

**Asim Majumdar Vs. Union of India and Others**

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**Court :** Armed forces Tribunal AFT Regional Bench Kolkata

**Decided On :** May-17-2010

**Judge :** SADHAN KUMAR GUPTA, MEMBER (JUDICIAL) & THE HONOURABLE LT GEN MADAN GOPAL, MEMBER (ADMINISTRATIVE)

**Appeal No. :** Transfer Application No.13 of 2010

**Appellant :** Asim Majumdar

**Respondent :** Union of India and Others

**Judgement :**

JUSTICE SADHAN KUMAR GUPTA, MEMBER (JUDICIAL)

1. Originally Writ Petition no. 8971 of 2009 was filed by the petitioner before the Honble High Court at Calcutta. However, since the coming into operation of the Armed Forces Tribunal Act, said writ petition was transferred to this Bench for disposal and same has been renumbered as T A No.13 of 2010.

2. Case of the petitioner is that he joined the Indian Air Force and was enrolled on 31st December 1952 for a period of nine year regular service and six year reserve service. After completion of the nine year regular service, the petitioner was transferred to reserve service with effect from 31st December 1961 and a certificate of transfer to that effect was issued by the authority. During the Chinese Aggression in 1962 the petitioner was re-called since he was liable to render service until completion of the reserve period of six years. Accordingly, the petitioner joined the regular service and performed his duty for a period of one year and 135 days. On 14th May 1963 he was discharged from the Indian Air Force as per Rules. However, the petitioner was not granted any pension by the Government of India inspite of the fact that he had rendered nine years regular service and was kept in reserve for six years. Subsequently the petitioner came to know that the Government was considering such similar of cases for grant of pension and accordingly he submitted an application with the authority on 30.7. 2001. Petitioner followed such application by sending several other representations to the concerned authority. On 23rd October 2007 the petitioner was informed by the AIR FORCES RECORD OFFICE regarding the condonation of short fall in qualifying service for grant of pension and accordingly the petitioner submitted the requisition. However, by the letter dated 6. 11. 2007 the authority concerned asked him to wait for further communication. As no positive reply was received within one year thereafter, the petitioner again submitted representation with the authority in the year 2008. Ultimately the petitioner had to send legal notice through his Advocate in this respect wherein the judgment passed by the Honble High Court at Kerala was referred. In reply to such notice, the authority by its letter dated 22nd December 2008 replied that the claim of the petitioner could not be processed because all of his documents have been destroyed after stipulated retention period and as per Long Roll he has not rendered requisite qualifying service for grant of service /reserve pension.

3. According to the petitioner, the decision of the authority in this respect is highly illegal and without any justification. He has claimed that since he has completed fifteen years of qualifying service (nine years regular

service plus six years reserve service) he is certainly entitled to get the pension as per Rules.

4. Being aggrieved by and dissatisfied with the denial of the authority in granting reservist pension to the petitioner, he preferred this application.

5. The respondents contested the application by filing A/O wherein the claim the petitioner has been denied. In the A/O it is admitted that the petitioner completed nine years of regular service and was kept in the reserve list. It has further been admitted by the respondent that during the Chinese operation the petitioner was called back and directed to join the regular service. The respondents further admitted that subsequently the petitioner was discharged as his service was no longer required. According to the respondents, as the petitioner rendered total 10 years and 135 days of service, so, since he did not complete fifteen years of service, he was not entitled to pension, as claimed by him.

6. The respondent in the A/O has admitted that they were aware about the judgment of the Kerala High Court and on the basis of that they identified number of cases of similar nature including that of the petitioner for processing their case of pension.. However, after scrutiny the respondent authority could not grant the pension in favour of the petitioner since he did not complete fifteen years of qualifying service.

According to the respondents, the Record Copy of Sheet Roll(RCSR) of the petitioner has been destroyed after retention for a stipulated period of 25 years and only limited information is available in respect of the petitioner in the form of Long Roll. However, in the said Long Roll except the enrolment of the petitioner in the Air Forces and his transfer to the reserve and subsequent discharge on 14th May 1963 under the clause service no longer required, nothing more is available and as such the case of the petitioner could not be favourably considered. However, it is emphatically claimed by the respondents that the claim of the petitioner cannot be considered after such a long gap and since the petitioner is guilty of laches, so he could not be given any benefit,as prayed for in this application.

