

Reserved

**ARMED FORCES TRIBUNAL, CIRCUIT BENCH,
NAINITAL**

(REGIONAL BENCH, LUCKNOW)

Original Application No. 289 of 2017

Thursday this the 2nd of November, 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

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

Smt. Dhanuli Devi W/o No. 4034704P Gnr (Late) Dharmanand R/o
Village Billekh Tehsil Ranikhet District Almora

..... Applicant

By Legal Practitioner : Shri D.S. Mehta, Advocate,
Learned counsel for the Applicant.

Versus

1. Union of India through the Secretary, Ministry of Defence,
Central Civil Secretariat, New Delhi.
2. Commandant, Artillery Record APS PIN 908802,
C/o 56 APO.
3. The PCDA (Pensions) G-4 Section,
Allahabad (U.P.).

..... Respondents

By Legal Practitioner : Shri Bhanu Pratap Singh,
Learned Counsel for the Central Government

ORDER

Per Hon'ble Justice S.V.S. Rathore, Member (J)

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

“Humble applicant prays to Hon'ble Tribunal to set aside the impugned order/letter dated 21.3.2013, 4.5.2013 and letter/order dated 21.7.2016 and further directing the respondents to sanction the regular pension/disability pension from the year 2.7.1968 to 7.9.1995 and further to sanction family pension from 7.9.1995 with all consequential benefits and interest @ 12% on arrears of pension and other pensionary benefits and interest @ 12% on arrears of pension and other pensionary benefits.

And/or may pass any other suitable order be deemed fit and proper in the facts and circumstances of the case mayt also kindly be passed to meet the interest of justice.

2. The O.A. was filed after a considerable delay of 48 years, 04 months and 14 days, but said delay has already been condoned vide the order of the Co-ordinate Bench of this Tribunal dated 02nd August 2017.

3. In brief, the facts of the instant O.A. may be summarized as under:

4. As per record, Govindi Devi was the first wife of the deceased soldier Gunner (Late) Dharmanand, who died on 20.06.1964, thereafter Gunner (Late) Dharmanand remarried the applicant on 20.06.1965.

5. The husband of the applicant Gunner (Late) Dharmanand was enrolled in the Army as a Soldier on 30th December 1951. He was discharged from service on 02.07.1968 on his own request after completing service of more than 15 years, but pension was not granted to him. In the year 1995, the applicant has filed an application before the respondent authority that her husband has completed more than 15 years of service, therefore, the family

pension be sanctioned in her favour. The applicant had filed representation before the concerned authorities, but the family pension was declined to her vide orders dated 21.03.2013 and 04.05.2013. Hence this O.A. has been filed.

6. In the counter affidavit, the facts stated in the O.A., to a large extent, have been admitted. However, it has been pleaded that as per the service record, Gunner (Late) Dharmanand has rendered 15 years and 186 days of total service, including 230 days of non qualifying service which includes 62 days absence without leave or over staying leave and 84 days as under custody period and from 13th November 1966 to 04th February 1967 i.e. for 84 days, he remained on leave without pay. Thus, total period of 230 days of non qualifying service has been reduced from the total period of service. After reduction of the aforesaid period of 230 days, the actual qualifying service period of the applicant comes to 14 years and 321 days, therefore, he was not granted service pension as per Para 132 Pension Regulations for the Army 1961 (Part-I). It has also been pleaded that Gunner (Late) Dharmanand died on 07 September 1995 and after his death, the applicant requested for family pension annexing the death certificate before the competent authority. It has also been pleaded that the applicant was discharged from service on his own request on extremely compassionate grounds after fulfilling the conditions of enrolment under item III (iv) of the Army Rules 13(3) and not on medical grounds, therefore, no pension is admissible to the applicant under existing rules. The applications of the applicant were duly considered, but family pension was not to the applicant as the husband of the applicant did not have minimum qualifying service of 15 years after deducting the non qualifying service period.

