

(2001) 10 BOM CK 0076

In the Bombay High Court

Case No : Writ Petition No's. 4721, 4722, 4799, 4801, 4808, 5880 and 5902 of 1999 and Writ Petition No's. 766-776, 782, 799, 801, 874, 1009, 1033, 1049, 1050, 1053-1056, 1235, 1291, 1292, 1404, 1445, 1447-1449, 1471-1774, 1811-1813, 1822-1824, 1848, 2071, 2289 wi

Onkar Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-10-2001

Acts Referred:

Navy (Ceremonial Conditions of Service and Miscellaneous Provision) Regulations, 1963 — Regulation 268(1), 269

Navy Act, 1957 — Section 11, 184

Navy Service Pension and Gratuity Pension Regulations, 1964 — Regulation 78, 79

Citation : (2002) 2 BomCR 247

Hon'ble Judges : A.P. Shah, J; A.M. Khanwilkar, J

Bench : Division Bench

Advocate : M.N. Bhatkal, P.L. Naik and Shyam Mehta, instructed by Satendra Kumar, in W.P. No. 2289 of 2000, for the Appellant; Ashok H. Bathija, S.M. Shah and S.M. Shah, R.C. Master and R.K. Sharma, in W.P. No. 2289 of 2000, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Shah, J.—These writ petitions under Article 226 of the Constitution involve common question relating to the right to receive pension and since this question is common to all the writ petitions, they are being disposed of by this common order.

2. The petitioners were sailors. They joined the services of the Indian Navy as Artificer Apprentices for a period of 15 years from the date of their respective appointments. They were discharged from service on different dates before completion of 15 years of service. The petitioners had completed 14 years of service at the time of discharge. The question involved in these petitions is whether the petitioners are entitled to pension under Service Pension and

Gratuity Pension Regulations (Navy), 1964 hereinafter referred to as "the pension regulations".

3. The terms and conditions of service of sailors such as petitioners are governed by the Navy (Ceremonial Conditions of Service and Miscellaneous Provision) Regulations, 1963, hereinafter referred to as the "Regulations" which were framed u/s 184 of the Navy Act, 1957, hereinafter referred to as the Act. Section 11 relates to the enrolment of sailor. Section 11(2) of the Act, as it stood at the material time, prescribed that:

Section 11: Enrolment---

(1)

(2) No person shall be enrolled as a sailor in the Indian Navy for a period exceeding fifteen years in the first instance provided that in the case of a minor the said period of fifteen years shall be reckoned from date on which he attains the age of eighteen.

(3)

4. Similarly, the Regulations contain corresponding provisions in Regulation 268(1) and Regulation 269(1A). Regulation 268(1) provides "Boys, Artificer Apprentices and Direct Entry sailors shall be enrolled for continuous service as provided in sub-regulation (1) of Regulation 269". In 1978, Regulation 269(1) was replaced by Regulation 269(1A) which provides for "New Entrants" and the said reads as follows:

"(a) Boys, Artificer Apprentice and Direct Entry sailors may be enrolled for a period calculated to permit a period of 15 years service to be completed from the date of enrolment or from the date of attaining the age of 17 years, whichever is later, provided their services are so long required".

5. At the end of the period of initial engagement or enrolment for continuous service, a sailor is entitled to be discharged. Thus section 16 of the Act provides:

Discharge on expiry of engagement-

Subject to the provisions section 18, a sailor shall be entitled to be discharged at the expiration of the term of service for which he is engaged unless---

(a)

(b) he is re-enrolled in accordance with the regulations made under this Act.

Re-enrolment of sailors such as the petitioners is provided in Regulation 268 sub-regulations (2) and (3)(a) and (b).

6. The period of service necessary to qualify for pension is contained in Regulation 78 of the Pension Regulations. Regulation 78 says "Minimum Qualifying Service for Pension: Unless otherwise provided, the minimum service

which qualifies for service pensions is fifteen years".

