

Union Of India Ministry Of Defence ... vs Wg. Cdr. Subrata Das(19942H) on 29 January, 2019

Equivalent citations: AIRONLINE 2019 SC 602

Bench: Hemant Gupta, Dhananjaya Y Chandrachud

1

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 10953 OF 2014

UNION OF INDIA
THROUGH ITS SECRETARY,
MINISTRY OF DEFENCE DHQPO,
NEW DELHI & ORS.

.....APPELLANTS

Versus

WG. CDR. SUBRATA DAS (19942-H)

.....RESPONDENT

WITH

CIVIL APPEAL (D) No. 4575 OF 2017

WITH

CIVIL APPEAL No. 2821 OF 2015

AND WITH

DAIRY No. 26814 OF 2018

2

JUDGMENT

Dr Dhananjaya Y Chandrachud, J.

1 Delay condoned.

2 Leave granted.

3 This batch of appeals arises from proceedings initiated before the Armed Forces Tribunal¹. Each of the four officers of the Indian Air Force - Wing Commanders Subrata Das, P K Sen, Rachit Bhatnagar and Group Captain Rajeev Moitra sought a premature separation from service under the Human Resource Policy² notified on 5 August 2011 by the Air Headquarters. Their requests for a Premature Separation from Service³ were allowed. Before the date stipulated for their separation from the Indian Air Force⁴, the officers withdrew their requests and sought to continue in service. The rejection of their plea to continue by the Air Headquarters led them to institute proceedings before the Tribunal.

4 The officers succeeded before the Tribunal in three of those proceedings, ⁵ while the decision of the Air Headquarters was upheld in the fourth proceeding. 6 The Union of India is in appeal against the three decisions of the Tribunal allowing the requests made by the officers to withdraw from their applications for 1 The Tribunal 2 The Human Resource Policy, Air HQ/988321/1/PO-5 3 PSS 4 “IAF” 5 O.A. No. 425 of 2013, O.A. No. 467 of 2013 and O.A. No. 134 of 2015 PSS and continue in service. Wing Commander Rachit Bhatnagar was unsuccessful in pursuing his remedy before the Tribunal and has filed a Civil Appeal questioning the decision.

5 The facts follow a similar trajectory. The facts relevant to each of the appeals are set out below :

(i) Civil Appeal 10953 of 2014 : Wing Commander Subrata Das:

The officer was commissioned on 14 June 1989 as Pilot Officer and was promoted to the rank of Wing Commander on 16 December 2004. On 6 May 2013, he applied for PSS with 2 December 2013 as the proposed date of severance. The ground on which he sought PSS was that he was Permanently Passed Over⁷ by the Promotion Board. The request was accepted and communicated on 3 June 2013. The officer commenced a pre-release course at the International College of Financial Planning, New Delhi. At around the tenth week of the twelve-week course, he withdrew from the course and submitted an application to withdraw his request for PSS on 16 September 2013. The ground pleaded for withdrawing the application for PSS was acute domestic problems.

The request was rejected on 15 October 2013. The officer is due to superannuate from the Air Force on 31 January 2019. He did not complete the pre-release course.

(ii) Civil Appeal 2821 of 2015 : Wing Commander P K Sen:

7PPO The officer was commissioned on 4 September 1989 and was promoted to the rank of Wing Commander on 16 December 2004. On 1 October 2012, he applied for PSS with 30 October 2013 as the proposed date of severance. He sought PSS on compassionate grounds and since he was Permanently Passed Over. The request for PSS was approved and communicated on 30 April 2013. The officer commenced a pre-release course at Amity Institute of Education and Training, Noida. The officer sought a change in the PSS date from 30 October 2013 to 3 January 2014. The request was rejected and he was informed on 18 October 2013. On 8 October 2013, he submitted an application to withdraw his request for PSS which was received on 24 October 2013. The officer sought to withdraw his application for PSS on the ground that he had not been able to obtain private placement in a volatile market and that he faced personal difficulties. Before a decision could be taken, the officer instituted proceedings before the Tribunal on 25 October 2013. The officer is due to superannuate from the Air Force on 31 January 2020. He completed the pre-release course.

(iii) Civil Appeal (D) No. 4575 of 2017 : Group Captain Rajeev Moitra:

The officer was commissioned on 17 December 1988 and was promoted to the rank of Group Captain on 17 December 2014. On 25 April 2014, he applied for PSS with 31 December 2014 as the proposed date of severance. He sought PSS on compassionate grounds and since he was Permanently Passed Over. The request for PSS was approved on 12 July 2014 and was communicated on 15 July 2014. Upon a request by him for a change in the date of severance, the date of PSS was postponed from 31 December 2014 to 7 March 2015. On 19 January 2015, he submitted an application to withdraw his request for PSS which was rejected on 5 March 2015. The request for withdrawal was on the ground that the age of superannuation had been altered from 54 to 57 years and that he faced personal family difficulties. The officer was due to superannuate from the Air Force on 31 December 2020. He completed the pre-release course.