Following points that are to be considered so far as this application is concerned :-

(a) whether the petitioner is entitled to get reservist pension, as claimed in the application?

(b) whether the claim of the petitioner should be rejected due to long delay and lack of document, as pointed out by the authority concerned ?

## DECISION

7. We have considered the submission of the learned Advocates for both the sides as well as we have perused the application, affidavit-in-opposition and the rejoinder thereto and the documents that are annexed in connection with this writ petition. It is the admitted position that the petitioner rendered nine years of regular service in the Air Forces and thereafter he was kept in the reserve list for six years. It is also undisputed that while the petitioner was in the reserve list he was called back due to emergency situation and directed to join the regular service, which the petitioner complied. There is no dispute also that the petitioner rendered 1 year 135 days service while he was in the reserve list. Admittedly a person is qualified to get Air Forces Pension provided he completes fifteen years of service (nine year regular service + six years reserve service) Admittedly the petitioner has completed the nine years service and was kept in six years reserve service as per order issued by the authority. Under normal circumstances, after the completion of six years reserve period, the person concerned is certainly entitled to get pension. For this, we rely upon the unreported decision of the Kerala High Court passed in W P (C) 2949 7/04 dated 31st May 2006 wherein it has been clearly held to the effect

That issue is no more res integra covered by two bench decisions of this Court, one in W A No. 1360 of 1999 and the other in W A no. 1392 of 1997. In both decisions, it has been held that the reserve period is also liable to be counted for the purpose of pension

Against the decision of the learned Single Judge appeal was preferred and in W. A no. 1439 of 2006 the Division Bench of the Kerala High Court, (as it appears from the copy of the said judgment) the decision of the learned Single Judge was upheld. In two other appeals being W A NO. 1360 of 1999 and W A No.1392 of 1997, copies of which were placed before us, it appears that the same principle was followed. In the decision passed by the Learned Division Bench of the Kerala High Court in W A no. 1392 of 1997 it has been observed to the effect :-

The minimum qualifying period for eligibility to pension is 15 years of service (9 regular and 6 reserve with the Air Force). Therefore, the respondent is entitled to get pensionary benefits. As rightly contended by learned counsel for the respondent, the action of the appellants is violative of the principles of natural justice and that the refusal of the appellants to grant pension to the respondent after he completed the minimum period required to get pension is discriminatory and untenable in law. The learned Judge, on a careful consideration of the records placed before him in original, came to the conclusion that the respondent herein is entitled to get pensionary benefits. We are not persuaded to take a different view than the one taken by the learned Judge.

So in view of the ratio as decided by the Kerala High Court, there cannot be any doubt that the petitioner is certainly entitled to get pension after the completion of the 15 years of qualifying service.

8 Learned Advocate for the respondent argued that the petitioner is not entitled to get pension because after 1 year and 135 days of the service, so rendered by him while in the reserve, he was discharged from the service on the ground that his service was no longer required. Accordingly, the position stands that the petitioner actually rendered 10 years 135 days service to the Air Force thereby not acquired the prescribed period of 15 years of qualified service. This argument, which is supported by the department, appears not only to be unjust but also against the principle of natural justice. It is difficult to accept the argument that a person who had come forward to render service in the interest of the Nation, could not be given the benefit of pension, which is not a big amount, whereas if he did not join the force after completion of the nine years regular service, then he would have been granted the pension by way of calculating his service to fifteen years (9 years + 6 years). Another issue that needs to be highlighted is that the applicant served for one year and 135 days during the reserve period liability. He was discharged since the war situation no longer existed and his services was not required. So far so good, but it no way cancelled or over ruled the six years reserve liability which the applicant had undertaken. The reserve liability of six years remained operative. This is an argument that is not acceptable. This view is not expected from the authority who are in the helm of the defence affairs. If such a plea is allowed to be continue, it will certainly demoralize the forces. Exactly same position was considered by the Division Bench of the Kerala High Court in WA no. 1439 of 2006 wherein Their Lordships observed to the effect

if we accept the interpretation given by the appellant, Union of India, it will give rise to an anomalous situation where a person who had been kept as reservist and was not called to serve again will be entitled to get pension, whereas a person who had been serving the Nation for a second time will be at loss

9. Under such circumstances, we are of the opinion that the petitioner did not lose his six years reservist service simply because he was called again by the Air Force authority and in the process rendered further 1 year and 135 days of service. In our considered opinion the authority should consider that the petitioner completed fifteen years of qualified service after the expiry of six years reservist period and the authority should allow the pension to the petitioner accordingly and as per Rules.

