

AFR

Court No.2

RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 134 of 2015

Friday the 05th day of August, 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)

Hon'ble Lt Gen Gyan Bhushan, Member (A)

Rajeev Moitra, aged about 51 years, s/o Sri Porash Kumar Moitra, resident of 564, Udhyan-II, Eldeco Colony, Raibereily Road, Lucknow-226025.

.....Applicant

Ld. Counsel for the applicant : **Shri J.N. Mishra, Advocate**

Versus

1. Union of India through its Secretary, Ministry of Defence, New Delhi.
2. Chief of Air Staff, Air Headquarter, Vayu Bhawan, New Delhi.
3. Air Commanding-in-Chief, HQ Maintenance Command, Vayu Sena Nagar, Nagpur.
4. Air Officer Commanding, Air Force Station, Avadi, Chennai.
5. Commanding Officer, 8 BRD AF, Air Force Station, Avadi Chennai.
6. Station Commander, 38 Wing, Air Force Station BKT, Lucknow.

.....Respondents

Ld. Counsel for the Respondents

**Dr. Shailendra Sharma Atal, Advocate
assisted by Wg Cdr Sardul Singh, OIC Legal Cell.**

ORDER**“Per Hon’ble Lt Gen Gyan Bhushan, Member (A)”**

1. The instant application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, and has claimed the reliefs as under :-

2. The applicant has sought the following reliefs:-

“(i) To quash/set aside the para-18 of Air Headquarters Human Resource Policy dated 05.08.2011 with regard to the applicant only.

(ii) To quash the orders dated 15.07.2014 and 29.10.2014 by which the applicant’s application has been approved for Premature Separation from Service (premature separation from service) w.e.f. 07.03.2015.

(iii) To quash the order/communication dated 05.03.2015 by which the order dated 29.10.2014 & 15.07.2014 have been confirmed by the opposite parties.

(iv) To quash the Discharge order dated 07.03.2015 after summoning the same from the opposite parties.

(v) To issue an order or direction to the respondents to treat the applicant in continuous service after 07.03.2015 as if he was in continuous service and pay him salary and other consequential benefits to the applicant became due to him.

(v-a) To quash the order by which the respondents have rejected the applications dated 17.12.2014, 19.01.2015 and 30.01.2015 for withdrawal of the premature separation from service after summoning the same from the opposite parties.

(v-b) To quash the communication letter dated 15.07.2015 by which the respondents have communicated that his application for withdrawal of premature separation from service has been rejected by the competent authorities.

(vi) To issue an order or Direction to the respondents authorities to permit the applicant to continue in service till he attains the age of

superannuation i.e. till the age of 57 years and pay and regular salary and other consequential benefits.

(vii) To issue an order or direction that this Hon'ble Tribunal may deem fit and proper under the facts and circumstances of the case.

(viii) Award the cost of the application to the applicant."

3. Heard Ld. Counsel for the applicant and Ld. Counsel for the respondents assisted by Wg Cdr Sardul Singh, OIC Legal Cell and perused the documents on record.

4. The factual matrix of the case is that the applicant was commissioned in the Indian Air Force on 17.12.1988 and was promoted to the rank of Gp Capt (TS) on 17.12.2014. He applied for grant of premature separation from service with effect from 31.12.2014 and the same was granted to him. The applicant thereafter applied for and was detailed for Director General of Resettlement sponsored Pre Release Resettlement Course at IIM, Lucknow from 08.09.2014 to 21.02.2015. While undergoing the course he requested for change of date of premature separation from service and the date was changed from 31.12.2014 to 07.03.2015. He again submitted an application dated 19.01.2015 requesting for withdrawal of his approved premature separation from service which was not approved by the competent authority. Aggrieved with the aforesaid, the applicant filed this O.A.

5. Ld. Counsel for the applicant submitted that the applicant had applied to be posted to Lucknow owing to ill health of his parents but after rejection of the request for home posting he applied for premature separation from service as no male member was available to look after his

ailing parents. His premature separation from service was approved and in the meanwhile the applicant moved an application dated 05.05.2014 for pre-release course sponsored by Director General of Resettlement which was to commence from 08.09.2014. His request was acceded and applicant was detailed to undergo 24 weeks General Management Programme at IIM, Lucknow from 08.09.2014 to 21.02.2015. During the interregnum period Hon'ble Supreme Court in the matter of W.P. (C) 7811/2009; **Atul Shukla vs Union of India & Others** vide judgment and order dated 24.09.2014 ruled that Gp Capt (TS) in the Indian Air Force are entitled to continue in service upto the age of 57 years. In consequence thereto the Government of India approved reinstatement of 76 officers of the rank of Gp Capt (TS). The applicant on coming to know that retirement age of Gp Capt (TS) has been enhanced to 57 years and for other reasons requested the appropriate authority for withdrawal of his premature separation from service.