(iv) Civil Appeal Dairy No. 26814 of 2018 : Wing Commander Rachit Bhatnagar :

The officer was commissioned on 28 November 1994 and was promoted to the rank of Wing Commander. The application for PSS was submitted on 3 November 2016 with a proposed date of severance as 31 July 2017. The ground for PSS was that the officer had been Permanently Passed Over (PPO). The request for PSS was accepted on 1 February 2017. On 26 May 2017, the officer made a request for a change in the PSS date which was rejected on 20 July 2017. On 28 July 2017, the officer submitted an application for withdrawing his request for PSS, citing family constraints and unfavourable market conditions. Before a decision could be taken, the officer instituted proceedings before the Tribunal. The Tribunal did not grant the officer

relief and he retired on 31 July 2017. The officer was due to superannuate from the Air Force on 31 October 2025. The officer completed the pre-release course.

6 Wing Commanders Subrata Das, P K Sen and Group Captain Rajeev Moitra succeeded before the Tribunal and the rejection of their applications to withdraw the request for PSS was set aside. Following the decision of the Tribunal, Wing Commanders Subrata Das and P K Sen have been taken back into service and continue to work as officers of the IAF. In the case of Group Captain Rajeev Moitra, the order of the Tribunal was stayed during the pendency of the Civil Appeal and he has not been taken back on duty. Wing Commander Rachit Bhatnagar was not successful before the Tribunal and he is in appeal before this Court.

7 The Tribunal at its Principal Bench, while rendering its decision on 27 March 2014 in the case of Wing Commander Subrata Das, held that officers have a substantive right to continue in service until they attain the age of superannuation and that an application for premature retirement can be withdrawn at anytime before the actual date of retirement. The Human Resource Policy of the Air Force permits the withdrawal of the request for PSS on “extreme compassionate grounds”. The Air Force, according to the Tribunal, did not take into consideration the grounds indicated in the application, and proceeded to reject it on the ground that the officer had already undergone the pre-release course. In the view of the Tribunal, the pre-release course is an option which is given to an employee to improve career prospects and is not a condition of service. The Tribunal held that the officer has a substantive right to continue in service and that this right cannot be whittled down by a policy which has no statutory flavour. In taking this view, the Tribunal has relied upon the decision of this Court in *Union of India v Wing Commander T Parthasarathy* 8. The Tribunal held that severance from service which takes effect on a prospective date can be withdrawn at any time before it becomes effective. Hence, the order passed by the Air Headquarters was quashed with a direction to take the officer back in service with consequential benefits.

8 “Parthasarathy” : (2001) 1 SCC 158 8 In the case of Wing Commander P K Sen, the Tribunal at its Principal Bench relied on the decision of this Court in *Parthasarathy* (supra) and its earlier decision in the case of Wing Commander Subrata Das while granting relief in similar terms in its order dated 3 September 2014. In the case of Group Captain Rajeev Moitra, the Tribunal at its Regional Bench at Lucknow relied on the decisions of this Court in *Balram Gupta v Union of India*⁹, *Shambhu Murari Sinha v Project & Development India Ltd.*¹⁰ and *Parthasarathy* (supra). The Tribunal by its order dated 15 September 2016 held that an officer has an absolute right to withdraw an application for PSS before the effective date of retirement. The Tribunal placed reliance on its earlier decision in the case of Wing Commander P K Sen to hold that a substantive right which enures to the benefit of the officer cannot be denied merely on the basis of a policy of the Government. 9 In the case of Wing Commander Rachit Bhatnagar, the Tribunal at its Principal Bench has ruled against the officer by its decision dated 7 February 2018. The Tribunal, while taking a view contrary to its earlier decisions held that officers are commissioned into the Armed Forces on a commission by the President of India. The commission is associated with privileges, duties and distinct liabilities. In the view of the Tribunal, separation from service of a commissioned officer is not a vested right but is at the will and pleasure of the President. A request for premature retirement has to be approved by the Central government. Premature retirement is not a matter of right. The need for a highly disciplined force

distinguishes the Armed Forces from civil services. In other words, under the legislation which governs the Armed Forces, it is the right of the 9 “Balram Gupta” : 1987 Supp SCC 228 10 (2002) 3 SCC 437 authorities and of the government to retain or retire an officer and there is no vested right for premature retirement.

10 The questions of law which have been urged in the appeals from the above decisions of the Tribunal are similar. The appeals were consolidated and have been heard together.

11 Mr Rana Mukherjee, learned Senior Counsel appearing on behalf of the Union of India has urged the following submissions:

(i) Service in the Indian Air Force is on the grant of a commission by the President of India. The tenure of every member of the service is subject to the Air Force Act 1950 and is at the pleasure of the President;

(ii) Rule 13 of the Air Force Rules 1969 provides for the release of a member, subject to the Air Force Act 1950 and in accordance with the rules, orders or instructions made in that behalf by or under the authority of the Central government;

(iii) Premature Separation from Service is governed by the Human Resource Policy formulated by the Air Headquarters under powers delegated to it by the Ministry of Defence on 14 August 2001;

(iv) The policy seeks to achieve a convergence of individual aspirations and interests of the service;

(v) The number of officers granted PSS in a year is restricted, based on the exigencies of the service including inductions, superannuation and other exits.

