

(2023) 02 DEL CK 0114

In the Delhi High Court

Case No : Civil Writ Petition No. 14390 Of 2022

M. A. Ansari, Advocate

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 17-02-2023

Acts Referred:

Air Force Act, 1950 — Section 161(2)

Citation : (2023) 02 DEL CK 0114

Hon'ble Judges : Suresh Kumar Kait, J; Neena Bansal Krishna, J

Bench : Division Bench

Advocate : Mohd. Ashfaque Ansari, Nagender Benipal, Ankit Siwach, Harithi Kambiri, Arpita Rawat, Manoj Sharma

Final Decision : Disposed Of

Judgement

Suresh Kumar Kait, J

1. The present petition has been preferred by the petitioner seeking quashing and setting aside of the order dated 08.10.2021 in RA 27/2020 in OA No.42/2012 as well as order dated 04.12.2019 passed in OA No.42/2012 by the learned Air Force Tribunal (henceforth referred to as the "Tribunal"). In addition, a direction is also sought to the respondents to release petitioner's pensionary and other benefits from the date of his discharge i.e. 18.11.2009 or from 20.07.2010.

2. Petitioner claims to have been enrolled in Indian Air Force as an Airman on 15.10.1992. The petitioner further claims to have applied for premature discharge/ voluntary retirement on 12.03.2008 after completion of 15 years' of his service. He also claims to have sent request letters dated 03.07.2008; 08.10.2008; 20.03.2009 for voluntary retirement, however, the same were rejected by the respondents by orders of even dates. According to petitioner, on 09.07.2009 he was posted at Air Force Station, Bitha, Patna, however, he was reluctant to join there in view of his requests for voluntary retirement. His

requests for stay of his posting were rejected by this Court as well as Supreme Court. According to petitioner, his entry was banned in the office on 18.11.2009 in contravention of Air Force Law. When petitioner's effort to regain entry in his office failed, he filed a petition before the Hon'ble Supreme Court being W.P.(C) 7/2010 seeking a direction to respondents to discharge from service as per Indian Air Force Law. The said petition was dismissed by the Supreme Court, however, liberty was granted to avail of the remedy for pension benefits, as available in law.

3. The petitioner made a representation dated 22.01.2010 to the respondents seeking his pension and retiral benefits. Having no response to his representation, petitioner preferred W.P.(C) No. 886/2010 before this Court on 10.02.2010. During pendency of the said petition, on 26.02.2010 petitioner was arrested from his residence on the charge of desertion for 03 months and he was dismissed from service on 20.07.2010. Besides deserter charge, 05 other petty charges prior to his entry ban/removal from service i.e.18.11.2009 were also added. On the request of the petitioner that his appeal under Section 161(2) of the Air Force Act against the order of court martial and seeking pensionary benefits is pending before the Central Government, his petition [W.P.(C) No. 886/2010] was dismissed as withdrawn on 29.04.2011. Petitioner's representation seeking pensionary benefits was forwarded by the respondents to the appropriate authorities i.e. Jt. JAG(Air), Air HQs, Vayu Bhavan, New Delhi, as dismissed persons were delegated pension from Hon'ble The President of India.

4. The petitioner claims that his conduct remained good throughout his career, as is evident from last pay certificate dated 07.09.2011 which shows petitioner was being paid good conduct pay till 20.07.2010. The petitioner thereafter filed OA No. 42/2012 before the learned Tribunal seeking a direction to the respondents to release pension and other retiral benefits. However, the Tribunal permitted the petitioner to withdraw the said OA with liberty to make an application before the Supreme Court in his earlier petition i.e. W.P.(C) No. 7/2010. Thereafter, an application being MA No. 2739/2018 was filed by the petitioner in W.P.(C) No. 7/2010, which was disposed of by the Supreme Court holding that the order dated 51.01.2010 was crystal clear and the order dated 20.03.2018 passed by the learned Tribunal was set aside with directions to the Tribunal to hear OA 42/2012 on merits.

5. After completion of pleadings and hearing on merits, the learned Tribunal vide order dated 14.07.2020 rejected petitioner's claim for grant of pension and dismissed OA 42/2012. Even petitioner's review petition [RA No. 27/2020] was also dismissed by the learned Tribunal.

