

Court No.1
(Sl. No.26)

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 334 of 2021

Wednesday, this the 3rd day of May, 2023.

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

1. 14746 GP Capt Mohammed Anwaruzzaman Khan (Retd), S/o Late Brig MA Khan, R/o G-312, Jalvayu Towers, Sector 47, Noida, UP-201301.
2. 14737 GP Capt Mahesh Narain Sexena (Retd), S/o Shri Kailash Narain Saxena, R/o A-2102, Apex Athena, Sector 75, Noida, UP-201301.

.....Applicants

Ld. Counsel for the: **Shri Abhishek R. Shukla**, Advocate
applicants

Versus

1. Union of India, through the Secretary, Ministry of Defence, DHQ PO New Delhi-110011.
2. The Chief of the Air Staff, HQ, Vayu Bhawan, JDPO, RC, New Delhi-110011.
3. Air Officer-in-Charge personnel Air HQ, Vayu Bhawan, JDPO, RC New Delhi-110011.

.....Respondents

Ld. Counsel for the: **Shri Yogesh Kesarwani**, Advocate
Respondents: Central Govt Counsel

ORDER (Oral)

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs:-

(a) To call for records on the basis of which the Respondents have formulated the policy instruction dated 12.03.2005 whereby the Respondents have fixed the age of superannuation in respect of the Applicants at 54 years by which he was made to retire from the service respectively on 14.06.2006 and 12.12.2008.

(b) To further direct the Respondents to grant all consequential benefits at par with the selection Grade Group Captain by extending the benefit of the judgement dated 02.05.2013 passed in TA No. 385 of 2009 in WP(C) No. 7811 of 2009 titled Gp Capt Atul Shukla vs Union of India & Ors and the judgement/final order dated 26.11.2014 of Gp Capt (Retd) BS Chillar & Ors passed in O.A. No. 350 of 2013 and Gp Capt (Retd) Ajit Singh & Ors in O.A. No. 351 of 2013 as the case of the applicants is strikingly similar to the said case considering deemed service for 3 years after the date of retirement.

2. Briefly stated facts of the case are that both the applicants got commissioned in the Indian Air Force (IAF) on 29.12.1976. During the course of their service they were promoted to the rank of Wing Commander. Due to lack of vacancy they could not be promoted in the select list of Group Captain and were granted time scale promotion to the rank of Group Captain w.e.f. 16.12.2004 after completion of 26 years of service. Both the applicants superannuated on attaining the age of 54 years on 31.12.2007 and 31.12.2009 respectively. This O.A. has

been filed for issue of directions to the respondents to grant all consequential benefits at par with the selection grade Group Captain by extending the benefit of the judgment dated 02.05.2013 passed by the Hon'ble AFT (PB), New Delhi in T.A. No. 385 of 2009, **Gp Capt Atul Shukla vs Union of India & Ors** which was upheld by the Hon'ble Supreme Court by order dated 24.09.2014 passed in Civil Appeal No. 4717 of 2013.

3. Submission of learned counsel for the applicants is that the applicants were commissioned in the IAF on 29.12.1976 and rose to the rank of Wing Commander. They were granted time scale promotion of Group Captain on completion of 26 years service. It was further submitted that applicants were retired after attaining the age of 54 years whereas Group Captain (select) were retired after attaining the age of 57 years which is discriminatory on the ground that Group Captain (Time Scale) and Group Captain (Select) are of same grade pay and their appointments are equal in nature.

4. In support of his contention learned counsel for the applicants has placed reliance on order dated 02.05.2013 passed by AFT (PB), New Delhi in T.A. No. 385 of 2009, **Gp Capt Atul Shukla & Ors vs UOI & Ors**, which brought Group Captain (Time Scale) at par with Group Captain (Select) in terms of their age of retirement i.e. 57 years. It was further submitted that the aforesaid judgment of the AFT (PB), New Delhi was challenged in the Hon'ble Supreme Court in Civil

Appeal No. 4717 of 2013 but the appeal was dismissed vide order dated 24.09.2014 upholding the judgment passed by AFT (PB), New Delhi.