6. Ld. Counsel for the applicant submitted that denial of withdrawing application for premature separation from service on the ground that the applicant had undergone pre-release course is illegal on the anvil of principles of natural justice. Ld. Counsel further submitted that the order refusing to withdraw premature separation from service is hit by Article 14 and 21 of the Constitution of India and as per judgments of the Hon'ble Apex Court the applicant has right to withdraw his application before effective date of retirement. Ld. Counsel for the applicant relying on the judgment of Principle Bench, New Delhi in O.A. No 425 of 2013 in the case of **Wg Cdr P.K. Sen vs. Union of India & Ors** stated that in

similar case Principle Bench has granted relief as such the applicant be granted relief as prayed.

7. **Per contra** Ld. Counsel for the respondents submitted that the applicant while submitting his application for grant of premature separation from service had given undertaking signed on 25.04.2014 wherein he had stated that he was seeking premature separation from service on compassionate grounds and after careful consideration he had submitted his request for premature separation from service. The applicant had also submitted an undertaking that he would neither withdraw nor seek any change of date of premature separation from service and Para 18 of Human Resource Policy 04/2011 clearly mentions that request for withdrawal of approved premature separation from service would be permitted only as exception under extreme compassionate grounds except in case the officer had undergone pre-release course in which case he/she would not be permitted to withdraw premature separation from service .

8. Ld. Counsel for the respondents submitted that conditions of non withdrawal of request for premature separation from service after an officer has undergone Pre Release Resettlement Course has been introduced in the Human Resource Policy because 60% of the cost of the Resettlement Course is paid by the Govt of India for the benefit of Officers/Air Warriors proceeding on premature separation from service. Moreover, absence of the officer/air warrior from duty while doing the subject course (for almost 24 weeks) causes immense loss of manpower to the organization. He also submitted that an officer who is granted

premature separation from service actually takes away a vacancy which another needy person could have taken and that an officer who is granted a Pre Release Resettlement Course also takes a vacancy/opportunity which could have been granted to another officer who would have utilized it to build his second career.

9. Ld. Counsel for the respondents vehemently argued that an employee has right to apply for withdrawal of his application of premature separation from service prior to it being accepted but at the same time the Government has discretion to accept or reject the same depending on reasons mentioned in the application for withdrawal. He submitted that there was no substantial change in the circumstances and thus the application for withdrawal of premature separation from service has rightly been rejected.

10. The main issue for consideration is whether the applicant has right to seek withdrawal of his application for premature separation from service from future specified date before it becomes effective or not?

11. In the case of *Balram Gupta vs. Union of India and Another* reported in 1997 (Supp) Supreme Court Cases 228, in para 10 and 13 of the judgment, Hon'ble Apex Court has held :-

“10. This question arose in the case of one Shri Satish Chandra, then a Judge in the High Court of Allahabad in Union of India vs. Gopal Chandra Mishra. There the second respondent Shri Satish Chandra wrote to the President of India, on May 7, 1977, intimating his resignation from the office of judge of the Allahabad High court, with effect from August 1, 1977. On July 15, 1977, he again wrote to the President, revoking his earlier communication, and commenced deciding

matters in court from July 16, 1977. On August 1, 1977 the first respondent Shri Misra, an advocate of the said High Court filed a writ petition under Article 226 of the Constitution contending that the resignation of Shri Satish Chandra having been duly communicated to the President of India in accordance with Article 217 (1) Proviso (a) of the Constitution was final and irrevocable, and that the continuance of said Shri Satish Chandra as a Judge of the High Court thereafter, was an usurpation of public office. The High Court allowed the petition holding that Shri Satish Chandra was not competent to revoke his resignation letter. On appeal this Court held that the resigning office necessarily involved relinquishment of the office which implied cessation or termination of, or cutting as under from the office. A complete and effective act of resigning office is one which severs the link of the resigner with his office and terminates its tenure. In the context of Article 217 (1) this assumes the character of a decisive test, because the expression “resign his office” occurs in a proviso which accepts or qualifies the substantive clause fixing the office tenure of a Judge up to the age of 62 years. It was further reiterated that in the absence of a legal, contractual or constitutional bar, an intimation in writing sent to the appropriate authority by an incumbent, of his intention or proposal to resign his office/post from a future specified date, can be withdrawn by him at any time before it becomes effective i.e., before it effects termination of the tenure of the office/post, or employment. This general rule equally applies to government servants and constitutional functionaries, this Court reiterated. The other peculiar essence of Article 217 which was discussed need not detain us in the facts of this case. On the principle of general law the offer to relinquishment could have been withdrawn by the appellant before the date it became effective if sub rule (4) of Rule 48 (A) was not there.”