Manpower deployment is a scientific process based on data collected every year and the data is collated and divided into two Boards of Officers scheduled to be held in the months of March and September;

(vi) Under the terms of the Human Resource Policy, officers with more than 24 years of service or those Permanently Passed Over may apply for PSS within nine months from the proposed date of severance and retire with full benefits. During this period, an officer has the opportunity to adjust to post retirement life;

(vii) Discipline is the backbone of the Armed Forces and the policy has been amended to permit one extension of the date of severance when it falls within the prescribed jurisdiction of the Board of Officers;

(viii) The withdrawal of an application for PSS is governed by paragraph 18 of the Human Resource Policy. The policy stipulates that an officer who has undergone a pre-release course is not entitled to

withdraw the application. 60% of the cost of the resettlement/pre-release course is paid by the Union government for the benefit of personnel proceeding on PSS;

(ix) Exits from the Air Force are carefully planned in accordance with manpower requirements which bear on the operational efficiency of the organisation;

(x) The officer who is granted PSS takes away an exit vacancy which could have been availed by another officer; and

(xi) If an officer who is in a sensitive appointment applies for PSS, the individual is posted to a non-sensitive appointment and is considered for the grant of PSS. Frequent withdrawal of an approved PSS may lead to officers using PSS as a modality to escape a transfer to a sensitive appointment and to later withdraw the request for PSS.

In the above background, it has been submitted that: (a) grant of PSS and permission for its withdrawal is not an absolute and unconditional right; (b) while an employee may seek to withdraw the application for PSS, the government has the discretionary power to accept or reject the application depending on the reasons advanced in the application; (c) in deciding whether to accept or reject an application, the government is entitled to have due regard to the exigencies of service; (d) the Human Resource Policy has been framed under powers delegated by the Ministry of Defence and is referable to the provisions of Rule 13 of the Air Force Rules 1969; and (e) the Tribunal erred in equating the withdrawal of an application for PSS from the IAF with the rules which govern employment in the civil services without bearing in mind the essential differences between service in the civilian wing and in the Armed Forces.

12 On the other hand, learned Counsel representing the officers of the Air Force in the present case urged the following submissions:

(i) Under Section 189(2)(a), the rule making power governs removal, retirement release or discharge of persons subject to the Air Force Act 1950;

(ii) Under Section 190, regulations can be framed by the Central government for the purposes of the Act, other than those specified in Section 189. The regulations framed under Section 190 cannot govern the field covered by Section 189(2)(a);

(iii) Unless a law is enacted by Parliament, fundamental rights of members of the Armed Forces cannot be abrogated. In the absence of a statutory provision restricting the right of an officer to withdraw a request for premature separation, the same principle which governs civilian employment must apply to severance from the Air Force;

(iv) Paragraph 18 of the Human Resource Policy dated 5 August 2011 does not abrogate the right of an officer to withdraw a request for premature separation prior to the date on which it is to become effective;

(v) Administrative instructions contained in the Human Resource Policy cannot restrict the right of the employee to withdraw from a request from premature separation; and

(vi) The latest Human Resource Policy dated 23 February 2018 has liberalised the provisions pertaining to the withdrawal of a request for PSS.

In the above background, it has been submitted that the Tribunal justifiably held that the three officers were entitled to resume their duties in the Air Force. Wing Commanders Subrata Das and P K Sen are stated to have joined back active service. In the case of Group Captain Rajeev Moitra, it has been submitted that as a result of the stay order passed by this Court on 24 March 2017 on the operation of the decision by the Tribunal, he was unable to resume service. The decision of the Tribunal in the case of Wing Commander Rachit Bhatnagar has been assailed on the ground that it runs contrary to the law laid down by this Court in Parthasarathy (supra).

13 These submissions fall for our consideration.

14 At the outset, it is necessary to clarify that we are considering the terms of the Human Resource Policy dated 5 August 2011. We have not had the occasion to evaluate the provisions of any later policy. We must, while commencing the analysis, advert to the salient provisions of the Air Force Act 1950 which have a bearing on the present case. Section 2 defines the ambit of the Act by stipulating the persons who are subject to it. Section 2 provides thus:

“Persons subject to this Act.- The following persons shall be subject to this Act wherever they may be, namely:-

(a) officers and warrant officers of the Air Force;

(b) persons enrolled under this Act;

(c) persons belonging to the Regular Air Force Reserve or the Air Defence Reserve or the Auxiliary Air Force, in the circumstances specified in section 26 of the Reserve and Auxiliary Air Forces Act, 1952 (62 of 1952);

(d) persons not otherwise subject to Air Force law, who, on active service, in camp, on the march, or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of the Air Force.” Section 3 provides thus:

“Termination of application of the Act.- Every person subject to this Act under clauses (a) to (c) of section 2 shall remain so subject until duly, retired, discharged, released, removed, dismissed or cashiered from the service.” A person who has been made subject to the Act by virtue of the provisions of clauses (a) to (c) of Section 2 continues to remain subject to it unless ‘duly’ retired, discharged, released, removed,

dismissed or cashiered from service. Chapter IV spells out the conditions of service. Section 18 which falls in that Chapter provides that tenure of service is at the pleasure of the President :

“Tenure of service under the Act.- Every person subject to this Act shall hold office during the pleasure of the President.”

