

**HIGH COURT OF JAMMU AND KASHMIR**  
**AT JAMMU**

LPASW no. 462/2002

Date of decision: 23.03.2011

Union of India and ors.

v.

Kasturi Lal.

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**Coram:**

***Hon'ble Mr. Justice Dr. Aftab H. Saikia, Chief Justice***

***Hon'ble Mr. Justice Hasnain Massodi, Judge***

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**Appearing counsel:**

For appellant (s) : Mr. Tashi Rabstan, CGSC.

For respondent(s) : Mr. Z. A. Mughal, Advocate.

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i) Whether approved for reporting in Law Journals? **Yes.**

ii) Whether approved for reporting in Press? **Yes.**

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**Dr. Saikia, CJ:**

Legality and correctness of judgment and the order dated 31.12.2001 passed by the Writ Court in SWP No.933/2001 has been assailed in this Letters Patent Appeal preferred by the Union of India-appellants .

2. By the impugned judgement and order, the writ petition initiated by the respondent as writ petitioner was disposed of in his favour with a direction that he was held entitled to pension by ignoring the vague options

said to have been exercised by him, with a further direction that the pensionary benefits be calculated and released in favour of the respondent within a period of two months from the date copy of the order passed by the Writ Court was made available by the respondent to the appellants.

3. The factual matrix, in brief, necessary for the proper resolution of this appeal, as emerged from the pleadings exchanged by and between the parties in the writ proceedings, is that the respondent herein had joined Army Service on 11.12.1965. After serving 7 years and 5 months, he was transferred to RESERVE. The respondent was in receipt of Reserve Pension with effect from 20.5.1973.

4. The respondent was re-enrolled in Defence Security Corps (D. S. C.) with effect from 19.2.1976 and discharged with effect from 3.1.1988 and he had served for 19 years and 93 days.

5. Thereafter, the respondent was again, in second spell of service, enrolled in D. S. C. on 11.11.1991 and was discharged on 28.2.1999 after serving 8 years 3 months and 17 days. Taking into account the period of earlier

service and the service on second spell, it is claimed, the respondent had total service period of 27 years in his credit and he is, therefore, entitled to total pension for the entire period. However, the service period of second spell was allegedly not calculated for pension.

6. Thus the respondent has prayed for counting of his second spell / re-employment in D. S. C. for the purpose of pension and consequently for release of Army pension which was allegedly kept in abeyance during his re-employment in first and second spell of service in D. S. C. The respondent has claimed to be entitled to get one pension from Army service and second from D. S. C. alongwith arrears of pension and other allowances. Despite rendering total 27 years service, pension was being paid only for 19 years, as per the respondent.

7. Respondent has further prayed that his failure to get any relief from the department despite repeated representations/communications, has compelled him to file the instant writ petition.

8. The Union of India had filed the objections to the writ petition thereby controverting the claims of the respondent in toto.

9. The learned Single Judge having considered the pleadings exchanged by and between the parties including the records made available before the Court as well as upon hearing the learned counsel for the parties, accepted the writ petition and passed the impugned order.

10. Feeling aggrieved by the impugned judgment and order passed by the Writ Court, the Union of India has preferred the instant writ appeal.

11. We have heard Mr. Tashi Rabstan, learned Central Government Standing Counsel (CGSC), appearing for the appellants-Union of India as well as Mr. Z. A. Mughal, learned counsel for the respondent.

12. The core issue involved in the case in hand is as to whether the respondent is entitled to get the pension for his second spell of service in D. S. C, after having elected to continue to draw earlier pension and not to count the former service towards the enhanced rate of pension.

13. Mr. Rabstan, learned CGSC, questioning the validity of the impugned judgment, has submitted that the respondent has been regularly and continuously drawing the pension for the period from 11.11.1991, on being enrolled in D. S. C., to 28.2.1999, the date of his

discharge under Army Rule 13 (3) Item III (iv) of the Army Rules, 1954. When he was re-enrolled in D. S. C. for the second spell, he, having himself elected to continue to draw the pension and not to count the former service towards the enhanced rate of pension, is not entitled to claim any further benefit. He has further urged that the respondent himself has exercised the option to cease pension and count the former service.

14. Relying on the affidavit-in-opposition filed on behalf of the Union of India, Mr. Rabstan has forcefully contended that the respondent was paid his service pension throughout his re-enrolled period of second spell of service with D. S. C, in addition to pay and allowances of his appointment and at no point of time, pension was withheld or kept in abeyance, as alleged.

15. Under such circumstances, it is emphatically argued that the Writ Court failed to appreciate this factual position as narrated in the counter filed by the appellants and the impugned judgment and order, therefore, deserves to be interfered with.