“13. We hold, therefore, that there was no valid reason for withholding the permission by the respondent. We hold further that there has been compliance with the guidelines because the appellant has indicated that there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is

very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees.

12. In the case of ***J.N. Srivastava vs. Union of India and Another*** reported in (1998) 9 Supreme Court Cases 559, in para 3 of the judgment, Hon'ble Apex Court has held :-

"3. The short question is whether the appellant was entitled to withdraw his voluntary retirement notice of three months submitted by him on 03.10.1989 which was to come into effect from 31.01.1990. It is true that this proposal was accepted by the authorities on 2.11.1989. But thereafter before 31.1.1990 was reached, the appellant wrote a letter to withdraw his voluntary retirement proposal. This letter is dated 11.12.1989. The said request permitting him to withdraw the voluntary retirement proposal was not accepted by the respondents by communication dated 26.12.1989. The appellant, therefore, went to the Tribunal but the Tribunal give him no relief and took the view that the voluntary retirement had come into force on 31.1.1990 and the appellant had given up the charge of the post as per his memo relinquishing the charge and consequently, he was stopped from withdrawing his voluntary retirement notice. In our view the said reasoning of the Tribunal cannot be sustained on the facts of the case. It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement.

13. In the case of *Shambhu Murari Sinha vs. Project & Development India Ltd and Another* reported in (2002) 3 Supreme Court Cases 437, in para 13, 18 and 19 of the judgment, Hon'ble Apex Court has held:-

“13. In Nand Keshwar Prasad vs. Indian Farmers Fertilizers Coop. Ltd. In paragraph 11, this Court reiterated that it is open to the employee concerned to withdraw letter of resignation before the date indicated in the notice of voluntary retirement. It was also observed therein: “It appears to us that the law is well settled by this Court in a number of decisions that unless controlled by condition of service or the statutory provisions, the retirement mentioned in the letter of resignation must take effect from the date mentioned therein and such date cannot be advanced by accepting the resignation from an earlier date when the employee concerned did not intend to retire from such earlier date.”

18. *Coming to the case in hand the letter of acceptance was a conditional one inasmuch as, though option of the appellant for the voluntary retirement under the Scheme was accepted but it was stated that the ‘release memo along with detailed particulars would follow’. Before the appellant was actually released from the service, he withdrew his option for voluntary retirement by sending two letters dated 7.8.1997 and 24.9.1997, but there was no response from the respondent. By office memorandum dated 25.09.1997 the appellant was released from the service and that too from the next day. It is not disputed that the appellant was paid his salaries etc. till his date of actual release i.e. 26.9.1997, and, therefore, the jural relationship of employee and employer between the appellant and the respondents did not come to an end on the date of acceptance of the voluntary retirement and the said relationship continued till 26.09.1997. The appellant admittedly sent two letter withdrawing his voluntary retirement before his actual date of release from service. Therefore, in view of the settled position of the law and the terms of the letter of acceptance, the appellant had locus poenitentiae to withdraw his proposal for voluntary retirement before the relationship of employer and employee came to an end.”*

“19. We, therefore, hold that the respondent could not have refused to accept the resignation of the appellant as it was sent before the jural relationship of employee and employer came to an end..

14. In the case of *Union of India & Anr vs. Wg Cdr T. Parthasarathy*, (2001) 1 SCC 158 the Hon’ble Supreme Court while considering similar issue held that where resignation is to have affect from a future date, it can be withdrawn at any time before that date. It was further held that where withdrawal was sought even prior to acceptance of the resignation which was to be affected from a future date, in absence of any contrary statutory provision or rule, right to withdraw cannot be denied merely on the basis of any policy decision of the Govt or certificate issued by the resigner himself at the time of tendering the resignation stating that he was aware that he could not later seek cancellation of his application for resignation. A substantive legal right cannot be denied to a person merely on the basis of some policy decision of the Govt or any certificate issued by the employee acknowledging a particular position which has no legal sanctity. The policy decision which obligated the respondents to furnish the said certificate cannot be destructive of the right of the respondents, in law, to withdraw his request for premature retirement before it ever became operative and affected and effected termination of his status and relation with the department. The relevant portion of the judgment is reproduced below :-

“The reliance placed upon the so called policy decision which obligated the respondent to furnish a certificate to the extent that he was fully aware of the fact that he cannot later seek for cancellation of the application once made for pre-mature retirement cannot in our view be destructive of the right of the

respondent. In law to withdraw his request for pre-mature retirement before it ever became operative and effective and effected termination of his status and relation with the Department. When the legal position is that much clear it would be futile for the appellants to base their rights on some policy decision of the Department or a mere certificate of the respondent being aware of a particular position which has no sanctity or basis in law to destroy such rights which otherwise inhaled in him and available in law. No such deprivation of a substantive right of a person can be denied except on the basis of any statutory provision or rule or regulation. There being none brought to our notice in this case, the claim of the appellants cannot be countenanced in our hands. Even that apart, the reasoning of the High Court that the case of the respondent will not be covered by the type or nature of the mischief sought to be curbed by the so called policy decision also cannot be said to suffer any conformity in law, to warrant our interference”.