6. During the course of hearing, learned counsel appearing on behalf of petitioner submitted that denial of pensionary benefits by the Tribunal vide orders dated 04.12.2019 and 08.10.2021, has caused grave injustice to petitioner as well as his family members. It was submitted that petitioner was banned from entering into his office on 18.11.2009 and thereafter, he had first

knocked the doors of this Court by filing W.P.(C) 7/2010 on 19.12.2009 for grant of pensionary benefits, whereas petitioner was dismissed from service on 20.07.2010. It was submitted that in a few cases where there were serious allegations, even then pension benefits have been granted. Reliance is placed upon decision of this Court in W.P.(C) 1588/2013, wherein petitioners were dismissed on grave charges like corruption and anti national activities, yet pension was granted to them.

7. Learned counsel empathically submitted that during his service, petitioner had rendered operational services in Jammu and Kashmir, international borders, participation in Kargil war and parliament attack in the long span of 17 years and 276 days, for which petitioner was continuously rewarded monetarily by way of 'Good Conduct Badge Pay' till his dismissal on 20.07.2010. It was submitted that before the learned Tribunal, reliance was placed upon decisions in Union of India & Ors Vs. Devjee Mishra (2016)10 SCC 445; decision dated 23.09.2013 in W.P. (C)1588/2013 titled as Ex-Sgt RS Dwivedi Vs. UOI & Ors.; Ex-Commodore Sukhjinder Singh Vs. UOI (OA No.302/2013); Ex-Cdr Satyavir Singh Payal Vs. UOI (OA No. 27/2013) ; Ex-Nk Manoj Kumar Mishra Vs UOI & Ors. (OA No.146/2011); S Muthu Kumaran Vs. UOI (CA No.352/2017); Lt. Col.(TS) Harbans Singh Sandhu Vs UOI & Ors. (2002) 1 SCC 427, however, these decisions have not been considered in their correct perspective in the case of petitioner. Lastly, it was submitted that the impugned orders passed by the learned Tribunal deserve to be set aside and petitioner is entitled to get pensionary benefits and so, this petition deserves to be allowed.

8. To the contrary, learned Senior Panel Counsel appearing on behalf of respondents submitted that petitioner was tried by the District Court Martial (DCM) under the Air Force Act, 1950 on the following seven charges:-

(i) Deserting the Service:- The petitioner was directed to report to &&^ SU by 20.11.2009 but he did not report and absented himself and remained absent till his apprehension on 26.02.2010.

(ii) Without sufficient cause overstaying leave granted to him:- Petitioner was granted leave of absence from 30.05.2009 to 07.06.2009, however he overstayed the said leave till 26.06.2009

(iii) Using insubordinate language to his superior officer

(iv) Making a false accusation against a person subject to the Air Force Act, 1950 knowing such accusation to be false

(v) Absenting himself without leave:- Petitioner absented himself without leave from 22.10.2009 till 17.11.2009

(vi) Disobeying in such manner as to show wilfull defiance of authority, a lawful command given personally by his superior officer in the execution of his office:- The petitioner, despite directions, did not collect his movement order and proceed on posting.

(vii) An act prejudicial to good order and air force discipline

9. The petitioner was found guilty of six charges, except second, and awarded the sentence to undergo rigorous imprisonment of one year, dismissal from service and reduction in rank. However, the sentence was suspended under the orders of this Court during pendency of the appeal before the competent authority, which was disposed of on 01.09.2011. Next it was submitted that petitioner's request for grant of pension was considered by the Ministry of Defence, Government of India and was rejected vide order dated 01.09.2011. The appeal (OA NO. 74/2012) preferred by the petitioner before the learned Tribunal was also dismissed on merits vide order dated 24.05.2016. Even another appeal being OA No. 42/2012 seeking past service benefits was also dismissed by the learned Tribunal vide order dated 04.12.2019. The Review Petition being RA 27/2020 in OA No.42/2012 was also dismissed by the learned Tribunal on 08.10.2021. The writ petition being W.P.(C) 5973/2020 filed thereafter by the petitioner was dismissed by this Court vide judgment and order dated 04.09.2020, which was upheld by the Supreme Court vide order dated 30.09.2022 in SLP 360/2022.

10. It was submitted that petitioner's prayer for grant of pension was considered by the Ministry of Defence and in the present petition, nothing substantial has been put forth by the petitioner seeking interference in the grant of pension. It was submitted that in the decisions relied upon by the petitioner it was found that the punishment of dismissal was too harsh and so, a lesser punishment was awarded. It was submitted that the averments made by the petitioner are untenable and the petitioner had been an undisciplined airman who regularly exhibited scant regard for service rules and regulations and pursuant to dismissal from service, petitioner has become ineligible for service benefits like pension, gratuity etc.