10 Learned Advocate for the respondents argued that the claim of the petitioner cannot be considered by the authority because of the lack of papers. According to him as per Rules, after 25 years, the service particulars of an Air Force person would be automatically destroyed. True it is there is such provision in the Regulation and as such we do not disbelieve that after 25 years, since the retirement of the petitioner, the service documents concerning him were destroyed. However, it appears from the A/O that the respondent had

admitted that Long Roll of the petitioner is still available and from there it can be ascertained as to when he joined and for how much period he was in the regular service and when he was transferred to the reservist category. It is further stated that from the Long Roll it can be ascertained that the petitioner was recalled and rendered further service of more than one year while he was in the reserve list. So for the purpose of granting a reservist pension to the petitioner, all the necessary particulars are available with the authority from the Long Roll, concerning the petitioner. As such, we do not find any justification in this argument of the respondent that because of lack of service particulars, the case of the petitioner could not be processed. In our considered opinion, the authority concerned has certainly shown step motherly attitude in the case of the petitioner which is not befitting for the Defence Forces. Be that as it may, since it appears that the petitioner has completed 15 years of qualified service, we are of the opinion that he is entitled to get pensionary benefit, as claimed in this case.

11. Learned Advocate for the respondents argued further that the case of the petitioner cannot be considered due to long delay and as the same is barred by limitation. As against this, the learned Advocate for the petitioner argued that claim of pension is a recurring process and is continuing from month to month and as such there cannot be any limitation in this respect. In support of his contention he has relied upon the decision passed by the Central Administrative Tribunal, Hyderabad Bench wherein it has been held that the claim for pensionary benefit is a continuous cause of action and as such the question of limitation does not arise. This view finds support from the decision reported in 2007 JCR -2P - 123 Shiv Dass vs- Union of India where the Honble Apex Court held

In the case of pension the cause of action actually continues from month to month

As such, since the petitioners claim is confined to getting pensionary benefit, it cannot be said that no relief could be granted in his favour due to long delay. In case of pension it is always open for the Court to look into the matter in all its perspective and to consider the entitlement of the petitioner. Of course, that does not mean that in considering such claim, the long delay that has taken place should be over looked altogether. It is always open for the Court to see as to whether such delay was intentional or not and thereby getting an undue advantage putting the administration in a most disadvantageous position. Let us now consider this aspect from the material available on record and to come to a conclusion as to whether such claim, as made in this application, can be or should be entertained after such a long lapse of time.

12. Learned Advocate for the respondents in this respect has preferred to rely upon several decisions of the Honble Apex Court as well as of the Honble High Court. However, it appears that only the head notes have been provided and not the entire judgment. As such it is not possible for us to take into consideration those decisions. Subsequently after the argument was closed, Mr Mukherjee, the learned Advocate for the respondents placed the entire judgment as reported in 2007 JCR- 2 123 Shiv Dass vs- Union of India. Relying upon the said decision as well as upon other decisions, synopsis of which have been filed, Mr Mukherjee argued that the petitioner filed this application almost about 40 years after he was discharged from the Air Force service. According to him, such an inordinate delay should not be condoned and since the petitioner is guilty of gross negligence, he is not entitled to get any relief. There cannot be any dispute that the application has been filed after lapse of long time. However, simply because there was inordinate delay, that cannot be a ground for rejection of the application. We must not forget that it is the settled position that in respect of claim of pension the cause of action actually continues from month to month. That however, cannot be a ground to over look the delay in filing the petition. It would depend upon the fact of each case. So what is relevant for our purpose is to see as to whether from the fact of the present case it can be said that the petitioner was negligent in filing the application in proper time. So far as the present case is concerned, it appears that the petitioner filed representation with the authority after the judgment was passed by the Kerala High Court holding that in such cases the persons concerned are entitled to reservist pension. It further appears from the documents, as filed in this case, that the authority concerned actually acted as per the judgment, so passed by the Kerala High Court and called for some particulars from the petitioner and others. Thereafter, of course the authority concerned preferred to reject the claim of the petitioner on the