15. In the instant case, the applicant applied for grant of premature separation from service and the same was granted to him which was to be effective w.e.f. 07.03.2015. Subsequently he applied for withdrawal of his application for premature separation from service on 19.01.2015. It is evident that the applicant had submitted application for cancellation of his premature separation from service to his higher authority in the chain of command well before date of actual release from service. However, his request for cancellation of premature separation from service was not accepted because he had submitted an undertaking that he would neither withdraw nor seek any change of date of premature separation from service and as per Para 18 of Human Resource Policy 04/2011 request for withdrawal of approved premature separation from service application would be permitted only as exception under extreme compassionate grounds except in case the officer who had undergone pre-release course

in which case he/she would not be permitted to withdraw premature separation from service . Respondents have also submitted that 60% of the fees of this Pre-release Resettlement Course is paid by the Government for the benefit of Officers/Air Warriors proceeding on premature separation from service and that absence of officer from duty while doing the Resettlement Course (for almost 24 weeks) causes loss of manpower to the organisation and it also takes away a vacancy which another needy officer could have taken and utilized it to build second career.

16. It transpires from the perusal of records as also from submission of both the learned counsels that the applicant had submitted request for withdrawal of his application for premature separation from service on 19.01.2015 and the date of discharge to be effective was 07.03.2015. In view of the aforesaid citations of the Hon'ble Apex Court in the cases of *Balram Gupta* (supra), *J.N. Srivastava* (supra), *Shambhu Murari* (supra) and *Wg Cdr T. Parthasarathy* (supra), it is well settled law that if the applicant submits his application for withdrawal of his separation from service to his higher authority well before the effective date of retirement, he has legal right to withdraw his application for separation from service before effective date of retirement. We also observe that Armed Forces Tribunal (Principal Bench) in O.A. No. 425 of 2013 *Wg Cdr P.K. Sen vs. Union of India & Ors* (supra), in a similar case has given relief. It is evident that the applicant had submitted his request for withdrawal of his application for premature separation from service on 19.01.2015 and the date of discharge to be effective was 07.03.2015 and this fact has not been contested, in fact it has been agreed to by the learned counsel for the respondents, also.

17. Since the applicant had submitted his application for withdrawal of premature separation from service prior to effective date of retirement, merely on the basis of any policy decision of the Indian Air Force, it is legally not justifiable for the respondents to deny his constitutional right of withdrawing his application for premature separation from service. It is well settled proposition of legal jurisprudence that a substantive right cannot be denied to a person merely on the basis of some policy of the Government. From the facts and circumstances as emerging from the records, it is amply clear that the respondents have issued the impugned orders without considering the rules and regulations in entirety.

18. In view of the facts and circumstances of the case, we are of the considered view that the applicant had submitted application to withdraw his application for premature separation from service well before the effective date of retirement, therefore he has every legal right to withdraw his application for premature separation from service before the relationship between employer and employee came to an end i.e. the effective date of retirement. The impugned order of discharge is unjust, arbitrary and against the settled position of law and thus is liable to be set aside. The O.A. deserves to be allowed and the applicant is entitled to rejoin his duties and also to other benefits during the period he was out from the service. In view of discussions made herein above, we converge to the view that the respondents have committed illegality in refusing to accept withdrawal of his application for premature separation from service. We are also of the view that since it is admitted fact that 60% of the fees for the Pre-release Resettlement Course was paid by the Govt of

India. The cost so paid may be adjusted and recovered from salary of the applicant in 12 equal monthly installments.

19. The Original Application succeeds and is **allowed**. The impugned orders for premature separation from service passed by Air Headquarters vide order dated 15.07.2014 and 05.03.2015 are hereby **set aside**. The applicant shall be deemed to be in continuous service after 07.03.2015 (will rejoin service in case he has already retired) and will continue in service till he attains the age of superannuation as per latest policy in vogue and shall be paid salary and other consequential benefits within four months from the date of presentation of certified copy of this order. The cost shall be adjusted and recovered from salary of applicant in 12 equal monthly installments paid as fees by the Government for Pre-release Resettlement Course.

No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

gsr

Dated: August, 2016

(Justice D. P. Singh)
Member (J)