15 Section 19 empowers the Central government to dismiss or remove from service any person who is subject to the Act in accordance with its provisions and the rules and regulations made under it. Section 22 contains the following provisions in matters of retirement, release or discharge:

“Retirement, release or discharge.- Any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed.” The expression ‘prescribed’ is defined in Section 4 (xxiv) to mean prescribed by rules made under the Act.

16 Rule 13 of the Air Force Rules 1969 contains the following provisions in regard to release:

“13. Release.- A person subject to the Act may be released from the air force in accordance with these rules, or in accordance with any orders or instructions made in that behalf by or under the authority of the Central Government.”

17 Section 189 empowers the Central government to make rules for carrying into effect the provisions of the Act. Under clause (a) of Section 2 of sub-section 189, the rules may provide for the removal, retirement, release or discharge from service of persons subject to the Act. Section 189(2)(a) provides thus:

“189. Power to make rules.-

(1) ... (2) Without prejudice to the generality of the power conferred by sub-section (1), the rules made thereunder may provide for-

(a) The removal, retirement, release or discharge from the service of persons subject to this Act.”

18 The Air Force Headquarters’ Human Resource Policy was notified on 5 August 2011. The policy has been issued in pursuance of powers delegated to it by the Ministry of Defence on 14 August 2001. The policy seeks to lay down comprehensive guidelines for premature separation from service by officers of the Air Force, other than those from the medical and dental branches. The object of the policy is to bring about a balance between requests made by officers of the Air Force to leave service and the interests of the Air Force. The policy, in paragraph 1, provides thus:

“Officers on active service may wish to leave the Air Force for varied personal reasons. It is the endeavour of the Personnel Branch and Air HQ to give due

consideration to all such requests, on the merits of each case and seek convergence of individual aspirations and service interests. This Human Resources Policy (HRP) on Premature Separation from Service (PSS) aims to provide more clarity in the PSS policy. For the purpose of HRP, total service, whether mentioned, would imply commissioned service in the IAF excluding ante-date or any previous service.”

19 Paragraph 3 of the policy requires that PSS applications from officers be “considered on the merits of the case and requirements of service”. The grounds on which requests for PSS can be considered are, inter alia, (i) cases where officers have been Permanently Passed Over (PPO) or superseded; (ii) extreme compassionate grounds; (iii) better employment in civil life; and (iv) lack of career prospects. These grounds have been explained as follows in paragraph 3:

(a) “Permanently Passed Over (PPO)/Supersession.

Officers who submit an application for PSS on grounds of being PPO will be considered for release from service. Officer superseded in the select ranks may also be considered for release. In such cases, decision by Air HQ would be based on the officer’s record of service, future promotability prospects and service exigencies.

(b) Extreme Compassionate Grounds. Requests on extreme compassionate grounds would be considered after the facts presented by the officer are verified, to the extent possible, by this Headquarter. Such verification is necessary to ensure that the grounds are genuine. Domestic problems such as the need to look after ailing parents, inheritance problems, need to look after business, serious illness of wife/children’s ailments requiring officer’s presence at home, possibility of break-up of conjugal life if the officer continues in service, etc., would be treated as compassionate grounds depending on the circumstances of each case. Applications with medical issues will be routed through the Dte of Medical Services and interviews/counselling conducted by them.

(c) Better Employment in Civil Life. If a service officer applies for PSS within a period of one year before the due date of superannuation for obtaining employment in private sector, the request would normally be acceded to. For employment under Public Sector, Government controlled Corporation, Municipal Corporations etc. requests within a period of two years from superannuation would be considered as a measure of rehabilitation assistance to the officers. All applications for employment outside will, however, be submitted through proper channels so that Service HQ has sufficient notice of the intentions of the officers in this regard (Refer HRP 04/09). Officers who have been permitted to apply for civil/commercial employment as per HRP 04/09, will be required to put up an application for PSS. Officers are to carefully consider these aspects before applying for civil/commercial employment.

(d) ...

(e) Lack of Career Prospects (LCP). A person seeking a career in the Air Force is expected to be aware of his career progression at every stage of his career.

During his career, if an officer feels that he has no prospects for advancement in service, he may apply for PSS. However, the lack of career prospects of an officer will be ascertained by the 'P' branch." Where officers are trained in specialised courses, requests for PSS can be considered only upon the expiry of the minimum period indicated in the policy. 20 Paragraph 4 of the policy provides for eligibility criteria and the categorisation of officers seeking PSS. Paragraph 4 provides thus:

"4. The organization requires a dedicated pool of officers, who are motivated and willing to work towards organizational goals and at the same time fulfil their personal aspirations, which may be dynamic and may be influenced by external factors. In an attempt to address both, its goals and the individual's aspirations, the organization needs to fine-tune its policies. The thought processes, which have gone into formulating the eligibility criteria, which are enumerated in the subsequent paragraphs, are as follows:-

(a) There is a large shortfall of officers in the junior ranks (up to that of Sqn Ldr) in all branches.