7. Till 1996 the respondents proceeded on the basis that the period of training would not be counted in calculating the 15 years of service required to be completed for pension. It seems that the circular dated 27-2-1984 was issued by the respondents wherein it was clearly stated that the period of service as Artificer Apprentice did not qualify as pensionable service. Before expiry of engagement of each of the petitioner, the Navy issued Expiry of Engagement Serial (EES) wherein it was also stated that the petitioners were required to serve in the Navy for a further period of 5 years to be eligible for pension and pursuant thereto the petitioners communicated to the respondents a formal declaration of their unwillingness to serve further.

8. A sample declaration in the case of petitioner in Writ Petition No. 776 of 2000 is reproduced below:

"(i) I understand that I am required vide COMBRAX (DR) letter/signal EES---3/78 dated 28th March, 78 to sign for further service.

(ii) I hereby declare that I am unwilling to sign for further service and wish to be released from the service on completion of my present engagement.

I fully, understand that consequence of this declaration will be that any subsequent application from me for re-engagement will not be entertained."

It seems that practically all the petitioners have given such undertakings/declarations indicating their unwillingness to work in the Navy.

9. On 28-11-1996, the Supreme Court in Anuj Kumar Dey and Another Vs. Union of India (UOI) and Others, , held that there was no basis for the Naval authorities for not counting the training period as service for the purpose of pension. It was observed that "Qualifying period of earning pension is the service of 15 years under the Navy....There is little doubt that training period as Artificer Apprentice will have to be included in the computation of the qualifying period of service."

10. Relying on the above decision in Anuj Kumar Dey's case it is contended by the petitioners that at the time of expiry of the initial engagement of each of the petitioner, it was presumed by the authorities that they require minimum 5 years service in Navy for the purpose of pension. It is contended that the representation was made under a mistaken belief that the period of 4 years of service of the petitioners as Artificer Apprentices in the Navy was not liable to be counted while computing the qualifying service for pension. If the service rendered by each of the petitioners as Artificer Apprentice was taken into consideration, then the petitioners required less than a year's service in Navy for completing 15 years of service for being eligible for pension. It is contended that the representation of the respondents that the petitioners would be required to serve for 5 years to complete the qualifying service for pension was a misrepresentation and it was on the basis of this misrepresentation, the

petitioners did not re-engage in the Navy to complete the qualifying service for pension which was 1 year or less in the case of each of the petitioner and completed 15 years of service was the qualifying service period for pension. It is, therefore, contended that the petitioners should be deemed to have completed the qualifying service of 15 years. In the alternative a direction is sought to re-engage the petitioners and to continue them in service for one year or for the necessary period to complete the minimum qualifying service period of 15 years for the payments of pensionary benefit.

11. In the counter reply filed on behalf of the respondents, it is submitted that all the petitioners had been released from Navy according to their requests. If the petitioners are released for their own benefit from Navy they cannot blame the respondents for their short fall in service to become eligible for pension. It is submitted that due to categorical refusal of the petitioners to serve the Navy further, the respondents had no alternative but to discharge them from service on expiry of their engagements. It is submitted that under Regulation 82 discretion is vested in the competent authority to exercise the power of condonation of deficiency in service upto the period of six months only.

12. With regard to the Supreme Court decision in Anuj Kumar Dey's case it is submitted that the respondents bona fide held the view that first four years of service as Artificer Apprentice i.e. training period was not to be taken into account. It is submitted that the said policy decision cannot be termed as misrepresentation. It is submitted that re-engagement or release from the Navy cannot be claimed by the sailor as a matter of right. This has to be decided by the competent authority keeping in view, all the relevant factors. It is also submitted that the petitions suffer from gross laches and delays. It is pointed out that some of the petitioners were released from Navy about 20 years back. It is therefore, submitted that the petitioners are not entitled to pension as they have not completed the qualifying service 15 years.

