

APP  
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ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

Transferred Application No. 799 of 2010

Tuesday this the 22<sup>nd</sup> day of March, 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)  
Hon’ble Lt. Gen. P.R.Gangadharan, Member (A)”

Ram Chandra Arya, son of late Shyam Lal,  
House No.87, Topkhana, Lalkurti, Kanpur Nagar,  
Ex. Service No. 675582 H, Arya R.C. Sergeant,  
Trade MT.D, Unit 51 A.S.P. Air Force,  
C/O 99 A.P.O.

**Applicant**

By Legal Practitioner Shri V.P.Pandey, Advocate.

**Versus**

1. The Chief of Air Staff,  
Air Headquarters Vayu, New Delhi.
2. The Air Officer Commanding Air Force Records Officer,  
New Delhi-10.
3. The Commanding Officer, 51 A.S.P, Air Force,  
99 A.P.O.
4. Union of India, through Secretary, Ministry of Defence,  
Govt. of India.
5. The Assistant Adjutant, 51 A.S.P., Air Force, C/O 99 A.P.O

Sec. order dt 17/4/11  
gaur  
25/4/11

**Respondents**

By Legal Practitioner Sri Raj Kumar Singh, Central  
Government Counsel.

**ORDER**

“Hon’ble Mr. Justice Janardan Sahai”

1. The applicant Ram Chandra Arya was enrolled in  
Air Force as MT.D on 24.06.1980. His term of  
engagement was for a period of 20 years colour service  
and 6 years in reserve. The term of the colour service was

to come to an end on 23.06.2000. The applicant was promoted as Sergeant in the year 1998 and the next promotion for which he was eligible was to the rank of JWO. Before his term of engagement could come to an end, the applicant applied for extension of 6 years service in November, 1998 in view of the policy dated 06.11.1995 of Air Headquarters as modified by letter dated 19<sup>th</sup> December, 1997 of Air Headquarters Vayu Bhawan, Annexure R-2 and R-3 to the Counter Affidavit. Under clause (d) of that policy, one of the conditions for grant of extension is that the individual should have cleared the Promotion Examination (Part I and II in case of the applicant) three months before the term of his engagement is to come to an end. The relevant portion of the policy Annexure R-3 is quoted below:

*“ (d) Passing of Examinations: Extension of Engagement will be granted to only those Airmen who have passed all parts of their promotion Examinations which make them eligible for Promotion to their next higher rank. However, those airmen who have already appeared in promotion examinations before submission of their applications for grant of extension or are likely to appear at such promotion examinations which will make them eligible for promotion to the next higher rank may be considered for grant of Extension of Engagement provided they pass the promotion examinations three months prior to the expiry of their regular engagement. Airmen who do not attain the rank of Cpl within 12 yrs will be discharged by AOIC Records subject to AFI 12/S/48 being amended.”*

2. The applicant had already appeared in the JWO Part I Promotion Examination in March, 1998 and had cleared the same. He appeared for the JWO Promotion

Examination Part II in July,1999 but failed. He again appeared in JWO Part II Promotion Examination on 12.01.2000. The result of the examination was declared on 15.04.2000 and the applicant was declared passed. The applicant, however, was not granted extension of service on the ground that he had not cleared the Promotion Examination at a point of time more than three months before the date his engagement was to come to an end. Consequently, the applicant was discharged from Air Force service on 30<sup>th</sup> June, 2000, the last date of the month in which his term of engagement was to come to an end. The applicant filed Writ Petition No.51813 of 2000 in the Allahabad High Court, the papers of which have been transmitted to the Tribunal in view of the provisions of section 34 of the Armed Forces Tribunal Act,2007.

3. We have heard Sri V.P.Pandey on behalf of the applicant and Sri Raj Kumar Singh, Central Government Counsel on behalf of the respondents.

