

AFR**RESERVED****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****COURT NO. 1
(List B)****Transfer Application No. 9 of 2014****Thursday, this the 9th day of March, 2017****Hon'ble Mr. Justice Devi Prasad Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)**

Shashi Kant Jha, Son of Krishan Nandan Jha,
R/o Village – Gowasa Sheikhpura, Post- Khas,
Police Station – Pandaraf, Tehsil- Mayavath,
District – Patna (Bihar)
Presently residing at C/o B.N. Tiwari A.A.O.
PAO, ORs, 39 G TC, Varanasi Cantt, Varanasi.

- Petitioner

Versus

1. Union of India through Secretary
Ministry of Defence, Govt. of India,
New Delhi.
2. Office Incharge,
Records, A.S.C. Record (MT),
Aurangabad- 431002 (Maharashtra),
Now ASC (South) Bangalore- 560007
3. Officer Commanding,
Coy (M.T.) 523 A.B.C. Bn.,
Care of 99 A.P.O.
4. Directorate General of Supplies & Tpt,
Quartermaster General Branch,
Army Head Quarter,
D.H.Q. New Delhi – 110011
5. Chief Controller of Defence Accounts (Pension),
Draupati Ghat, Allahabad.

- Respondents

Learned counsel appeared
for the petitioner

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Shri Rohit Kumar, Advocate

Learned counsel appeared
for the respondents

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Shri A.K. Sahu, Addl. Standing Counsel,
assisted by Maj Salen Xaxa, OIC Legal
Cell

ORDER**Per Mr. Justice Devi Prasad Singh, Member (J)**

1. Being aggrieved with impugned order of discharge dated 31.01.1984, petitioner had preferred a writ petition, bearing No. 18867 of 2001 in the High Court of Judicature at Allahabad, which has been transferred to the Tribunal in pursuance to provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007, now registered as T.A. No. 9 of 2014.

2. We have heard learned counsel for the petitioner Shri Rohit Kumar and Shri A.K. Sahu, learned Addl. Standing Counsel, Central Government, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

3. Petitioner was enrolled in the Indian Army on 29.01.1969 in the rank of Sep/Driver. The petitioner was transferred to pension establishment w.e.f. 01.02.1984 after completion of his terms of engagement. He was granted no pension, so after retirement he submitted a representation dated 20.11.1984 to the appropriate authority for grant of pension. In response whereof A.S.C. Records (M.T.) Aurangabad informed that the petitioner possessed non-qualifying service of one year and 28 days and the absent period of service in case is reduced from the total period of service rendered by the petitioner of 15 years 2 days, it shall be 13 years and 330 days, hence, he shall not be entitled to pension. However, he has been paid death cum retirement gratuity for 13 years and 330 days. Copy of the letter of A.S.C. Records (MT) Aurangabad dated 05.12.1984 has been filed as Annexure No.III to the petition. He was further informed on his representation dated 04.01.1985 by Army

Headquarters that condonation of period of non-qualifying service is up to 180 days according to the Rules, hence the petitioner is not entitled for the condonation of period to make him eligible for payment of service pension. On repeated representations, same reply has been given by letter dated 28.09.1999 as contained in Annexure-VIII to the petition stating that the period exceeding 180 days may not be condoned making the petitioner eligible for pension. While assailing the denial of pension, learned counsel for the petitioner Shri Rohit Kumar asserted that pension is a fundamental right of Govt. employee, hence it cannot be denied. Learned counsel also pleaded that statutory power for condonation of shortfall should be exercised. After amendment the relief claimed by the petitioner stands as under :-

“(i) To issue a direction to the respondent no.1 to accord sanction of shortfall in service, if any of the applicant based on Rule 124 of the Pension Regulation (Army) 1961 coupled with provisions of Leave Rules issued on 13 Feb 1978 as amended and order payment of pensionary dues to the applicant with effect from 01 Feb 1984, the date it became due together with penal rate of interest.

(ii) To issue any other order or direction considered expedient and in the interest of justice, fair play and equity.

(iii) To award exemplary compensation based on the spirit contained in the judgment of Hon’ble Delhi High Court reported in 2003 (3) ESC 1660/AIR 1997 SC 27. “

4. It has been informed that correct address of respondent no. 2 is now “ASC Records (South), Bangalore”, instead of previous address “A.S.C. Records (MT), Aurangabad – 431001 (Maharashtra)” and accordingly we are not making changes in array of parties.’