ground of inordinate delay and non-availability of records. We have already pointed out that non-availability of record cannot be a ground for rejection of the claim of the petitioner since all the necessary particulars, that are required, are available with the authority. So, we do not find any reason for the authority in rejecting the prayer of the petitioner on this ground. Due to the peculiar facts of the present case, as discussed above, we are of the opinion that it cannot be said that the petitioner was lethargic and negligent in raising his claim in respect of the reservist pension. We have already pointed out that the Kerala High Court judgment was an eye opener for the people like the petitioner to raise such claim. After the said judgment was passed the authority concerned were also of the opinion that decision should be taken following the ratio as decided by the Kerala High Court and for that some particulars were called for from the petitioner. Since even after such particulars were furnished, the authority did not grant the pension on the ground mentioned above the petitioner had to move the High Court in its writ jurisdiction for the grant of reservist pension. We fail to understand as to why the authority did not grant the reservist pension to the person, so entitled, but instead preferred to take advantage of the ignorance of the candidates in respect of the legal position. The Defence Ministry is the guardian of all the members of the Armed Forces and it is expected that they will take benevolent steps in favour of jawans and others so that they should not be deprived of their legitimate claim. If that is not done, then the morale of the force would be deteriorated and that will cost the Country as a whole. Under such circumstances, we are of the opinion that the delay in preferring this application by the petitioner was not intentional and the laches in this respect should be condoned. As such, we hold that the delay has been sufficiently explained and the claim of the petitioner, as put forward in this petition, can be taken into consideration. Since we have already discussed that the petitioner is entitled to get reservist pension as per the Rule and as per the decision of the Kerala High Court, both single bench and the division bench, which finds support from the judgment of the Apex Court as mentioned above, we are of the opinion that the claim of reservist pension, as put forward by the petitioner should be allowed,, if not for anything else but for the interest of natural justice and fair play.

13. Be that as it may, in the decision reported in 2007 JCR -2 123(Supra) the Hon'ble Supreme Court has observed -

if petition is filed beyond a reasonable period say 3 years normally Court would reject the same or restrict the relief which could be granted to a reasonable period of about 3 years

In the decision passed by the learned single judge of the Kerala High Court in W P (C) no. 31644 of 2003 (P) the learned single judge has observed to the effect

the said judgment was confirmed in Ext. P2, judgment of the division bench. This was challenged by the respondent and by Ext P3 order the Apex Court, while not interfering with the matter made it clear that the claim of the petitioner for pension cannot be allowed for the entire period as he had approached the High Court in 1998 while he had retired from Army in 1967. The Court further held that he was entitled to pension computed from 3 years prior to his filing the writ petition

So it appears that the Honble Apex Court has held that in case of such long delay, even if the claim of pension is allowed by the Court, then that should be allowed 3 years prior to the filing of the writ petition/application before the High Court or in the Tribunal, as the case may be. Arrear amount of pension beyond such three years period, cannot be allowed in any circumstances. In view of such decision we are of the opinion that the claim of the petitioner in respect of reservist pension should be allowed and the authority should be directed to pay the same with retrospective effect of three years prior to the filing of the writ petition.

14. In the result the Transfer Application is allowed on contest but without cost. It is declared that the petitioner is entitled to get reservist pension as per Rule taking into consideration his 15 years period of service (9 years regular + 6 years reserve). The respondents are directed to pay such pension, as per the rate provided in the Rules from 15. 5. 2006 onwards (i.e. 3 years prior to the filing of the writ petition). The respondents are directed to grant such pension in favour of the petitioner within 3 months from the date of

communication of this judgment, by their learned Advocate and in case the amount is not paid within such period then it will carry interest @ 12 % per annum and such amount of interest, if at all is to be paid, then the same shall be realized from the salary of the concerned defaulting officer.

15. Let a plain copy of this judgment duly countersigned by the Registrar of this Tribunal be handed over to the learned Advocates for both sides for their taking necessary action.

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