide Ministry of Defence Letter No.01(05)/2010-D(Pen/Policy) dated 17 January 2013, enabling grant of dual family pension.

19. At this juncture we would like to observe that the subject of pension had been examined in depth by a Constitution Bench of the Hon'ble Apex Court in **D.S.Nakara** (supra). The Apex Court had held as follows:

20. The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar & Ors. (1971) 2 SCC 330 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab & anr. v. Iqbal Singh (1976) 2 SCC 1.

.....

27. Viewed in the light of the present day notions pension is a term applied to periodic money payments to a person who retires at a certain age considered age of disability; payments usually continue for the rest of the natural life of the recipient. The reasons underlying the grant of pension vary from country to country and

from scheme to scheme. But broadly stated they are (i) as compensation to former members of the armed forces or their dependents for old age, disability, or death (usually from service causes), (ii) as old age retirement or disability benefits for civilian employees, and (iii) as social security payments for the aged, disabled, or deceased citizens made in accordance with the rules governing social service programmes of the country. Pensions under the first head are of great antiquity. Under the second head they have been in force in one form or another in some countries for over a century but those coming under the third head are relatively of recent origin, though they are of the greatest magnitude. There are other views about pensions such as charity, paternalism, deferred pay, rewards for service rendered, or as a means of promoting general welfare (see Encyclopaedia Britannica, Vol. 17 p.575.). But these views have become otiose.

.....

31. From the discussion three things emerge: (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Art. 309 and clause (5) of Art.148 of the

Constitution; (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 the employer on an assurance that in their 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 average emoluments drawn during last three years of service reduced to ten months under liberalised pension scheme. 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.

20. The Hon'ble Apex Court also examined the aspects of discrimination and arbitrariness in the same judgment ie. **DS Nakara** (supra) and held as follows:

13. The other facet of Art. 14 which must be remembered is that it eschews arbitrariness in any form. Article 14 has, therefore, not to be held identical with the doctrine of classification. As was noticed in Maneka Gandhi's case (1978) 1 SCC 248 in the earliest

stages of evolution of the Constitutional law, Art. 14 came to be identified with the doctrine of classification because the view taken was that Art. 14 forbids discrimination and there will be no discrimination where the classification making the differentia fulfills the aforementioned two conditions. However, in *EP. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, it was held that the basic principle which informs both Arts. 14 and 16 is equality and inhibition against discrimination. This Court further observed as under: (SCC p.38, para 85)

From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

14. Justice Iyer has in his inimitable style dissected Article 14 in Maneka Gandhi case as under at SCR p.728:(SCC p.342, para 94)

"That article has a pervasive processual potency and versatile quality, egalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness and ex cathedra ipse dixit is the ally of demagogic authoritarianism. Only knight-errants of 'executive excesses'-if we may use current cliché-can fall in love with the Dame of despotism, legislative or administrative. If this Court gives in here it gives up the ghost. And so it is that I insist on the dynamics of limitations on fundamental freedoms as implying the rule of law; be you ever so high, the law is above you."

Affirming and explaining this view, the Constitution Bench in *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722, held that it must, therefore, now be taken to be well settled that what Art.14 strikes at is arbitrariness because any action that is arbitrary must necessarily involve negation of equality. The Court made it explicit that where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Art. 14. After a review of large number of decisions bearing on the subject, in *Air India v. Nargesh Meerza*, (1981) 4 SCC 335, the Court

formulated propositions emerging from analysis and examination of earlier decisions. One such proposition held well established is that Art. 14 is certainly attracted where equals are treated differently without any reasonable basis.

21. The Honourable Apex Court therefore held that pension is not a bounty or a matter of grace depending upon the will of the employer, but a compensation for the services rendered. The Honourable Apex Court has also held that there should be no arbitrariness or discrimination while framing rules with regard to pension, as any arbitrary action would become violative of Articles 14 and 16 of the Constitution.

22. It emerges from the foregoing discussions that Reg.6 of the Pension Regulations, prohibits additional pension only if it is from the same service or post. We have already observed that DSC is a separate service from the Army/Navy/Air Force, as a second pension is provided

for on completion of 15 years of service in DSC. Further, as brought out, retired Armed Forces personnel, reemployed in DSC, were initially eligible only for one pension, in that their pension from their respective former service, was ceased on joining the DSC and was restored only on completion of their DSC tenure. Since then the Regulations have been modified to enable them to continue to draw pension from their respective former service while serving in DSC, and also to draw fresh pension from the DSC on completion of 15 years of service in DSC. Further apart from the grant of dual pension, the Government has also relaxed the rules to provide for dual family pension. Hence the only issue for consideration is the aspect of condonation for grant of second pension.

23. Condonation of short fall in service for grant of pension, has been provided for in the regulations. As brought out, the earlier condonation period of six months has since been enhanced to one year. In other words, the

essential policy provides for grant of pension to a person who had put in only 14 years of service as against 15 years required. It is also observed that even though condonation was not permitted in case of personnel who were discharged at their own request, the clause denying them condonation has been held as ultra vires and violative of Article 14 of the Constitution by the Honourable High Courts of Bombay and Delhi as observed by the Honourable Apex Court in **Surender Singh Parmar** (supra). Therefore even a person who seeks discharge prior to completion of 15 years is permitted condonation. Further, as brought out the Honourable Apex Court in **D.S.Nakara** (supra) has clearly enunciated that pension is not a bounty, but compensation for services rendered. When that be so and more so as provision of a second pension from DSC exists on completion of 15 years, denial of condonation of short fall for earning the second pension, in our view, is arbitrary.

24. In the instant case, the applicant had not sought voluntary retirement, but had fallen short of requisite service as he had reached the age of superannuation. When even a person who seeks discharge on his own prior to completion of minimum qualifying service, is permitted condonation, to deny the same to a person who has fallen short of service due to his reaching the age of superannuation would be arbitrary and discriminatory. In our view, therefore, the amendment to Reg.44 introduced as sub-regulation (iv), denying condonation for a second pension, is not in keeping with the principles enunciated by the Honourable Apex Court in **D.S.Nakara** (supra). We therefore declare sub-regulation (iv) as ultra vires and strike down the same. Therefore the applicant becomes eligible for condonation of short fall in qualifying service even for second service pension, ie., in the instant case for pension for his DSC service.

25. In view of the foregoing, the Original Application is allowed and Annexure A3 is quashed. The respondents are directed to grant second service pension to the applicant condoning the deficiency of 03 months and 04 days in his qualifying service to earn service pension in DSC. The respondents are further directed to pass appropriate orders and issue PPO to the applicant within a period of four months from the date of receipt of a copy of this order. Monetary benefits are to be disbursed to the applicant within a further period of two months, failing which unpaid amount will carry simple interest at the rate of 8% per annum. The service gratuity already paid to the applicant is to be adjusted against the Arrears/pension due.

26. There will be no order as to costs.

27. Issue free copy to the parties.

Sd/-

sd/-

**VICE ADMIRAL M.P. MURALIDHARAN,
MEMBER (A)**

**JUSTICE BABU MATHEW P. JOSEPH
MEMBER (J)**

an.

/true copy/