(b) Below ten years of commissioned service, an officer should be discouraged as far as possible as even the cost of training would not have been recovered in full.

(c) Beyond 24 years of commissioned service, PSS cases would be favourably considered subject to service exigencies.

(d) Therefore, in the critical seniority group of up to about 21 years of commissioned service, the organisation has to be circumspect of the number of departures that can be permitted, in order not to upset the manning levels or its operational efficiency. At the same time one cannot deny a genuine case.

(e) With the implementation of the AVSC II proposals, an officer would have a fairly clear picture of his career prospects by about 20-22 years of commissioned service, as select grade would eventually start at 17.5/19.5 years for flying / ground duty branches respectively. Therefore, allowing superseded officers of separate from service beyond about 21 years would allow for better promotion ratios and at the same time allow superseded officers to seek avenues in the civil sector at a relatively young age." Paragraph 5 classifies officers seeking PSS into four categories:

(i) Officers with more than 24 years of commissioned service and those who have been Permanently Passed Over (PPO);

(ii) Officers between 21 and 24 years of commissioned service;

(iii) Officers between 10 and 21 years of commissioned service; and

(iv) Officers with less than 10 years of commissioned service.

21 Paragraph 6 envisages the constitution of the Board of Officers in March and September. The 'jurisdiction period' has been planned to provide officers proceeding on PSS adequate time to complete their formalities. Paragraph 8 provides for submission of applications for PSS, paragraph 9 for the procedure for officers on deputation and paragraphs 10 to 13 for the processing of applications. Paragraph 15 provides that applications for separation from service by officers with less than 21 years of service for reconsideration of an earlier request will not be considered before a lapse of one year from the non- acceptance of the previous application by the Board of Officers unless the grounds have changed substantially. Paragraph 17 contemplates that one change of the effective date of PSS may be permitted. Paragraph 18 provides for the withdrawal of a request for PSS. Paragraph 18 is in the following terms:

“18. Withdrawal - A request for withdrawal of approved PSS application would be permitted only as an exception under extreme compassionate grounds (except in case the officer has undergone a Pre Release Course, in which he / she would not be permitted to withdraw). The officer would be debarred from submitting a fresh application for one year from his proposed date of PSS.” Paragraph 18 of the policy indicates that:

- (i) A request for withdrawal of a PSS application which has been approved can be permitted only by way of an exception;
- (ii) A request for withdrawal can be permitted only under “extreme compassionate grounds”;
- (iii) An officer who has undergone a pre-release course will not be permitted to withdraw the request; and
- (iv) A fresh application cannot be submitted for a period of one year from the proposed date of PSS.

One of the grounds for submitting an application for PSS is “extreme compassionate grounds”. The policy, in paragraph 18, uses the same expression. The grounds in paragraph 18 would evidently be based on events which have taken place after the submission of an application for PSS and its approval. The expression “undergone” would mean completed or finished. Under paragraph 18, no withdrawal from PSS is permitted where an officer has undergone the pre- release course. However, even if an officer has not ‘undergone’ the pre-release course, there is no unqualified or absolute right to withdraw an application for PSS. Paragraph 18 permits an officer to submit a request for the withdrawal of a PSS application and the grant of such a request is subject to the approval of the competent authority. There is no unilateral right to withdraw from a request for PSS once it has been approved.

Para 20 stipulates that while individual aspirations are borne in mind to the extent feasible, the requirements and interests of the service are paramount. Paragraph 20 is in the following terms:

“20. Seeking PSS is an important decision in the career of an officer. At the Personnel Branch, no efforts are spared to ensure that individual aspirations are favourably considered. However, service requirements/interests remain paramount and cannot be overlooked. The intent of this HRP is to provide on all related aspects regarding PSS to an officer at a critical juncture of his service.” 22 The provisions of the Air Force Act 1950 govern the persons who are subject to it. Clauses (a) to (d) of Section 2 define the categories to whom the Act applies. Once a person is subject to the Act, its provisions continue to govern them until the individual is duly retired, discharged, released, removed, dismissed or cashiered from the service under the provisions of the Act. Induction into the service under Section 10 is upon the grant of commission as an officer by the President or by appointment as a warrant officer of the Air Force. The tenure of service of every person subject to the Act is during the pleasure of the President.

Matters of retirement, release or discharge from service are governed by the prescriptions contained in the Rules.

23 The provisions of the Air Force Act 1950 are a necessary concomitant of the intent of Parliament to establish the Air Force as an armed force of the Union. As members of an Armed Force, those who are subject to the provisions of the Act are governed by the rigour and discipline of the Force. Indeed, that is the rationale which underlies Article 33 of the Constitution which empowers Parliament by law to restrict or abrogate the provisions of Part III in their application inter alia to the members of the Armed Forces. The purpose of these restrictions is to ensure the proper discharge of duties and the proper maintenance of discipline.¹¹ 24 Entry into and departure from the service of the Air Force is in terms of the above provisions and is not a matter which lies at the sweet will of a member of the Air Force. The provisions contained in the Act for commissioning, tenure and cessation of service reflect the need to maintain the discipline and efficiency of the Air Force. The organisational efficiency of the Armed Forces of the Union is of paramount importance. It is in this background that the provisions which are contained in the Human Resource Policy must be evaluated. 25 The policy has been formulated in pursuance of the powers delegated to the Air Headquarters by the Ministry of Defence. As we have noticed earlier, Rule 13 of the Air Force Rules 1969 stipulates that a person subject to the Act may be released from the Air Force in accordance with the rules, orders or instructions made by or under the authority of the Central Government. The Human Resource Policy which was notified on 2 August 2011 seeks to bring about a convergence of individual aspirations and the interests of the service. 26 The policy has enunciated comprehensive guidelines for premature separation. It defines the grounds on which premature separation can be contemplated. It lays down a categorisation of officers based on the length of 11 “33. Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to— (a) the members of the Armed Forces; or (b) the members of the Forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or (d)