13. Mr. Shyam Mehta and Mr. M.N. Bhatkal learned Counsel for the petitioners submitted that in view of the decision of the Supreme Court in the case of Anuj Kumar Dey four years service period of each petitioner as Artificer Apprentice was required to be counted while computing the qualifying service period for pension and if this period was counted then the petitioners required less than a year's service in Navy for completing 15 years of service for being eligible for pension. It is submitted that the respondents wrongly advised the petitioners that to complete qualifying service for pension they were required to serve 5 more years in Navy when in fact the petitioners required maximum of one year's service each in Navy. Due to this misrepresentation the petitioners did not re-engage in Navy to acquire qualifying service period for pension. It is submitted that in a case where a party is induced to enter into a contract on the basis of misrepresentation, the party is not only entitled to rescind the contract but also to restoration of the status quo ante. In the instant case though there is no question of rescission there is certainly the question of restitution to the

petitioners. The only manner in which this can be done is by putting the petitioners in the same position that they would have been had there not been any misrepresentation on the part of the respondents. In other words the petitioners should be treated as having re-engaged for a period of one year and as having completed the 15 years service period qualifying for pension. It is submitted that in any event the respondents should be directed to re-engage the petitioners and to continue in service for one year or for necessary period to acquire the maximum qualifying service period of 15 years for availing pensionary benefit. Reliance is placed on an unreported decision of the Division Bench of this Court in *Nirvair Singh v. Union of India and others*, decided by M.B. Shah, C.J., as he then was, and Sakhare J., in Writ Petition No. 166 of 1990 dated 4/6th March, 1998.

14. Mr. Master and Mr. Rao learned Counsel appearing for the respondents on the other hand contend that it is abundantly clear that the petitioners have not acquired qualifying service of 15 years required for getting pension. All the petitioners have been released from the Navy as per their desire. If the petitioners opt for release from the Navy for their own benefit they cannot seek any directions against the respondents for re-engaging them and allow them to continue to complete 15 years to become eligible for pension. It is submitted that release and/or re-engagement in Navy is not a matter of course. In this connection the learned Counsel referred to the decision of the Supreme Court in *Union of India and Others Vs. R.P. Yadav*, . A reference is also made to the decision of the learned Single Judge of the Delhi High Court in *Ex. Chera Balwan Singh v. Union of India and others*, dated 29-3-2000 in C.W.P. No. 4848 of 1996. According to the learned Counsel even otherwise the writ petitions are liable to be dismissed for delay and laches.

15. There is no dispute that the apprentice training period is now countable towards qualifying service for pension. This is established position in law as settled by the Supreme Court in the case of *Anuj Kumar Dey*. This is even admitted by the respondents in their affidavit in reply. If 4 years period spent by the petitioners as Artificer Apprentice is counted the total service rendered by them comes to 14 years or more. Both parties agree that this is the service rendered by the petitioners. The question which falls for consideration is whether on rendering this service, petitioners are entitled to pension.

16. The petitioners have heavily relied upon the judgment of the Division Bench in the case of *Nirvair Singh* (supra). In that case the petitioners had approached this Court seeking to quash and set aside the order discharging them from service and to continue the petitioners in service for one year or for the necessary period to complete the minimum qualifying service period of 15 years for the payment of pensionary and death cum gratuity benefits. In *Nirvair Singh*'s case the petitioners had shown their willingness to complete their service of 15 years and in order to show that the petitioners were ready and willing to complete 15 years, specific prayer was made in the petition to permit

the petitioners to re-engage in service. The petitioners had also sought directions to continue them in service till they fulfil qualifying period of service for pension. It appears that the Court had not granted interim relief and as interim relief was not granted discharge certificates issued by the respondents were implemented. This is apparent from the following observations:

"In order to show that the petitioners were ready and willing to complete their service of 15 years, the learned Counsel for the petitioners pointed out the submissions made in the petition as well as the prayer clauses and specifically pointed out that at the time of admission of the petitions, the petitioners have requested the respondents not to discharge them at the end of January 1990 but to permit them to continue in service till they fulfil the qualifying period of service for pension. It is admitted that at the time of admission of the matters, as the appeal was pending before the Supreme Court, the Court had not granted interim relief. As interim relief was not granted, the discharge certificate issued by the respondents was implemented. The discharge certificate which is granted to the petitioner in Petition No. 166 of 1990 is as under:

"This is to certify that Nirvair Singh, Chief Electrical Artificer 202349-K has served in the Indian Navy from 8th January, 1975 to 31st January, 1990 as per details overleaf "

Similar discharge certificates are granted to all the petitioners. As per the discharge certificate, the reason for discharge is "on expiry of engagement". From this discharge certificate, it is apparent that all the petitioners were discharged on the ground that their term of engagement has expired".