5. A plain reading of relief claimed by the petitioner shows that the petitioner has prayed for a direction to the respondents to accord sanction of shortfall in service under Regulation 124 of the Pension Regulations for the

Army, 1961, coupled with provisions of Leave Rules issued on 13.02.1978. On the other hand learned counsel for the respondents Shri A.K. Sahu, Addl. Standing Counsel, Central Government while vehemently opposing petitioner's prayer for grant of such relief submitted that the petitioner has committed fraud while approaching the High Court by not disclosing correct facts. Shri A.K. Sahu, learned Addl. Standing Counsel, Central Government invited our attention to the judgment of High Court of Patna, delivered in Civil Writ Jurisdiction Case No. 653 of 1988 (R), which was filed by the petitioner himself.

6. We propose to reproduce the entire judgment of High Court of Patna (supra), which is as under :-

"The petitioner, in this application, has prayed for issuance of a writ of mandamus for a declaration that the petitioner was entitled to pension and for issuance of a writ of mandamus directing the respondents for payment of pension.

2. The petitioner was enrolled in Army on 29.01.1969 and was holding the rank of Sepoy Driver/MT bearing No. 13831594 in the Army Service corps. The petitioner was discharged on 31.01.1984 and according to him, he had completed 15 years and 2 days colour service.

3. The grievance of the petitioner in that although he had put in minimum qualifying colour service of fifteen years for earning pension, but the respondents have deprived him of the same.

4. In the counter affidavit, it has been stated, inter alia, that although the petitioner had completed more than 15 years' service, the period of his unauthorised absence shall have to be deducted, for completing the qualifying colour service. It has also been stated that the petitioner has been given service gratuity and death cum retirement.

5. During the course of hearing of this case, Mr. Devi Prasad produced for perusal and also for perusal of of the counsel of the other side, a copy of the letter dated 13.10.1990 in proof of the fact that the petitioner has remained in unauthorized absence for a total period of one year and 30 days. In view of this it was urged on behalf of the respondents that from the total period of 15 years and 2 days, a period of one year and 30 days shall have to be deducted and if that is done, the

petitioner has not put in the minimum qualifying colour service of 15 years pension. In rebuttal of this fact, nothing has been brought on record by the petitioner. It must therefore be held that in view of Regulation 122(iv) of Pension Regulations for the Army, the petitioner did not put in the minimum qualifying colour service for earning pension. In this view of the matter, no relief can be granted to the petitioner in terms of his prayer.

6. In the result, this application is dismissed.

7. After I dictated the judgment, it was submitted on behalf of the petitioner, that the pension which the petitioner will receive will not exceed Rs.25 per month and therefore the competent authority is competent to condone the interruption of service under Regulation 124. It is not necessary to record any finding on this. However, the petitioner, if so advised, may file a representation before the competent authority stating the facts with prayer for condonation of the interruption of service as provided under Regulation 124. ”

7. A plain reading of the judgment (supra) of the High Court of Patna shows that initially the High Court of Patna had dismissed the application but later on in view of prayer made, permitted him to file a representation before the competent authority according to regulation 164. It appears that the case of the petitioner was considered by order dated 16.02.99 by Deepa Mathur, CSO, who declined to condone the delay and also warned and restrained him to move any further representation to different authorities. The order dated 16.02.99 is reproduced as under :-

“Tele: 3375324

Directorate General of Sup & Tpt
Quartermaster General Branch
Army Headquarters
DHQ PO New Delhi – 110011

78402/MT/IV/C/ST20

16 Feb 99

No 13831594 EX/Sep Shashi Kant Jha
Village and P.O. – GOWASA SHEIKHPURA
Teh : BARH
District : Patna (Bihar)

A VERY HUMBLE PRAYER FOR CONDONATION OF AN
INTERRUPTION OF SERVICE FOR GRANT OF PENSION

1. Reference your petition dated 07 Dec 98.
2. Your case for condonation period for non qualifying service can not be acceded to because it is more than 180 days. Please desist raising further petition to various authorities.

Sd/-
 (Deepa Mathur)
 CSO
 DDRT/ ST-12
 For DGSt

Copy to:-

ASC Records (MT)
 Bangalore – 7

1. Ref your letter No.13811594/SR/T-IV
 NER-1 of 23 Jan 99.

2. The docu recd under your letter
 Quoted above is returned herewith. ”

8. It appears that while preferring the present writ petition, petitioner has not disclosed the fact that he had approached the High Court of Patna and his writ petition (supra) has been dismissed. While filing the writ petition, originally he had made a prayer to issue a writ in the nature of mandamus directing the respondents to pay the pension to him in accordance with Rule 124 of Pension Regulations for the Army. He has prayed for the same relief, on which the petition filed by him was dismissed by the High Court of Patna (supra). Before preferring the writ petition in the High Court of Judicature at Allahabad in the year 2001, number of representations had been submitted by the petitioner and ultimately while preferring the writ petition, which has been transferred to this Tribunal, he has concealed material facts and sworn in a false affidavit.