person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses

(a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.” years of service for considering applications for PSS. It enunciates the manner in which their proposals would be evaluated. The policy contemplates a Board of Officers to consider requests for PSS in the months of March and September every year. The policy enunciates a time schedule for the submission of applications and of the modalities to be followed in the issuance of release orders. The policy defines the manner in which PSS applications are processed. Significant among them is the need to counsel individual officers after ascertaining the full details of each case, while keeping current manning constraints in mind. Details of the interview and recommendations of the Command Headquarters have to be annotated while forwarding the case for consideration to the Air Headquarters.

27 The number of officers who are granted PSS in a year is restricted in order not to upset the manning levels and the operational efficiency of the Air Force. Hence, while attempting to balance the genuine aspirations of the members of the Air Force and their personal difficulties, the number of officers to be granted PSS is computed on the basis of various factors such as induction, superannuation and other exits from the Air Force. This exercise requires the collection and gathering of data relating to inductions, rank wise surplus and deficiencies in each branch and stream from the Directorate of Personnel and Planning. The data is utilised to compute the number of officers to be granted PSS in a year. This is distributed between two Boards of Officers scheduled for being convened in the months of March and September of each year. In each Board, the figure is further divided into two categories - officers with less than 21 years of service and officers with 21 to 24 years of service. The timeline which is embodied in the policy contemplates that an officer would be given a sufficient period of approximately nine months to apply for PSS and to retire with full benefits. During this period, the officer can prepare for the future. 28 Consistent with the need to maintain efficiency and discipline, the policy restricts the right to seek an extension of PSS. During the period which leads up to a severance from service, an officer may undergo a pre-release course or a resettlement course, for which 60 per cent of the cost is borne by the Government of India. In interpreting the provisions of the policy, including the withdrawal of a request for premature separation, it is necessary to emphasise that an officer who is granted PSS takes away an exit vacancy which could have been provided to another officer of the Air Force.

29 In the submissions before this Court, the rationale for restricting the right of withdrawal from a PSS has been explained in the above terms. It has also been emphasised that an officer who is tenanted a sensitive appointment would be posted to a non-sensitive appointment upon applying for PSS and would be considered for the grant of PSS on completing a desensitising period of one year. Permitting an absolute right to withdraw from an approved PSS may, it is apprehended, lead to the use of the PSS as a tool to escape transfers to sensitive appointments.

30 It is in this background that it has been submitted, and in our view with justification, that the right to withdraw a request for PSS from an armed force is not absolute or unconditional. Paragraph 18 of the Human Resource Policy conditions the withdrawal of an approved PSS application by a

stipulation that such a request can be permitted only as an exception and under “extreme compassionate grounds”. Paragraph 18 contemplates that a request for withdrawal of a PSS application, in order to be effective, needs to be permitted. The use of the term ‘permitted’ is indicative of the fact that a withdrawal of a request is not a matter of right. A withdrawal can be permitted by the competent authority only by way of “exception” and on “extreme compassionate grounds”. Moreover, officers who have undergone a pre-release course are not permitted to request for a withdrawal.

31 Paragraph 18 clearly indicates that the general principle of service law which has been applied to the civil services, does not apply in the situation of the Air Force. In matters relating to civilian employment, particularly in the civil services, voluntary severance of service may either be in the form of a unilateral or bilateral act. Where severance follows on the basis of a unilateral act by an employee, no acceptance of the request for severance is required. On the other hand, where the severance contemplated is bilateral in nature, the request of an employee for severance becomes effective only upon its acceptance by the employer. In the context of service jurisprudence, the principle of law which has been enunciated in the decisions of this Court is that where an employee tenders a resignation from service with effect from a future date, it is open to the employee to withdraw from the resignation until it takes effect on the future date so stipulated.