17. In the light of the above facts the Division Bench held as follows:

"15. In this view of the matter, in our view, it is apparent that the stand taken by the department that the petitioners were not entitled to complete the remaining period of service so as to qualify for grant of pension is apparently illegal and in violation of the instructions issued by the Chief of the Naval Staff on 9th August, 1976. It appears that the department was under a misconception that the period of service when the petitioner was working a boy or Artificer Apprentice would not be taken into consideration so as to qualify it for pension and gratuity. As the re-engagement for limited period was refused to the petitioners, the petitioners approached this Court with a specific prayer, that the respondents be directed to re-engage the petitioners to continue in service for one year or for the necessary period to complete the minimum qualifying service period of 15 years for the purpose of pensionary and death cum gratuity benefits in terms of Regulations 78 and 79 of the Pension Regulations. As stated above, at the time of admission this prayer was not granted as the matter was pending before the Apex Court.

16. After the Apex Court's judgment it is clear that the period during which the petitioners were employed as Artificer Apprentice is required to be computed for pension and gratuity. Further, as per circular dated 9th August, 1976 the petitioners were required to be given chance of getting re-engagement for a

limited period so that they can complete the qualifying service for pension. However, petitioners were not permitted to complete 15 years of service and they were illegally discharged. The petitioners also sought interim relief, but that was also opposed at that time on the ground that the main question was pending before the Apex Court. Hence, for no fault of the petitioners and for the fault of the respondents, the petitioners were not permitted to complete 15 years of qualifying service. In such a situation, the only way which is open is to direct the respondents to consider that the petitioners have completed the qualifying service of 15 years for the purpose of getting pensionary benefits, as the petitioners were not permitted to get re-engagement for a limited period because of the wrongful insistence by the respondents that they must accept re-engagement for a period of five years. Further, the regulation itself empowers the competent authority to condone the deficiency in service for eligibility to service pension upto a period of six months. We would further note that in Writ Petition Nos. 166, 171, 221, 223, and 365, all of 1990, 268 and 312 of 1991, the seven petitioners would have completed 15 years of service if their service prior to attaining the age of 17 years is taken into consideration. With regard to the remaining ten petitioners in Writ Petition Nos. 164, 165, 168, 169, 170, 172, 222, 224, 225 and 369, all of 1990, if their service prior to the age of 17 years is taken into consideration, they would have completed more than 14 years of service. If the said period is not taken into consideration, they have completed more than 13 years and 6 months of service or 14 years and few days in some cases. For the aforesaid reasons, it is directed that the petitioners be considered to be in service for a period of 15 years for the purpose of getting pensionary benefits as at this stage, after lapse of 8 years, it would not be proper to direct the petitioners to serve the Navy for the remaining period by opting re-engagement for one year or few months more."

18. It would be clear from the aforesaid observations that the main question to be decided by the Court was as to whether the petitioners were entitled to serve for the remaining period to enable them to complete the shortfall in the minimum qualifying period of service for the purpose of getting pensionary benefits and death cum gratuity in terms of Regulations 78 and 79 of the pension regulations. The petitioners in the said petitions had in fact requested the respondents to allow them to complete the period but the respondents were insisting for re-engagement for a period not less than 5 years. The Court observed that it was the fault of the respondents in not allowing them to do so and in this context the Court directed that the petitioners be considered to be in service for a period of 15 years for the purpose of getting pensionary benefits as no useful purpose could be served in directing the petitioners to serve for remaining period by opting re-engagement for one year or few months more after a lapse of 8 years. The judgment does not lay down that in all cases where the sailors had completed 14 years of service it shall be presumed that they had completed requisite number of years of service as per the pension regulations and the authorities should grant them pensionary benefits. In *Nirvair Singh's*

case the petitioners wanted to complete the period of 15 years for service by serving for remaining period in order to earn the pensionary benefits. In fact the prayer was for permitting the petitioners to continue in service but since no interim relief was granted petitioners were discharged from service. It is therefore not possible to apply the ratio in the decision of the Division Bench to the facts and circumstances of the present case where the petitioners had taken discharge from service on their own volition. Therefore, in our opinion the decision in Nirvair Singh's case is of no assistance to the petitioners.