11. In rebuttal, learned counsel appearing on behalf of petitioner submitted that denial of pensionary benefits to petitioner, who has given more than 15 years of service, is against the principles of natural justice. Reliance was again placed upon decision of a Division Bench of this Court in Ex. SGTR.S. Dwivedi (Supra) wherein three personnel of Air Force were given pension even upon dismissal from service. It was submitted that petitioner has huge family responsibilities and grant of pension will help the petitioner to come out of financial stress.

12. Upon hearing and on perusal of material placed before this Court we find that though various averments with regard to previous rounds of litigation between the parties have been made in the present petition, however, the issue of grant of pension was left open to be decided, which has been decided by the learned Tribunal vide order dated 04.12.2019 in OA No. 42/2012, whereby petitioner's appeal seeking pension, gratuity and other benefits including canteen, medical etc. as per his entitlement, has been dismissed while holding as under:-

"27. In the present case, the applicant challenged the punishment imposed on

him and the punishment imposed on him has been upheld not only by this Tribunal, but by the Hon'ble Supreme Court also and there is no finding recorded or decision available to show that the punishment was too harsh or disproportionate to the gravity of the offence requiring modification. That stage, in this case, has already elapsed and the punishment imposed having attained finality, none of the judgments relied upon, when the quantum of punishment has been interfered with by the Court, can be made applicable in the case of the applicant. All the cases relied upon are clearly distinguishable on facts and law. The applicant should have made a prayer in the previous proceedings when he had challenged the punishment by making an alternate prayer that even if the misconduct is proved or the allegations are correct, the punishment imposed was too harsh and the same should be interfered with. Therefore, in these proceedings, now we cannot re-open the matter and re-assess the question of proportionality or otherwise of the punishment imposed. As already indicated herein above, the statutory provision clearly contemplates that when an Airman is dismissed or removed from service, he is not entitled to pension or gratuity. In exceptional circumstances, the Statute gives discretionary power to the competent authority viz. the Hon'ble President or the Central Government to grant pension or gratuity. When the power available with the statutory authority is discretionary in nature and there is nothing to indicate that the discretion exercised is arbitrary, unreasonable or contrary to the provisions of law, no direction to exercise the discretion in a particular manner can be issued by this Tribunal. The substantive decision arrived at or the decision taken or the opinion forced by the competent authority for denying the benefit to the applicant cannot be substituted by us in these proceedings nor can we sit in judgment over the said decision unless and until the same is permissible in law.

28. In the facts and circumstances of the case on hand, we find that the relief claimed by the applicant cannot be granted by this Tribunal. Accordingly, the O.A. stands dismissed."

13. Vide order dated 08.10.2021, petitioner's review appeal being RA No.27/2020 in OA No. 42/2012 has been dismissed while holding as under:-

"The grounds canvassed for review do not fall within the principles laid down by the Hon'ble Supreme Court in the case of SASI (DEAD) Through Legal Representatives Vs. Aravindakshan Nair and Ors. [(2017) 4 SCC 692], therefore, we see no reason to interfere into the matter."

14. Pertinently, the short question for determination before this Court is as to whether post dismissal of petitioner on the charges noted herein above, petitioner is entitled to grant of pensionary benefits, which has been denied by the learned Tribunal.

15. Relevantly, it has already been observed and held in catena of decisions that in case of dismissal of an officer through court martial, benefits of pension cannot be denied.

16. To deny the pension to petitioner, the learned Tribunal has taken note of statutory provision i.e. Pension Regulations for the Air Force, 1961 (Part-I), amended and contained in the Circular dated 25.04.2001 issued by the Deputy Secretary to the Government of India, to hold that when an Airman is dismissed or removed from service, he is not eligible for pension in respect of his previous service. However, in exceptional circumstances, the President in his discretion may grant pension and gratuity to such an Airman. The Tribunal has held that if such benefits are denied by the competent authority, judicial review thereof can be sought only if erring officer has to prove that arbitrary and discriminatory treatment has been given. The Tribunal has further observed that the only discrimination petitioner has been able to rely upon are the judicial precedents.

17. On this aspect we find that prior to exercising the discretionary powers in the matter of grant of pension and other ancillary benefits, the competent authority no doubt keeps in mind the charges framed against the delinquent official, but has to also bear in mind that for the misconduct or misdemeanour the officer has already been punished by imposing penalty of dismissal from service and what is left to be taken care of is as to whether the circumstances prevalent call for interference to grant pensionary benefits to him. In the case in hand, we find that prior to his dismissal, petitioner had rendered 15 years of service in Indian Air Force and his service history sheet speaks voluminous of his services rendered, which are noted as under:-

War Service, filed service, medals decorations and mentions in despatches and commendation

Authority and effective date

Signature of the person transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

34 Wing (i)

Provisionally authorized 50 year anniversary

independence medal

POR No.73/98

dated 15.07.1997

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign (ii)

Provisionally authorized to wear "J & K" medal with

effect from 01.10.2002

01.10.2002

POR No.41S/29/07

dated 20.10.2007

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign (iii)

Provisionally authorized to wear "9 years Long Service Medal" with

effect from 15.10.2021

15.10.2001

POR No. 41S/29/07

dated 20.10.2007

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign (iv)

Provisionally authorized to wear "Desert Medal" with

effect from 01.11.1997

01.11.1997

POR No.