7. Learned counsel for the applicant, in support of his submission, has argued that under Pension Regulations 134, the

competent authority has a right to condone the deficiency of service in a particular rank not exceeding three months. It is argued that in the case of the applicant, the deficiency in service is only of 44 days, therefore, such deficiency of service ought to have been condoned.

8. Learned counsel for the respondents has argued that the provisions of Pension Regulation 134 do not apply to the case of the applicant, because the applicant was discharged on his own request.

9. Keeping in view (i) whether non qualifying service period has been rightly counted and (ii) the rival submission, at this stage the points to be considered are whether the deficiency of 44 days of service in sanctioning the family pension to the applicant ought to have been condoned by the authorities. At this stage, we would like to quote Para 134 of the Pension Regulations which reads as under:

“134. A competent authority may condone a deficiency of service in a particular rank not exceeding three months, except on voluntary retirement”. (This period of three months has subsequently extended to one year)

10. The Pension Regulations for the Army Part-I 2008, Para 47 also provides that minimum qualifying service for earning a service pension is 15 years unless otherwise provided. Thus, the settled legal position is that period of minimum qualifying service is 15 years to earn pension. The applicant has rendered more than 15 years of service, but because of the non qualifying service of 230 days, there was deficiency of 44 days in the period of qualifying service.

11. We have examined the original records of the deceased soldier. It transpires from perusal of his original record that he was awarded Sena Sewa Medal in the year 1970 and an entry to this

effect was made in his personal file on 25th December 1970. The charges for which he was punished were not of very serious nature. The first charge was over staying leave for a period of 62 days and the second charge was of losing the clothing valuing Rs.95.27p. It is clear from the perusal of the record that he was under custody for a period of 84 days w.e.f. 12.11.1966 after his arrest on that date by civil police and from 13.11.1966 to 04.02.1967, he was granted leave without pay.

12. On examination of the facts of the instant case, then it is clear that the deceased soldier was punished only once for two different charges, one was for over staying leave and the other for the loss of clothing valuing Rs.95.27p. It appears that it was not within the notice of the applicant that his leave without pay would be counted towards non qualifying service, otherwise a person who has completed more than 15 years of service, would have also completed 44 days of service to make him entitled for pension. In our considered view, in such a situation, it was the duty of the officer concerned to inform him that in case he applies for voluntary discharge, then he shall not be entitled to family pension. Neither any such warning/notice was given to the applicant as per the original record nor it has been so pleaded in the counter affidavit.

13. We have examined the personal record of the deceased soldier. We find entry of leave without pay for 84 days. As per the record, the deceased soldier remained absent for the period of 62 days till he was apprehended by civil police on 12 November 1966. It also appears from perusal of the record that he remained in custody for a total period of 84 days after his arrest. It has been pleaded in the counter affidavit that the applicant remained on leave without pay from 13 November 1966 to 04 February 1967 for a total period of 84 days. Thus, it is absolutely clear that the period of

84 days during which the deceased soldier remained in custody, was deducted as non qualifying service. Admittedly, salary is not payable to a Sepoy while he is in custody. Therefore, for the same period, i.e. 13.11.1966 to 04.02.1967 he was granted leave without pay. Thus, the same non qualifying service has been deducted twice. This per se appears to be illogical, illegal and without any basis. It is clear that for a period of 84 days the applicant remained in custody and salary was not paid to him. Thus 84 days were deducted as non qualifying service as period in custody. Yet again, since salary for the same period in custody was not paid to him, therefore, the same period of 84 days was again deducted as non qualifying service, which disentitled him to the benefit of pension. It is really shocking. This double deduction of 84 days rendered his qualifying service short by 44 days. Thus, we do not find any substance in the arguments of the learned counsel for the respondents. We are of the considered opinion that injustice has been caused to the applicant by withholding his pension/family pension. Authorities have failed to consider the case properly and in a mechanical manner, the prayer for grant of pension was rejected on the ground that the deceased does not have 15 years of qualifying service to his credit.