19. In the case of *Union of India v. R.P. Yadav* (supra) the question that fell for determination before the Supreme Court was whether an Artificer Apprentice of Indian Navy who has been given a re-engagement for a certain period after obtaining his consent for it is entitled to withdraw the consent and demand his release from the force as of right. In that case the petitioners were working as Artificer Apprentices and before the expiry of the period of initial engagement for a maximum period of 15 years they exercised option for re-engagement for a further period of 4 years and signed requisite papers. The option was accepted and re-engagement was approved by the competent authority. Thereafter the respondents made a request for withdrawal of their option for re-engagement and cancellation of the order which was turned down by the Naval authorities. The main contention raised by the respondents in support of their case was that they had given their option for re-engagement under the impression that the period of 4 years of initial training after appointment was not to be counted for the purpose of qualifying service for pension and therefore they had to serve for four years more to earn pension under the rules. However, the Supreme Court in *Anuj Kumar Dey*'s case ruled that the period of initial training is also a part of qualifying service for the purpose of pension. The contention of the respondents was that in view of the change in the legal position brought about by the decision of the Supreme Court it is no more necessary for them to continue in service and they should be released from the service with all retiral benefits with immediate effect. The Supreme Court after examining the provisions of the Navy Act and the Regulations and Navy orders held that the sailors cannot seek release from re-engagement as a matter of right. In that regard the following observations of the Court are pertinent:

"23. As noticed earlier in section 16 of the Act a provision is made that a sailor shall be entitled to be discharged at the expiration of the terms of service for which he is engaged. One of the circumstances when this general rule shall not apply is that he is re-enrolled in accordance with the requirements made in the Act. No provision in the Navy Regulations, 1965 has been brought to our notice which expressly or by implication provides that a sailor can at any time during the subsistence of period of re-engagement demand release from service. On the contrary a fair reading of the provisions of the regulations shows that a very high standard of discipline is to be maintained by members of the Naval Force including sailors...."

"24. An incidental question that arises is whether the claim made by the respondents to be released from the force as of right is in keeping with the requirements of strict discipline of the Naval Service. In our considered view the answer to the question has to be in the negative. To vest a right in a member of the Naval Force to walk out from the service at any point of time according to his sweet will is a concept abhorrent to the high standard of discipline expected of members of defence services. The consequence in accepting such contention raised on behalf of the respondents will lead to disastrous results touching upon security of the nation. It has to be borne in mind that members of the defence services including the Navy have the proud privilege of being entrusted with the task of security of the Nation. It is a privilege which comes the way of only selected persons who have succeeded in entering the service and have maintained high standards of efficiency. It is also clear from the provisions in regulations like Regulations 217 and 218 that persons who in the opinion of the prescribed authority, are not found permanently fit for any form of naval service may be terminated and discharged from the service. The position is clear that a sailor is entitled to seek discharge from service at the end of the period for which he has been engaged and even this right is subject to the exceptions provided in the regulations. Sub provisions, in our considered view, rule out the concept of any right in a sailor to claim as of right release during subsistence of period of engagement or re-engagement as the case may be. Such a measure is required in the larger interest of the contrary. A sailor during the 15 or 20 years of initial engagement which includes period of training attains a high degree expertise and skill for which substantial amounts are spent from the exchequer."