9. Filing of false affidavit and concealment of material facts amount to commission of fraud as held by Hon'ble Supreme Court in catena of judgments. While deciding the Review Application No.19 of 2015, **Maj Gen R S Rathore vs. Brig N.K. Mehta**, by judgment and order dated 17.02.2016, we have referred number of judgments where concealment of fact and filing of false affidavit has

been held to be commission of fraud. Relevant portions of the judgment (supra) are reproduced below:-

“33. In Dalip Singh vs. State of U.P.,(2010) 2 SCC 114, the Hon’ble Supreme Court considered the question whether relief should be denied to the appellant who did not state correct facts in the application filed before the prescribed authority and who did not approach the High Court with clean hands. After making reference to some of the precedents, it was observed:

“9..... while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hand, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court will not non-suit him on the ground of contumacious conduct.”

34. In Oswal Fats and Oils Ltd vs. Commr (Admn), (20P10) 4 SCCF 728 relief was denied to the appellant by making the following observations (SCC pp.738-39 paras 10-20)

“19. It is quite intriguing and surprising that the lease agreement was not brought to the notice of the Additional Commissioner and the learned Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on ease from the Government by unequivocally conceding that it had purchased excess land in violation of Section 154(1) of the Act and the same vested in the State Government. In the list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional Commissioner, the High Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreements and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in the order dted 30.5.2001. In that event, the High Court or for that reason this Court would have none suited the appellant at the threshold. However, by concealing a material face, the appellant succeeded in persuading the High Court and this Court to entertain adventurous litigation instituted by it and pass interim

orders. If either of the courts had been apprised of the fact that by virtue of lease deed dated 15.10.1994, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court to entertain the writ petition or the special leave petition.

20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, it is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/ suppressing any material fact within his knowledge or which he could have known by exercising diligence expected for a person of ordinary produce. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person”

38. Hon’ble Supreme Court in the case of **Ram Chandra Singh vs. Savitri Devi** 2003 (8) SCC 319 held that concealment of fact or misrepresentation of fact amounts to fraudulent act and is nullity in law. In the case of **K Dalmia vs. Delhi Administration**, AIR 1962 SCC 1821 Hon’ble Supreme Court has held that if the intention with which a false document is made is to be concealed a fraudulent or dishonest act which has been previously completed, the intention could not be other than an intention to commit the fraud. In the case of **State of Maharashtra vs. Budhikota Subbarao (Dr)**, (1993) 2 SCC 567 Hon’ble Supreme Court has held that fraud is misrepresentation by one who is aware that it was untrue with an intention to mislead the other who may act upon it to his prejudice and to the advantage of the presenter. Affect of fraud on any proceeding or transaction is that it becomes a nullity.

39. Even a solemn proceeding stands vitiated if it is activated by fraud. In the case of **S.P. Chengalavaraya Naidu vs. Jagannath** (1994) 1 SCC 1 Supreme Court had held that a fraud is an act of deliberate deception with the design of securing something by taking undue advantage of another. In **Baburao Dagdu Paralkar vs. State of Maharashtra** (2005) 7 SCC 605 Hon’ble Supreme Court has held that by fraud meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other, is immaterial.

40. In **V Papayya Shastry vs. Government of AP** (2007) 4 SCC 221 Hon’ble Supreme Court has held that the judgment, decree or order obtained by plain fraud on the court, tribunal or authority is a nullity and non est in the eyes of law. Such a judgment decree or order passed by the first court or by the final court is to be treated as nullity by every

court, superior or inferior. It can be challenged in any court at any time, in appeal, revision, and writ or even in collateral proceedings.”

10. Keeping in view the fact that the petitioner has concealed material facts, which seems to be deliberate and intentional, he has committed fraud and also contempt of the Tribunal/Court. Though it is a fit case, where the petitioner should be tried for perjury or contempt and punished after due trial, but keeping in view the fact that he has served for about 13 years in the Indian Army, we are not proceeding with the petitioner’s trial for punishment but impose cost upon him to uphold the majesty of law.

11. In view of the above, T.A. deserves dismissal on the ground of fraud and concealment of material facts. Accordingly T.A. is dismissed with cost, which is quantified as Rs.10,000/-, which shall be deposited by the petitioner within two months from today. In the event of failure on the part of the petitioner in payment of cost, it shall be recovered as the arrear of land revenue by the District Magistrate concerned and remitted to the Tribunal. Registry to take follow up action.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

JPT