16. Refuting the submissions and contentions made on behalf of the appellants, Mr. Mughal, learned counsel

appearing on behalf of the respondent, has vehemently contended that since the respondent served for the first time from 19.2.1976 to 3.1.1988 and for the second time from 11.11.1991 to 28.2.1999, he is entitled to get full pension for the entire period for the simple reason that his Army pension was kept in abeyance but the same has been denied to him by the appellants illegally and arbitrary.

17. In support of such submission, Mr. Mughal has relied upon Regulation No. 267 of Army Pension Regulations, 1961 (Part-I) (for short 'the Regulations') wherein under Clause (d), it is provided that any individual in re-employment in D. S. C., who is in receipt of pension in respect of his former service, shall be kept in abeyance during his service in D. S. C, and his re-employment service shall be counted for enhancement of pension under the Regulations. Learned counsel has strenuously submitted that during the second spell of service/re-employment in D. S. C., pension of the respondent was withheld, i.e., kept in abeyance and, hence, the respondent is entitled to get his enhanced pension counting his entire service from his initial and first enrolment, i.e., 19.2.1976 till 28.2.1999.

18. Careful consideration has been given to the extensive submissions and arguments placed on record by the learned counsel appearing for the parties and also meticulously perused the entire relevant records so placed before us including the relevant laws including the Rules and Regulations framed for such purpose for counting of former service.

19. The relevant provisions the Regulations would be essential and apt to be noticed and the same may be extracted as under:-

*"265. Extent of Application- unless otherwise provided, the regulations in this Chapter shall apply to personnel of the Defence Security Corps who were in service on the 1st January 1986 and who joined or join service on or after that date.*

*266. General Provision- The grant of pensionary awards to personnel of the Defence Security Corps shall be governed by the same general rules as are applicable to combatants of the Army, except where they are inconsistent with the provisions of the regulations in this chapter.*

***267-Counting of Service- (a) An individual who has rendered previous service in the Army/Navy/Air Force and/or the Defence Security Corps is eligible to count such former service for pension/gratuity to***

***the extent and subject to the conditions laid down in regulation 126.***

***(b) Obsolete***

***(c) Obsolete***

***(d) An individual, including one who is re-employed in the Defence Security Corps as a Junior Commissioned Officer (except an Ex-EICO or Hony. Commissioned Officer accepting re-employment in the Defence Security Corps in the status of Junior Commissioned Officer) who is in receipt of pension in respect of his former service, shall be held in abeyance during his service, in the Corps. The re-employed service shall count for enhancement of pension under the regulations applicable to personnel of the Defence Security Corps. On release from the Corps either the pension which was held in abeyance, or any higher pension earned, shall become payable."***

20. In the backdrop of above Regulation 267, it is now required to be decided as to whether the respondent's pension for his former service was withheld, i.e., kept in abeyance.

21. The respondent, in paragraph 10 of his writ petition, contended as under:-

***"10. That the petitioner has joined Army Service in the year 1965 from 11.12.1965 and after***



*serving for a period of 7 years and 5 months was transferred to Reserve on 20.5.1973, and petitioner was in the receipt of Reserved Pension but since petitioner has Re-enrolled in Defence Security Corps in 1st Spell of service in D. S. C. on 19.2.1976 and discharged on 3.1.1988 and further in second Spell of Service was re-enrolled again in Defence Security Corps on 11.11.1991 and was discharged on 28.2.1999 after serving 8 years and 3 months and the period for which he has served in D.S.C. his pension is with-held kept in abeyance as per Army Pension Regulation 1961 Chapter IV Section 1 General."*

22. Again, in paragraph 11, after quoting the relevant provisions of Regulations, as quoted above, in last paragraph, the respondent has stated as under:-

".....The instant petitioner's pension or former service was with-held i.e. kept in abeyance during the period he was re-employed in D. S. C. and after retirement from D. S. C. Service, petitioner is fully eligible to get his former service pension which was with-held during service period of D. S. C. service. Hence petitioner is fully eligible to get his with-held pension with effect from his discharge from service of D. S. C. alongwith arrears of pension."

23. Refuting such claim, as made in paragraph Nos. 10 and 11 of the writ petition, the appellants-Union of India,

in paragraph No. 10 of their Affidavit/counter have specifically projected their submission as under:-

*"10. That the contents of par No; 10 and 11 are matter of record. The detailed reply has already been given in the fore going paras. However, it is respectfully submitted that the petitioner was paid Service Pension throughout the period of second spell of service with Defence Security Corps in addition to pay and allowance of his appointment. No pension was "with-held kept in abeyance" as alleged by the petitioner in this para. The petitioner may be directed to produce pension Certificate in support of his averment. It is further submitted that Rules 265 to 267 of Pension Regulations for the Army part 1 (1961) incorporated by the petitioner in this paragraph are matter of record, except certain spelling mistakes/ omissions. The allegations are baseless and without substance, frivolous in nature."*

24. However, the stand taken by the Union of India in paragraph 10, as quoted above, has not been confronted by the respondent for the reasons best known to him. The respondent has preferred not to respond to the said specific contention of the appellants that his pension for the earlier service was not withheld/kept in abeyance.