4. Learned counsel for the applicant submitted that the applicant had appeared in the JWO Promotion Examination Part II in January,2000, which is more than three months before the expiry of the term of his engagement and the applicant ought not to have been deprived of being considered for extension only on the ground that the result was not declared more than three months before the term of his engagement was to come to an end. He submitted that para 4(d) of the policy ought to

be read in liberal terms. In support of his contention, learned counsel for the applicant relied upon the decision of the Karnataka High Court in *Sergeant Tiwari R.K. vs. Union of India and others*: Writ Petition No.56 of 2006, decided by a Single Judge of the High Court on 19.06.2006. The copy of that judgment has been annexed with the supplementary affidavit filed by the petitioner. The case of **R.K.Tiwari** appears to be similar to that of the applicant. R.K.Tiwari had also been enrolled in the Air Force service in the year 1980 and was due to be discharged on 30.06.2000. He had also cleared Part II JWO Promotion Examination and his result was declared on 15.04.2000 alongwith that of the applicant. The Karnataka High Court took the view that para 4(d) of the policy has to be liberally construed and allowed the writ petition of R.K.Tiwari in the following terms:

*“Hence, the petition is allowed. The impugned endorsement Annexure “D” is quashed. Consequently Annexure “H” and “L” are also quashed. The respondents are directed to consider the case of the petitioner for grant of extension of service by holding that the petitioner had passed the promotional examinations in compliance with clause (d) of Item No.4 of the Air Force Order, even though apparently the result was announced 2 months 16 days before the expiry of regular term of engagement and provide for extension of service after promotion as Junior Warrant Officer. However, insofar as the petitioner’s claim for wages during the period that the matter was in dispute cannot be taken into consideration. The respondents shall comply with the order within a period of three months from the date of receipt of certified copy of this order.”*

A Division Bench decision of the Delhi High Court in *Sgt. Shukla PA vs. Union of India and others*: Writ Petition No.5240 of 2002 was also relied upon by the Karnataka High Court.

We are also of the view that condition 4(d) ought to be read liberally and the applicant's case for extension of service ought not to have been refused only on the ground that he had not cleared the JWO Promotion Examination more than three months before the expiry of his term of engagement when he had appeared in the examination in January, 2000.

5. It has been stated by the learned counsel for the parties that if the extension had been granted, the applicant would have continued for six more years of service i.e. till 30<sup>th</sup> June, 2006. In the case of the present applicant, this period has already run out during the pendency of this litigation. In the circumstances, relief of actual reinstatement in service cannot be granted. The respondents would, therefore, have to consider the case of the applicant for grant of extension and for notional promotion to the rank of JWO in terms of the policy letter dated 06.11.1995 as modified by letter dated 19<sup>th</sup> December, 1997(Annexure R-2 and R-3) and the relevant promotion policy.

6. Learned counsel for the applicant submitted that the applicant should also be given salary for the six years' period, in case he is found to be entitled to the extension.

The Karnataka High Court, however, has not granted this claim and has observed "However, insofar as the petitioner's claim for wages during the period that the matter was in dispute cannot be taken into consideration."

We have considered this question <sup>X</sup> even though the Karnataka High Court has not granted this relief. It appears that JWO promotion examination is held every year. In para 12 of the Counter Affidavit it is stated:

*"12. That contents of para 10 to 12 of Writ Petition are not admitted in the manner stated hence denied. It is submitted that petitioner was promoted to the rank of sergeant on 1 Oct. 92. However, he did not pass the requisite JWO promotion examination from the year 1992 to 1999.*

*It is pertinent to mention that the petitioner had more than 7 years at his disposal to pass the examination which he did not do so. Further, our comments on para 3 above are hereby reiterated."*

We find on facts that that JWO Promotion Examination Part II was taken by the applicant on 12.01.2000 and result was declared in April,2000. There is no material to indicate that there was any unreasonable delay on the part of the respondents in declaring the result. In our opinion the question of grant of salary for the period he has not worked is linked to the question whether the applicant was deprived of serving during the period in question on account of any fault on the part of

the Respondents. If Para 4(d) of the policy is strictly applied to the case of the applicant, he was not eligible for extension. The applicant has been granted benefit of liberal construction and application of the policy. The policy itself has not been challenged. The period of three months in para 4(d) appears to have been provided by modification made by letter dated 19.12.1997 to ensure reasonable time to the authorities to consider the case of extension. We have already found that there is no material to indicate any delay on the part of the Respondents in declaring the Result. It also appears that clearing the JWO promotion examination does not by itself entitle the applicant to be granted extension of service or promotion to the rank of JWO. Other factors mentioned in the policy including ACR/Assessments for last five years, suitability etc. have to be considered. It is only if the applicant is found fit in terms of the policy that he would be granted extension of service/promotion. The normal term of engagement of the applicant had come to an end and there was no order extending his services. In such circumstances, it cannot be said that though the applicant was willing to work, the Respondents had unjustifiably refused to allow him to do so. In *State of Haryana v. O.P. Gupta, (1996) 7 SCC 533*, the Apex Court dealing with a similar situation observed in para 6 of the reports as follows:

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“6. Having regard to the above contentions, the question arises whether the respondents are entitled to the arrears of salary? It is seen that their entitlement to work arises only when they are promoted in accordance with the Rules. Preparation of the seniority list under Rule 9 is a condition precedent for consideration and then to pass an order of promotion and posting to follow. Until that exercise is done, the respondents cannot be posted in the promotional posts. Therefore, their contention that though they were willing to work, they were not given the work after posting them in promotional posts has no legal foundation. The rival parties had agitated their right to seniority. Ultimately, this Court had directed the appellant to prepare the seniority list strictly in accordance with Rule 9 untrammelled by any other inconsistent observation of the Court or the instructions issued in contravention thereof. Since the order had become final in 1990, when the appeal had been disposed of by the Court by the above directions, the State in compliance thereof prepared the seniority list in accordance with the Rules and those directions and promotions were given to all eligible persons and postings were made accordingly on 1.12.1992. In the interregnum some had retired. As stated earlier, though the deemed date has been given as 1-1-1983, the respondents cannot legitimately claim to have worked in those posts for claiming arrears and, as a fact, they did not work even on ad hoc basis.”

6. The issue regarding payment of salary in such situations where notional promotion etc. is granted has also been considered by the Apex Court in several decisions. In *Union of India vs. B.M.Jha, (2007) 11 SCC 632*, the Supreme Court held that where notional promotion with retrospective effect was being granted, the back wages were not admissible on the principle of ‘no work, no pay’. The Apex Court followed its previous decision in *State of Haryana v. O.P. Gupta, (1996) 7 SCC*

533 and *A.K.Soumini v. State Bank of Travancore*,  
(2003) 7 SCC 238. Portion of para 9 of the Reports in

*A.K.Soumini* is quoted below:

*“ The fact that her non-promotion was legal and there has been no unlawful interference with her right to promotion or to serve in the promoted category was obvious and could not be minced over or completely ignored in the light of the judgment of this Court, allowing the appeal by the Bank. While that be the position, the grant of relief to her, keeping in view the delay merely due to pendency of proceedings before court, was more in the nature of a gesture of gratis and not by way of any right, to which she was found to be entitled to. Consequently, the notional promotion given to her by the Bank with suitable revision of her pay scales itself is more than sufficient to meet the requirements, be it either in law or in equity. The further claim for payment of arrears as well is far-fetched and can have no basis in law.”*

7. Learned counsel for the applicant relied upon the

Apex Court’s decision in *Commissioner, Karnataka*

*Housing Board v. C.Muddaiah*, (2007) 7 SCC 689. In

that case it was held that even in absence of statutory provision, normal rule is ‘no work no pay’. In appropriate cases, however, a court of law may, *nay* must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but he was illegally and unlawfully not allowed to do so.

It was also held that it cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a court of law and if such directions are issued, the authority can ignore

them even if they had been finally confirmed by the Apex Court of the country. The case does not much advance the case of the applicant in view of our finding upon the question regarding reasonableness of the conduct of the respondents in not taking work from the applicant.

8. Learned counsel for the applicant relied upon the decision of the Apex Court in *State of Kerala and others v. E.K.Bhaskaran Pillai, (2007) 6 SCC 524*. On a consideration of the case law, it was held by the Apex Court that no hard and fast rule can be laid down and each case would have to be decided on its own facts. We have already adverted to the facts of the case and found that there was no inordinate delay on the part of the respondents in declaring the result. Moreover, the Karnataka High Court in the identical case, as that of the applicant, has not granted the relief. On the facts of this case, we are of the view that the applicant would not be entitled to the back wages.

9. In the result, the Transferred Application is allowed. The discharge of the applicant dated 21.06.1999 is quashed. The respondents shall consider the case of the applicant for extension of service and his promotion to the rank of JWO treating the applicant as having cleared the JWO Part I and II examination within time. If the extension is granted and if he is found fit for promotion his services shall deemed to have been extended and/or he shall be granted notional promotion to the rank of JWO.

In such case the entire period of extension shall be counted as service for the purposes of payment of pension. If the extension is refused, the applicant shall be deemed to have been discharged on the date his engagement came to an end. The Respondents shall comply with these directions without delay, preferably within a period of three months.

(Lt. Gen. ~~P.R.~~ Gangadharan)  
Member (A)

(Justice Janardan Sahai)  
Member (J)

RPS/-