5. Learned counsel for the applicants further relied upon order dated 26.11.2014 passed by AFT (PB), New Delhi in O.A. No. 350 of 2013, **Gp Capt BS Chillar & Ors**, order dated 26.11.2014 passed by AFT (PB), New Delhi in O.A. No. 351 of 2013, **Gp Capt (retd) Ajit Singh & Ors vs UOI & Ors**, order dated 10.01.2014 passed by AFT (RB) Kochi in O.A. No. 120 of 2013, **Gp Capt SL Shiva Prasad vs UOI & Ors**. He pleaded that in view of the aforesaid pronouncements applicants be also considered to retire at the age of 57 years and granted consequential benefits.

6. On the other hand, learned counsel for the respondents submitted that applicants were granted commission in various branches of the IAF and were promoted to the rank of Wing Commander in accordance with the laid down policies and instructions applicable to their respective branches. As per AVSC report, the Govt of India issued instructions dated 12.03.2005 by creating a special dispensation for grant of Group Captain (Time Scale) rank to those Wing Commanders who were permanently superseded in three successive promotion boards and failed to attain the Group Captain (Select) rank, provided they had completed 26 years of commissioned service and met certain minimum performance

criteria. The learned counsel further submitted that Para 5 (d) of circular dated 12.03.2005 prescribes age of superannuation and according to which Group Captain (Time Scale) were to retire at the age of 54 years whereas age of retirement in respect of Group Captain (Select) was 57 years.

7. It was further submitted that both the applicants retired from service after attaining the age of superannuation i.e. 54 years and this O.A. being filed after an inordinate delay of more than 09 years deserves to be dismissed on the ground of delay and laches as held by the Hon'ble Apex Court in the case of **UP Jal Nigam and Another vs Jaswant Singh**, AIR 2006, 11 SCC 464. Learned counsel for the respondents further submitted that applicants retired in the year 2007 and 2009 cannot claim benefits of judgment dated 02.05.2013 passed by the AFT (PB), New Delhi. In support of his contention learned counsel for the respondents has further cited Paras 957 of Halsburyt's Law of England (4th Edition), the Hon'ble Supreme Court judgment in **Basawaraj vs Land Acquisition Office**, (2013) 14 SCC 81, **State of Karnataka vs SM Kotrayya**, (1996) 6 SCC 267 and AFT (PB), New Delhi order dated 06.04.2017 passed in O.A. No 515/2017. He pleaded for dismissal of O.A.

8. Heard Shri Abhishek R Shukla, learned counsel for the applicants and Shri Yogesh Kesarwani, learned counsel for the respondents and perused the record.

9. The undisputed facts of the case are that the applicants were commissioned in the IAF on 29.12.1976 and retired from service after attaining the age of superannuation of 54 years in the rank of Group Captain (Time Scale). During the course of their service they could not be promoted to the select rank of Group Captain and therefore, they were granted Group Capt (Time Scale) on attaining the service of 26 years. In the IAF there exist two branches i.e. flying branch and administrative branch. From the pleadings on record we find that Group Capt (Select) and Group Capt (Time Scale) discharges same duties except flying duties and their pay structure is same. We also find that Group Capt (Time Scale) has to retire at the age of 54 years and Group Capt (Select) has to retire at the age of 57 years which being discriminatory is hit by Article 14 and 16 of the Constitution of India.

10. While filing counter affidavit, respondents have conceded that pay scale in respect of Group Captain (Select) and Group Captain (Time Scale) are same and a Group Captain (Time Scale) can be posted to an appointment tenable by Group Captain (Select) while in administrative service. On a question being asked with regard to different ages of retirement in respect of aforesaid two groups, the respondents failed to describe rationale for prescribing two dates of retirement for officers of the same rank who are drawing same salary, same grade pay, perform same duty and wear same rank/uniform.