25. Since the respondent has not controverted the said contention of the appellants, the statements made by the appellants in their counter to the effect that his pension was not withheld/kept in abeyance appear to have been admitted. It is ruled in the case of *Smt. Naseem Bano v. State of U. P. and others*, reported in AIR 1993 SC 2592 (para 11), that the appellants' averments not controverted or refuted shall be deemed to be accepted by the respondent. The relevant portion of para 11 of *Naseem Bano's case* (supra) may be quoted as under:-

*"11.....Since no dispute was raised on behalf of respondent Nos. 1 to 4 in their reply to the averments made by the appellant in the writ petition that 40% of the total number of posts had not been filled by promotion inasmuch as the said averments had not been controverted the High Court should have proceeded on the basis of the said averments had been admitted by respondents."*

26. Besides, the respondent has exercised the option to cease pension and count the former service in his second spell of service. This position is made clear and loud from the two documents signed by the respondent on 22.4.1983 and 24.12.1991 and those are extracted as under:-

"OPTION TO CEASE PENSION AND  
COUNT FORMER SERVICE.

*I, No. 2455053 Rank SEP Name KASTURI LAL of 131 'A' DSC /P1 attached to 131 SQN AF C/O 56 APO hereby opt to cease to draw my pension or refund the service gratuity, including DCR gratuity, if any and opt the previous military service as qualifying service. This option is exercised in terms of Government of India, Ministry of Defence letter No. PC II to MF No. A00592/DSC-2/54-C/D(GS-IV) dated 03 Mar 83."*

*Sd/-*

*(Signature of the individual)*

*Signed at C/o 56 APO FRI day of 22 Apr 83.*

*Sd/-*

*M.K.Rajput*

*SQN Ldr*

*Station C/o 56 APO*

*Dated :- 22 Apr 83."*

CERTIFICATE TO CONTINUE TO  
DRAW PENSION AND NOT TO COUNT  
THE FORMER SERVICE

*I, No. 2455053 Rank SEP Name KASTURI LAL of DSC Centre Kannur hereby opt to continue to draw military pension and retain DCRG, or retain service gratuity and DCRG received by me on discharge from military service. This option is exercised in terms of Government of India Ministry of Defence letter No. PC III to M. F No. A 00592/DSC-2/54-C (GS-IV) dated 03 Mar 83 and my former military service shall not count as qualifying service.*

*Sd/*

*KASTURI LAL  
2455053*

*(Signature of the individual)*

*Signed at Kannur in my  
presence on this Twenty forth day of  
Dec. 1991.*

*Sd/-  
(Mitun P. V)  
OC (Unit)*

*Station: Kannur  
Dated 24 Dec 91."*

27. While delving upon those two documents, the Writ Court observed that options referred in those documents were not categoric. It was also recorded that it was not clear as to whether the respondent opted to cease to draw his pension or willing to refund the service gratuity including DCR and wanted to count the previous military service as qualifying service. However, the Writ Court made the specific observation that even though there was no dispute with regard to the signatures in those two documents but the fact remained that on reading of those two options, it could not be said definitely as to what was the ultimate intention of the respondent whether he wanted his previous service to be counted as qualifying service, as the same was not scored out on the face of the documents.

28. We respectfully agree to differ with the said observation of the Writ Court.

29. From the submissions and averments made in the pleadings, it is candidly clear that the pension was not withheld rather he has continued to receive the pension for his former service. Under the service jurisprudence, there is no such provision to get the pensionary benefit for the period when the employee is in re-employment. In the premises, the protection under Regulation 267 of the Rules, as claimed by the respondent, is not available to him.

30. Once the respondent is not disputing the signatures on those documents, we do not find any ambiguity in exercising his options in the documents dated 24.3.1983 and 24.12.1991.

31. In view of the above, in our considered opinion, the respondent is not entitled to get any pensionary benefit, as sought for, for his second spell of service/re-employment.

32. In view of what has been discussed, stated and observed above, we are of the view that the impugned

judgment and order deserves to be dislodged and, accordingly, the same stands set aside and quashed.

33. In the result, the appeal is allowed. However, there shall be no order as to costs.

**(Hasnanin Massodi)**  
**Judge**

**(Dr. Aftab H. Saikia)**  
**Chief Justice**

Jammu:  
23.03.2011  
Tilak, Secy.