14. The case of the applicant also gets strength from the pronouncement of Hon'ble Supreme Court in the case of **Union of India vs. Surender Singh Parmar** (2015 (3) SCC 404), wherein Hon'ble Supreme Court in Paras 9, 10 and 11 has held as under :

“9. It is not in dispute that the respondent has completed 13 years, 10 months and 13 days of service under the appellant. In view of declaration of Regulation 82(a) ultra vires, the prayer of the respondent for considering his case for condonation cannot be rejected on the ground that he voluntarily sought permission to leave the service. The aforesaid submission was also accepted by the High Court in the earlier writ petition preferred by the respondent.

10. The note below paragraph 5 of the Government of India, Ministry of Defence instructions dated 30th October, 1987 at clause 5 provides that in calculating the length of qualifying service fraction of a year equal to three months and above but less than six months shall be treated as a completed one half year for reckoning qualifying service. The said provision reads as follows:-

"5. Qualifying service.

(a)xx xx xx

(b)xx xx xx

Notes:

(1) to (4) xx xx xx

(5)In calculating the length of qualifying service fraction of a year equal to three months and above but less than six months shall be treated as a completed one half year and reckoned as qualifying service."

11. In view of the aforesaid provisions the respondent is entitled to claim total period of service as 14 years for the purpose of calculation of pension. By Government of India, Ministry of Defence order dated 14th August, 2001 administrative power has been delegated to the competent authority under clause (a)(v) the competent authority has been empowered to condone shortfall in qualifying service for grant of pension beyond six months and upto 12 months. The said provision reads as follows:-

"(a)(v)Condonation of shortfall in Qualifying Service for grant of pension in respect of PBOR beyond six months and upto 12 months."

15. We have examined the case of the applicant with another angle. As per the respondents, there was 230 days of non qualifying service in the year 1966 which spreaded upto 04.02.1967. Thus, the applicant worked for more than three months and less than six months in the year 1966. The note below paragraph 5 of the Government of India, Ministry of Defence instructions dated 30th October, 1987 at clause 5 provides that in calculating the length of qualifying service fraction of a year equal to three months and

above but less than six months shall be treated as a completed one half year for reckoning qualifying service. The said provision reads as follows:-

"5. Qualifying service.

(a)xx xx xx

(b)xx xx xx

Notes:

(1) to (4) xx xx xx

(5)In calculating the length of qualifying service fraction of a year equal to three months and above but less than six months shall be treated as a completed one half year and reckoned as qualifying service."

16. Therefore, keeping in view the abovementioned provisions, the period of six months ought to have been counted towards the qualifying service for the year 1966. If the period of qualifying service would have been calcu(Late)d in view of the aforementioned provisions, then there would not have been any deficiency in the qualifying service of the deceased army personnel.

17. Keeping in view the above mentioned case law and the facts of the case, we are of the view that virtually there was no deficiency in qualifying service. Even if the period of non qualifying service (i.e. 62 days AWL + 84 days in custody) is deducted from the total period of service rendered by the husband of the applicant, the qualifying service would be more than 15 years. Period of 84 days as leave without pay was deducted without any basis. Therefore, keeping in view the abovementioned facts, we consider that the authorities, in the facts of this case, have not applied their mind correctly which has caused failure of justice in calculating the qualifying period of service for sanctioning the pension to the husband of the applicant.

18. Accordingly, this O.A. deserves to be allowed and is hereby **allowed.**

19. The respondents are directed to calculate the arrears of service pension of Gnr (Late) Dharmanand from the date of his discharge till his death. All the arrears of service pension alongwith interest of 9% shall be paid to the applicant. Respondents are further directed to sanction family pension to the applicant from the date of death of Gnr (Late) Dharmanand and entire arrears shall be paid to her alongwith 9% interest. This entire exercise shall be completed within a period of three months from today.

20. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: November ,2017.
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