32 The governing principles were enunciated in the decision of a Constitution Bench of this Court in *Union of India v Shri Gopal Chandra Misra*¹² (“Gopal Chandra Misra”). The Constitution Bench noted that unlike in the case of a government servant whose severance from service requires acceptance (and is hence not a unilateral act), in the case of a judge of the High Court, the Constitution in the proviso to Article 217(1) has recognised a unilateral right or privilege to resign office. In the latter case, the resignation would lead to a termination of the tenure forthwith and cannot be withdrawn thereafter. But it is open to a judge who tenders a resignation with effect from a future date to withdraw the resignation before it becomes effective on the prospective date. The Constitution Bench held thus:

“50. It will bear repetition that the general principle is that in the absence of a legal contractual or constitutional bar, a ‘prospective’ resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office tenure of the resigner. This general rule is equally applicable to government servants and constitutional functionaries. In the case of a government servant/or functionary/who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/or office tenure terminated, when it is accepted by the competent authority. In the case of a Judge of a High Court, who is a constitutional functionary and under proviso (a) to Article 217(1) has a unilateral right or privilege to resign his office, his resignation becomes effective and tenure terminated on the date from which he, of his own volition, chooses to quit office. If in terms of the writing under his hand addressed to the President, he resigns in praesenti, the resignation terminates his office tenure forthwith, and cannot therefore, be withdrawn or revoked thereafter.

But, if he by such writing, chooses to resign from a future date, the act of resigning office is not complete because it does not terminate his tenure before such date and the Judge can at any time before the arrival of that prospective date on which it 12 (1978) 2 SCC 301 was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal.” This principle was reiterated in a decision of this Court in Balram Gupta (supra) where it was held that:

“12. In this case the guidelines are that ordinarily permission should not be granted unless the officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in such quick succession that it cannot be said that any administrative set-up or arrangement was affected...” (Emphasis supplied) The above observations indicate that the unrestrained choice of an employee to withdraw a resignation may yet be constrained if the employee had made arrangements acting on the resignation or letter to make another employee available for the job.

33 It is in this background that it is necessary to advert to the judgment of a two judge Bench of this Court in Parthasarathy (supra). The judgment merits a close analysis. In that case, the respondent was a Wing Commander in the Indian Air Force and submitted an application on 21 July 1985 for premature retirement from service with the proposed date of severance from service as 31 August 1986. When the application was being processed, he moved an amendment to his earlier application stating that the actual date of release could be decided taking into account the pensionary recommendations of the Fourth Pay Commission report which was expected in November 1985. On 19 February 1986, the respondent submitted an application seeking to withdraw his earlier request for premature retirement. It was thereafter on 7 March 1986 that he was served with a communication that on 20 February 1986, the Air Headquarters had accepted his application to withdraw from service and that he would retire prematurely at his own request from 31 August 1986.

34 The judgment in Parthasarathy (supra) therefore dealt with a situation where the officer had stipulated a future date with effect from which his premature retirement would become effective. However, before the application for retirement was accepted, he withdrew his request and it was only thereafter that Air Headquarters accepted his original application and communicated the decision to retire him from service. It was in this background that a two judge Bench of this Court

held that:

“8...On the other hand, not only the acceptance of the request by the headquarters, the appropriate authority, was said to have been made only on 20-2-1986, a day after the respondent withdrew his request for premature retirement but even such acceptance in this case was to be effective from a future date namely 31-8-1986. Consequently, it could not be legitimately contended by the appellants that there was any cessation of the relationship of master and servant between the Department and the respondent at any rate before 31-8- 1986. While that be the position inevitably the respondent had a right and was entitled to withdraw or revoke his request earlier made before it ever really and effectively became effective.” The facts of the case and the above extract clearly make the judgment of this court in Parthasarathy (supra) distinguishable. In Parthasarathy, the officer withdrew his request for premature retirement before the effective future date had arrived. He was sought to be retired prematurely thereafter by the government despite the request having been withdrawn before it was accepted. The next aspect of the judgment which merits emphasis is the observation that nothing in the form of any statutory provision or rule had been brought to the notice of the court which would impede or deny the right of the employee to withdraw a resignation before the date on which the resignation could have become effective. Evidently, the two judge Bench was not dealing with a provision akin to Paragraph 18 of the Human Resource Policy dated 5 August 2011 which is involved in the present case. It was in that background that the court held that there was nothing to impede or deny the right of the employee to withdraw from the resignation. The judgment of this Court in Parthasarathy (supra) is therefore distinguishable.

35 The decision of a three judge Bench of this Court in Bank of India v O P Swarnakar¹³ dealt with the voluntary retirement scheme of nationalised banks. Clauses 10.5 and 10.6 of the scheme provided thus:

"10.5. It will not be open for an employee to withdraw the request made for voluntary retirement under the Scheme after having exercised such option.

10.6. The competent authority shall have absolute discretion either to accept or reject the request of an employee seeking voluntary retirement under the Scheme depending upon the requirement of the Bank. The reasons for rejection of request of an employee seeking 13 (2003) 2 SCC 721 voluntary retirement shall be recorded in writing by the competent authority. Acceptance or otherwise of the request of an employee seeking voluntary retirement will be communicated to him in writing.” This Court adverted to the judgment of the Constitution Bench in Gopal Chandra Misra (supra) as well as to the decisions in Balram Gupta (supra) and in Parthasarathy (supra) and held thus:

“113. The submission of the learned Attorney-General that as soon as an offer is made by an employee, the same would amount to resignation in praesenti cannot be accepted. The Scheme was in force for a fixed period. A decision by the authority was required to be taken and till a decision was taken, the jural relationship of employer and employee continued and the employees concerned would have been entitled to payment of all salaries and allowances etc. Thus it cannot be said to be a case where the offer was given in praesenti but the same would be prospective in nature keeping in view of the fact that it was come into force at a later date and that too subject to acceptance thereof by the employer. We, therefore, are of the opinion that the decisions of this Court, as referred to hereinbefore, shall apply to the facts of the present case also.” The Court held that where a group of employees had accepted an ex gratia payment, they could not be permitted to approbate or reprobate or resile from their earlier stand. Similarly, the judgment in *J N Srivastava v Union of India*¹⁴ is an authority for the proposition that even if a notice of voluntary retirement which is moved by an employee is accepted by the authority within the time fixed, the employee has a locus poenitentiae to withdraw the proposal for voluntary retirement before the date of retirement is reached.

