

(1992) 12 PAT CK 0021

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1465 of 1991 (R)

Ex-Sepoy Ram Chandra Shaw

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-12-1992

Acts Referred:

Army Act, 1950 — Section 106, 23, 38, 39, 43

Citation : (1993) 1 BLJR 63

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Judgement

S.B. Sinha, J.—In this writ application, the petitioner has prayed for issuance of a writ of certiorari for quashing the letter dated 12-1-1991 issued by the Senior Records Officer/Officer in-charge, Corps Records, Lucknow, whereby the petitioner's prayer for grant of service pension has been rejected as also issuance of a writ of and in the nature of mandamus directing the respondents to pay service pension to the petitioners since the date of his retirements.

2. The fact of the case in brief is that the petitioner was enrolled in the Army Medical Corps on 22-4-1957. The petitioner contends that he completed 15 years and 244 days in Army service and was thereafter released on 22-12-1972.

3. According to the petitioner he is, therefore, entitled to the pensionary benefits in terms of the provision of the Army Act, 1950 and the Army Pension Rules.

4. The petitioner having not been paid any pension, filed a representation but the same has been rejected by as order dated 12-1-1990 as contained in Annexure 5 to the writ application wherein it was stated that his qualifying service being only 12 years and 162 days he is not entitled to service pension.

5. The petitioner has sent another representation which is contained in Annexure 6 to the writ application but no action has been taken by the respondents on the basis thereof.

6. A counter-affidavit has been filed in this case wherein it has been contended that owing to rendering of non-qualifying services extended to 3 years 82 days, the petitioner is not entitled to any pension in terms of paragraph 132 of the Pension Regulation.

7. It has further been stated as follows :

The petitioner was awarded four red ink and one black ink entries Army service which are as under :

(a) The petitioner was awarded 10 days R. I. in Military custody for an offence u/s 63 of the Act on 24-2-1967.

(b) Forfeiture of two days pay and allowance for an offence u/s 54 of the Army Act on 6-9-1969 by Officer Commanding Military Hospital Namkum.

(c) Awarded deprivation in the appointment for an offence u/s 39(a) of the Army Act by Officer Commanding 408 Battalion.

(d) 28 days rigorous imprisonment and 14 days detention as stated in para 5 above by Officer Commanding Administration Battalions Army Medical Corps Centre Lucknow.

(e) Awarded seven reprimand u/s 39, clause (B) of the Act on 30-11-1971. After retirement it was intimated by Officer M. E. O. Ranchi where he was re-employed as Choukidar that he was involved in the negligence of duties on 3-8-1973 for theft of water power motor. The above office requested this office to withhold payment of gratuity but at that time amount had already been terminated to him. Thus the statements mentioned in the para that the petitioner had bright service career is wrong and denied. Service is provided to every soldier wherever and whenever admissible therefore award of such medal does not affect for assessment of the career.

8. Mr. N. N. Tiwary learned Counsel appearing on behalf of the petitioner has raised a short question in support of this application. learned Counsel submitted that from a bar perusal of Section 39 of the Army Act it would appear that the same is not applicable in a case but the petitioner has been found guilty for unauthorised absence. learned Counsel submitted that the petitioner's unauthorised absence has been regularised by awarding punishment to him and in that view of the matter the plea of the respondents cannot be accepted. learned Counsel further drew my attention to the certificate of service which is contained in Annexure-1 to the writ application and submitted that even therein no period of non-qualifying service has been mentioned and in paragraph 4 thereof it has clearly been stated that the petitioner has been discharged by the order of Commandant upon completion of 15 years and 244 days of service.

9. According to Learned Counsel, the certificate of service is substitute for the service book and the respondents cannot be permitted to resile therefrom.

10. Mr. Debi Prasad, learned Counsel appearing for the respondents, on the other

hand, submitted that in terms of the Pension Rules, the petitioner was bound to render 15 years of qualifying service and in view of the fact that he had been awarded punishment of red ink he is not entitled to the reliefs prayed for in this writ application.

11. The short question which, therefore, arises for consideration in this application is as to whether in the facts and circumstance of the case, the petitioner can be held to have completed 15 years of qualifying service.

12. If a person renders a non-qualifying service, it appears from column 1 of the certificate of service that the same is required to be specifically stated therein in terms of Paragraph 21 i of the Pension Regulations Part II. In case of the petitioner no such period has been mentioned. Further, the petitioner was not discharged by way of punishment but was discharged in consequence of "on fulfilling the condition of employment" under Item/Section III (i) of the table annexed to Army Rule 13-A after serving 15 years and 244 days of service.

13. From a perusal of the counter-affidavit it is also evident that the petitioner was on leave with effect from 11-12-1961 and was declared a "deserter" by a court of inquiry on 14-3-1961. The petitioner surrendered himself to the Administrative Battalion A. M. C. Centre and School, Lucknow office after a period of 1173 days (3 years 78 days) and the above order of regularisation was passed upon awarding of 28 days R. I. and 14 days detention in Military custody and forfeiture of pay and allowance for the period of absence. He allegedly was also awarded severe reprimand on 13-11-1971 for overstaying leave by 3 days u/s 39(b) of the Army Act, 1950. He was also allegedly awarded the sentence of deprivation of appointment for absence of one day u/s 39(a) of the Army Act.