11. This controversy was placed before the Hon'ble Delhi High Court by filing Writ Petition No. 7811 of 2009, **Group Capt Atul Shukla vs Union of India & Ors** which was transferred to AFT (PB), New Delhi and registered as T.A. No. 385 of 2009. The AFT, (PB) New Delhi allowed the T.A. vide order dated 02.05.2013. For convenience sake, the operative portion in the form of Para 30 is reproduced as under:-

“30. Therefore, we are of the considerate view that this distinction which is sought to be made has no legs to stand. Consequently, we allow this petition and set aside the notification dated 12.06.2009 to the extent which lays down the ages of retirement for the Gp Capt (TS) at the age of 54 years and direct that all the persons who are in the rank of Gp Capt (TS) will be entitled to continue upto the age of 57 years. The order of the petitioner by which he has been sought to be retired at the age of 54 years dated 05.12.2008 is quashed and petitioner is entitled to all benefits upto the age of 57 years. His pension and other emoluments should be worked out and he should be also entitled to arrears of the salary till he attains the age of 57 years.”

12. A plain reading of the aforesaid order shows that all persons who were/are in the rank of Group Captains (Select and Time Scale) shall continue in service up to the age of 57 years. This order was challenged by the Union of India in the Hon'ble Supreme Court by way of Civil Appeal No. 4717 of 2013 which was dismissed vide order dated 24.09.2014. For convenience sake, Paras 36, 37 and 38 of the aforesaid order are reproduced below:-

“36. The assertion of the appellant that a parity in the retirement age reduces the combat effectiveness of the force has been stoutly denied by the respondents who have asserted that if a Group Captain (Select) or for that an Air Commodore or an Air Vice Marshall gets superseded, his

higher age neither automatically impedes the quality and standard of performance of his duties nor does the IAF summarily curtail his residual service as a consequence of his supersession, on the ground that his higher age group may impact combat effectiveness.

37. On the material placed before us and having regard to the rival assertions made by the parties in their respective affidavits the difference in employability of Group Captains (TS) is not borne out to justify the classification made by the Government. It is evident from the particulars given by the respondents that several Group Captains (TS) have held appointments which are also held by Group Captains (Select). If that be so, the difference in the employability of Time Scale officers vis-a-vis select officers appears to be more illusory than real. There does not appear to be any hard and fast rule on the question of deployment or employability of Group Captains (TS) or group captains (Select) for that matter. The Air HQ can, depending upon its perception, order deployment and post any officer found suitable for the job. Deployment remains an administrative matter and unless the same involves any reduction in pay, allowances or other benefits or reduction in rank or status of an officer legally impermissible, such deployment remains an administrative prerogative of the competent authority.

38. Suffice it to say that the basis for classification in question for purposes of age of superannuation which the appellant has projected is much too tenuous to be accepted as a valid basis for giving to the Time Scale Officers a treatment different from the one given to the Select Officers. We are also of the view that concerns arising from a parity in the retirement age of Time Scale and Select Officers too are more perceptual than real. At any rate, such concerns remain to be substantiated on the basis of any empirical data. The upshot of the above discussion is that the classification made by the Government of India for purposes of different retirement age for Time Scale Officers and Select Officers does not stand scrutiny on the touchstone of Articles 14 and 16 of the Constitution as rightly held by the Tribunal.”

13. Thus, the Hon'ble Apex Court has clarified that different age of retirement in respect of Group Capt (Select) and Group Capt (Time Scale) is not sustainable in view of the aforesaid judgment. Matter relating to retirement age in respect of Time Scale Group Captains is no more res-integra after pronouncement of **Atul Shukla's** case (supra) as this has

attained finality and is equally applicable to serving and retired Group Captains (Time Scale).

14. Respondents' contention is that since many applications have been dismissed by the coordinate Regional Benches, therefore this O.A. may be dismissed. In this regard we find that in all cases where benefits have not been granted by the Tribunals, the only reason is the limitations imposed due to delay and laches. On this point reference can be made to the decision of the Hon'ble Apex Court in the case of **Union of India & Ors vs Tarsem Singh**, Civil Appeal No 5151-5152 of 2008 decided on 13.08.2008. In this case their Lordships of the Hon'ble Apex Court have examined the question of limitation and continuous cause of action, and observed as under:-

"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc, affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the

consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.”