20. As regards the contention of the respondents that they agreed for re-engagement only for the reason that they were not eligible to receive pension under the Navy (Pension) Amendment Regulations, 1982 and since that provision no longer holds good in view of the decision of the Apex Court in Anuj Kumar Dey's case the Supreme Court observed as under:

"..This contention is wholly unacceptable and has to be rejected. Reasons for which a sailor may exercise option for re-engagement may be very many. Such reasons will vary from person to person. No provision in the Act or Regulation has been placed before us which shows that the sailor is required to state the reason in support of the option given by him for re-engagement. Therefore, the reason which played in the mind of the sailor concerned to exercise option in favour of re-engagement is not relevant for determination of the question raised in the case. In that view of the matter the decision of this Court in Anuj Kumar Dey and Another Vs. Union of India (UOI) and Others, is of little assistance to the respondents in the case. All that was decided by this Court in that case is that the training period as Artificer Apprentice, will be included in the computation of the qualifying period of service for earning pension for the reason that during the period of training as Artificer Apprentice the sailor was in the service of the Navy. This Court did not consider any other question which may have a direct or indirect bearing on the controversy raised in the present case. It follows that the

decision of this Court in Anuj Kumar Dey's case (supra) cannot provide a legitimate basis for claim of the respondents to be discharged from the Naval force as a right."

21. It is thus apparent that the sailor is not required to state reasons for discharge from the Navy. The reasons for which sailor may give option for release will vary from person to person. Therefore it is difficult to hold that the petitioners opted for discharge only on account of representation made by the respondents that the petitioners would be required to render 4 years service, as the service period of Artificer Apprentice was not available to them. In these circumstances it is not possible to accept the submission of the petitioner's Counsel that the petitioners should be deemed to have completed service of 15 years.

22. The next submission of the learned Counsel for the petitioners is that in any event the respondents should be directed to allow the petitioners to rejoin Navy and render requisite service to enable them to earn pension. It is seen from the provisions of the Act and the Regulations as well as Navy order that re-engagement cannot be claimed as a matter of right. Re-enrolment of sailors such as the petitioners is provided for in Regulation 268 sub-regulations (2) and (3) (a) and (b). The said regulation reads as follows:

"268. Engagements.---(2) Re-enrolment of continuous service sailors shall be as provided in sub-regulation (3).

(3)(a) Except as provided in Regulation 270, continuous service men who, after completing the period of their initial continuous service enrolment, volunteer and permitted to continue to serve, shall, subject to the provisions of Regulation 269(2), be enrolled by the Captain Naval Barracks, for a period not exceeding that required to complete the service necessary to qualify for the minimum pension. In exceptional cases, however, where the exigencies of the service so warrant, the prior sanction of the Chief of the Naval Staff may be obtained instead for the re-enrolment of the sailor for period not exceeding 8 years.

3(b). Re-enrolment after completing the necessary qualifying service for minimum pension, shall normally be allowed for a period not exceeding 2 years at a time subject to the proviso to Explanation (ii). Such re-enrolment for the first spell of 2 years shall be made by the Captain Naval Barracks, Bombay, but further re-enrolment of two years at a time may be made by the Captain Naval Barracks with the prior approval of the Chief of the Naval Staff. In cases, however, where the exigencies of service so warrant, re-enrolment on completion of the necessary qualifying service for minimum pension for a period not exceeding 5 years at a time may be made, subject to the proviso in Explanation (ii) by the Captain Naval Barracks, with the prior approval of the Chief of the Naval Staff".

23. The power to re-engage sailor is discretionary power. The Court cannot compel the Naval authority to re-enrolment the petitioners for the purpose of

allowing them to acquire pensionable service. Since discretion in this respect is vested with the competent authority which is to be exercised on the facts and circumstances of a particular case and on the basis of the Regulations and Navy orders, this Court cannot give any directive to the respondents to re-engage the petitioners in Navy. If the petitioners are desirous for re-engagement in the Navy they are free to apply to the competent authority for that purpose and the competent authority will deal with such application in accordance with law within a period of three months from the receipt of such application.

24. In the result, in view of the forgoing discussion prayer of the petitioners to direct the respondents to pay pension is rejected. The petitioners are at liberty to make application for re-employment and the same will be considered by the authority concerned in accordance with law.

25. Writ petitions are disposed of.