14. In this case, this Court is concerned with the punishment awarded to the petitioner for his alleged unauthorised absence of 1173 days.

15. For the aforementioned period of unauthorised absence, the petitioner was awarded punishment and his period of absence was regularised. If this be the position in my opinion, the petitioner cannot be doubly punished.

16. In terms of the provision of Section 23 of the Army Act a certificate of service is to be granted. Such certificate of service is, therefore, statutory in nature. The certificate granted to the Army personnel is binding upon the respondents.

17. The certificate of service not only contains particulars relating to the period of service of the concerned employee but also contains all the requisite particulars including qualifying and non-qualifying service, the reason for discharge and other relevant materials. If in terms of paragraph 211 of the Pension Regulation the petitioner had undergone any non-qualifying service the same would have found place in the certificate of service itself. Further, as noticed hereinbefore, the respondents on their own showing have stated that the period of the absence of the petitioner for the period of 1173 days had been regularised upon awarding the punishment. Thus, the respondents cannot resile

from the said position.

18. Mr. Debi Prasad, learned Counsel for the respondents has, however, relied upon paragraph 123 of the Pension Regulations for the Army which read as follows:

(a) A person who has been guilty of any of the following offences:

(i) desertion, vide Section 38 of the Army Act.

(ii) fraudulent enrolment, vide Section 43(a) of the Army Act shall forfeit the whole of his prior service towards pension for gratuity upon being convicted by Court Martial of the offence.

(b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct and without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity.

The aforementioned regulation is not applicable in the facts and circumstances of the case as admittedly the period of unauthorised absence as condoned and the said period had been regularised.

19. From a bare perusal of the aforementioned regulation 123, it is evident that the same applies in a case where a person has been found guilty of "desertion" in terms of Section 38 of the Army Act. Under the provision or" Section 39 of the Army Act, a conviction upon a deserter must be passed by a Court Martial. No such case has been made out by the respondents so far as the petitioner is concerned.

20. In paragraph 5 of the counter affidavit, it has clearly been stated that the petitioner's case was considered by a court of inquiry. A court of inquiry is enjoined with the power to make an inquiry in terms of Section 106 of the Army Act which reads as follows:

Inquiry into absence without leave.--(1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled and such court shall, on oath or affirmation administered in the prescribed manner inquire respecting the absence of the person and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries and if satisfied of the fact of such absence without due authority or other sufficient cause the court shall declare such absence and the period thereof and the said deficiency, if any and the Commanding Officer of the Corps or department to which the person belongs shall enter in the court martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not

apprehended, he shall, for the purpose of this Act, be deemed to be a deserter.

21. Thus, in terms of sub-Section (2) of Section 106 of the Army Act, a person would be deemed to be a deserter only when he does not surrender after his declaration as such or is not apprehended. Admittedly, in this case, the petitioner had surrendered after the order was passed by the court of inquiry and before the punishment was imposed upon him.

22. In that view of the matter, the case of the petitioner does not fall u/s 38 of the Army Act and consequently, Regulation 123 will also have no application in the facts of this case.

23. Further in terms of Section 94 of the Army Act, the total deduction from the pay and allowance of a person made under clauses (c) (g) to (i) of Section 91 cannot, except where he is sentenced to dismissal, exceed in any one month, one half of his pay and allowance for that month. Thus, then awarding forfeiture of pay so far the petitioner is concerned, must be confined to the aforementioned period.

24. Mr. Debi Prasad, learned Counsel for the respondents, however, has drawn my attention to the fact that in terms of Regulation 124 of the Pension Regulations the authority may condone an interruption of service only in respect of the interruptions not exceeding a period of 12 months in all.

25. But clause (a) of Regulation 124 aforementioned is applicable only in a case when proposed pension exceeds Rs. 25 per month. The respondents in the counter-affidavit have not stated as to what amount of pension was payable to the petitioner at the time of his discharge inasmuch as, if the proposed pension is Rs. 25 per month or less, all interruptions may be condoned irrespective of their duration as is evident from clause (b) of the Regulation 124.

26. For the reasons aforementioned, there cannot be any doubt that the petitioner became entitled to pensionary benefits upon his discharge.

27. The amount of pension of the petitioner has wrongly been withheld by the respondents. This is all the more regrettable that the petitioner has not been paid his pension despite the fact that he had been granted certificate of service as contained in Annexure-1 to the writ application. The submissions made in paragraph 5 of the counter-affidavit is contrary to the contents of the aforementioned certificate of service.

28. In this view of the matter, this writ application is allowed and the respondents are hereby directed to pay the entire amount of the pension to the petitioner payable to him in accordance with law within two months from the date of receipt of a copy of this order together with compound interest at the rate of 15 per cent per annum.

29. In the facts and circumstances of the case, the petitioner is also entitled to costs payable by the respondents which is quantified at Rs. 2,000.