14 (1998) 9 SCC 559.

36 The above principles are of general application. However, the present case stands on a different footing and is clearly distinguishable. All the officers in the present case submitted an application under the terms of the Human Resource Policy which governed them. Availing the benefit of the policy, they proceeded to opt for a pre-release course. The policy under which they sought the benefit of a premature severance of service conditioned the right of withdrawal to the stipulations contained in paragraph 18. Paragraph 18 of the Human Resource Policy makes it abundantly clear that there is no unilateral right to withdraw from a request for PSS once it has been approved. There is, as we have seen, a clear rationale for such a restriction. The officers involved in this batch of cases applied under the terms of the policy, seeking PSS. It is not open to them to approbate or reprobate. They cannot rely on the policy and seek to repudiate Para 18 conditioning the right to withdraw.

37 The determination of the number of PSS applications that should be granted is based on a careful exercise of assessing the manpower requirements of the Air Force. The approval of a request of an officer for PSS has consequences both for the service and for the officer individually until the eventual severance of service takes place. During the period between the approval of the application and the date of severance, arrangements are made to meet the operational requirements of the Air Force. As for the officer, they have the option to proceed on a pre-release course. The operational requirements of the Air Force and the need to carefully structure exits under the Human Resource Policy clearly distinguishes the present case from the judgments relied on by the respondents. In the reply filed by the Union of India in the Civil Appeal involving Wing Commander Subrata Das, it has been stated :

“That in the current year (2013), 143 officers have applied for PSS and 89 officers were granted PSS under the provisions of this HRP. 25 officers had applied for a

change of date due to various reasons and requests of 20 officers has been acceded to for various reasons. 13 officers have requested for withdrawal of approved PSS and requests of 11 officers have been acceded to. Request of only two officers were not acceded to.”

38 The Tribunal has, in its decisions in the cases involving Wing Commander Subrata Das, P K Sen and Group Captain Rajeev Moitra, clearly erred in failing to notice the critical difference in the operational requirements of the service of an Armed Force of the Nation. The Tribunal has also failed to collectively appreciate the terms of the policy, its rationale and the basis on which paragraph 18 restricts the right to withdraw from an approved PSS application. Paragraph 18 is founded on the principle that even though a severance from service will take place at a future date, an application for PSS which has been approved cannot be withdrawn except on the grounds contemplated in that paragraph. Whether a request to withdraw an approved PSS application meets the criterion of “extreme compassionate grounds” has to be considered by the competent authority. So long as the assessment is fair and bona fide, the decision, in our view, ought not to be faulted.

39 The right to withdraw from an approved PSS application is neither absolute nor unqualified. We are firmly of the view that the decisions to reject the applications to withdraw from PSS in the present cases were made bona fide. The authorities had applied their minds to the question of whether the grounds which were urged fulfilled the “extreme compassionate grounds” criterion. The authorities were also entitled to make a final determination based on the needs and exigencies of service. The Tribunal has erroneously interfered with the exercise of the administrative judgment by the authorities of the Air Force. We therefore disapprove of the view which has been taken by the Tribunal in the cases involving Wing Commanders Subrata Das, P K Sen and Group Captain Rajeev Moitra. The decision of the Tribunal in the case of Wing Commander Rachit Bhatnagar does not merit our interference for the reasons which we have indicated earlier.

40 The situation as it stands, is that Wing Commander Subrata Das and P K Sen resumed their duties after the decision of the Tribunal. Wing Commander P K Sen has been promoted as Group Captain. Wing Commanders Subrata Das and Group Captain P K Sen are due to superannuate on 31 January 2019 and 31 January 2020 respectively. Having regard to the fact that both these officers are presently in service, we direct, in the exercise of our jurisdiction under Article 142 of the Constitution, that their services in the Air Force for the remaining tenure will not be affected by the present judgment. This will, however, be subject to all the applicable norms, rules and regulations governing discipline and efficiency governing the service. As regards Group Captain Rajeev Moitra, we set aside the judgment and order of the Tribunal and in consequence, the original application filed before the Tribunal shall stand dismissed. We affirm the judgment of the Tribunal in the case of Wing Commander Rachit Bhatnagar, though for the reasons which we have indicated above.

41 The civil appeals shall stand disposed of in the above terms. There shall be no order as to costs.

.....J [Dr DHANANJAYA Y CHANDRACHUD]
.....J [HEMANT GUPTA] New Delhi;

January 29, 2019.