41S/29/07 dated 20.10.2007

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign (v)

Provisionally authorized to wear "Ops Vijay Medal" (Kargil War in 1999) with

effect from 01.07.1999

01.07.1999

POR No.

41S/29/07 dated 20.10.2007

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign (vi)

Provisionally authorized to wear "Ops

Parakaram"

13.12.2001

POR No.

41S/29/07 dated 20.10.2007

Signed by the officer transcribing the entry in appellant's
service record

Certified and signed by the officer affirming the entry in service
record.

(Parliament attack War in 2001) with
effect from 13.12.2001

CASB

(vii) Awarded 1st rate of "Good Conduct Badge Pay" with effect from
15.10.1996

15.10.1996

POR No.

CASB/97/96 dtd 15.10.1996

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

34 Wing

(viii) Awarded 2nd rate of "Good Conduct Badge Pay" with effect
from 15.10.2000

15.10.2000

POR No.

34W/99/00 dtd

15.10.2000

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

41 Sign

(ix) Awarded 3rd rate of "Good Conduct Badge Pay" with effect

from 01.03.2005

01.03.2005

POR No.41S/05/07

Signed by the officer transcribing the entry in appellant's service record

Certified and signed by the officer affirming the entry in service record.

18. We also cannot lose sight of the fact that time and again petitioner had been writing and making representations vide communications dated 03.07.2008; 08.10.2008; 20.03.2009 to the respondents seeking voluntary retirement, which were rejected. Instead, petitioner was posted at Air Force Station, Bitha, Patna where he was reluctant to join. No doubt an employee especially an officer of the Force cannot be permitted to work at his whims and fancies and seeking a discharge from service or voluntary retirement is not a matter of right but for lapse of his duties, grave charges have been framed against the petitioner and while holding him guilty, he has been dismissed from service. While sitting in writ jurisdiction of this Court, we do not concur with the opinion of the Tribunal that the petitioner has solely based upon the judicial precedents, however, has ignored the plea of petitioner that his financial condition is very bad and he has responsibilities of three children, who are school going, apart from an unemployed wife.

19. Before this Court, petitioner has heavily relied upon decision of this court in R.S.Dwivedi (Supra) to submit that despite infliction of grave charges, petitioners therein were granted pensionary benefits. The learned Tribunal on decision in R.S.Dwivedi (Supra) has observed as under:-

"21. The next case, the applicant referred to was a Division Bench judgment dated 23.09.2013 in Ex. Sgt. R.S.Dwivedi V Union of India and others which was filed against the decision of this Tribunal in O.A. No. 33/2013 rejecting the claim of the petitioner for grant of pension and other benefits. The High Court did not grant any relief to the petitioner therein, but only granted him liberty to submit a representation for grant of pension and the competent authority was directed to consider and take a decision on his representation taking into account the benefits granted to the two persons referred to in the judgment. This case also, in our considered opinion, is of no help to the applicant"

20. The learned Tribunal has observed that the this Court in R.S.Dwivedi (Supra) had only granted opportunity to the petitioners therein to make a representation to the competent authority and were not granted direct pensionary benefits by the Court. However, during the course of hearing, learned counsel for petitioner had drawn our attention to a reply obtained under the Right to Information Act, 2005 from Directorate of Personal Services, Air Head Quarters dated 10.09.2020 to show that Ex. SGT R.S.Dwivedi has been granted 60% pensionary benefits; Ex. Sgt K.C Saini has been granted 70% pension and Ex. Wg. Cdr. B.D. Jena has been granted 90% pension, despite having graver charges against them. In the considered opinion of this Court, keeping in view the totality of circumstances

and the fact that petitioner who was dismissed from service, has three school going children and housewife, petitioner deserves pensionary benefits for the services rendered.

21. Accordingly, the present petition is allowed. The respondents are directed to forthwith release pension benefit to petitioner within four weeks.

22. With directions as aforesaid, the present petition and pending application, if any, are accordingly disposed of.