15. In the instant case the applicants were retired at the age of 54 years when they were holding the rank of Group Captain (Time Scale) and were required to retire at 57 years of age. This indicates clear violation of the right to equality before law as held by the Hon'ble Supreme Court in the case of **Ram Krishna Dalmia v. Justice Tendolkar**, AIR 1958 SC 538, **Magan Lal Chaggan Lal v Municipal Corporation of Greater Bombay**, AIR 1974 SC 2009, **Maneka Gandhi v UOI & Ors**, (1978) 1 SCC 248, **Indra Sawhney v UOI & Ors**, AIR 1993 SC 477, **National Legal Service Authority [NALSA] v UOI**, AIR 2014 SC 1863 and **Joseph Shine v UOI**, 2018 SCC Online SC 1676.

16. In this case the main prayer of the applicants is for granting consequential benefits at par with Group Captains (Select) in terms of pay, gratuity, leave encashment, commutation and pension. We notice that in above consequential benefits pension is a recurring cause of action and it is very clear that the wrong and illegal action of the respondents to retire the applicants three years prior to their scheduled date of retirement, has resulted in a continuing wrong to them, in that they will not only get less pension every

month, but also lose out in all future revisions of their pension in terms of revision of pension under OROP scheme and pay commission related issues. With the aforesaid, it is apparent that the instant case is a clear case of continuing wrong being related to pension which is a recurring cause of action as held by the Hon'ble Apex Court in the case of **Ex Sep Chain Singh Thr Lr vs UOI**, Civil Appeal Diary No 30073 of 2017, Hon'ble Delhi High Court in **Ex Sep Sri Chand vs UOI & Ors**, Writ Petition No 148 of 2012 decided on 09.01.2012 and Hon'ble High Court of Punjab & Haryana at Chandigarh in **Ex Naik Umed Singh vs UOI & Ors**, CWP No 7277 of 2013 decided on 14.05.2014.

17. We have been informed that after decision of the Hon'ble Apex Court in the case of **Atul Shukla** (supra), respondents provided relief only to post 02.05.2013 retirees and ignored Group Captains (Time Scale) who retired before this date. We find that this is a gross violation of Article 14 of the Constitution of India i.e. right to equality before law which amounts to creating a sub class within the same class of pensioners and is therefore, a violation of the law as held by the Hon'ble Supreme Court in the case of **DS Nakara & Ors vs Union of India**, 1983 AIR 130, 1983 SCR (2) 165.

18. In view of the above and in the interest of substantive justice we are of the view that ends of justice will be met if the

applicants are provided relief on the issues which are related to their pension because pension is cause of continuing wrong. However, since pension is based on last pay drawn, relief to that extent will be provided to applicants subject to law of limitations as per the Hon'ble Apex Court in the case of **Shiv Das vs Union of India & Ors**, 2009 (1) AISLJ 371. Since other retirement dues paid to the applicants do not relate to the category of continuing wrong, their retirement dues already paid will not be re-opened. These benefits will be deemed to have been paid to the applicants after their final retirement.

19. In view of the above, the O.A. is **allowed**. Impugned order dated 14.12.2006 and 12.12.2008 ordering the retirement of the applicants at the age of 54 years are set aside. The applicants are held entitled to notional service for additional three years till attaining the age of 57 years. The pension already paid to the applicants during these three years of notional service shall be adjusted as part of payment towards salary. The respondents are directed to refix pay of the applicants after catering for the annual increments of three years of notional service as per rules as provided in pay fixation formula and revise their pension in accordance with re-calculated amount of last salary drawn by them. However, due to law of limitations they shall be entitled to arrears w.e.f. three preceding years from the date of filing of this O.A. which was

filed on 12.04.2019.

20. Let the entire exercise be completed within four months from the date of production of a certified copy of this order. Default will invite interest @ 8% p.a.

21. No order as to costs.

22. Miscellaneous application(s), pending if any, shall stand disposed off.

(Vice Admiral Atul Kumar Jain) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated : 03.05.2023

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