

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL
BENCH AT CHANDIMANDIR**

...

OA No.1334 of 2013

**Smt. Jiwani
Vs**

.....

Petitioner

Union of India and others

.....

Respondent(s)

-.-

For the Petitioner (s) : Mr.Samarvir Singh, Advocate

For the Respondent(s) : Mr. Rajesh Sehgal, CGC

...

**Coram: Justice Prakash Krishna, Judicial Member.
Air Marshal(Retd) Naresh Verma, Administrative
Member.**

...

**ORDER
14.11.2014**

1. The present petition has been filed under Sections 14 & 15 of the Armed Forces Tribunal Act, 2007 on 11th March, 2013 by the widow of late Sep Harnarain for the grant of war injury pension from 19.01.1946 till the date of death of her husband and, thereafter, liberalised family pension for life instead of Service Element as well as Disability Element.

2. The background facts may be noticed in brief.

3. The husband of the petitioner was enrolled in the Army on 30.01.1942. According to the petitioner, he was deployed during the Second World War Overseas Operation and received Gun Shot Wounds on right shoulder and was invalidated out on 19.01.1946 from service being in Low Medical Category with 30% disability. There is no issue with regard to the aforesaid disability. However,

by means of the present petition, the petitioner claims that in view of Para 11 of Government of India letter dated 31.01.2001, the petitioner is entitled to get War Injury Pension from the date the husband of the petitioner was invalidated out, till his death i.e. 25th August, 2001 and, thereafter, enhanced Liberalised Disability Pension accordingly.

4. It has been further pleaded that after the Vth Central pay Commission, there is no requirement for being declared a "Battle Casualty" for being entitled to War Injury Pension as well as Liberalised Disability Pension. In this regard, letter dated 31.01.2001, issued by the Government of India, has been relied upon.

5. On notice, the respondents have filed written statement raising various pleas. Firstly, the plea of limitation has been raised on the ground that the petitioner is claiming War Injury Pension after a period of more than 65 years from the date of discharge of her husband. Secondly, for grant of War Injury Pension, the disability must be declared as battle casualty. There being no entry in the record regarding battle casualty of petitioner's husband and the case being more than 65 years old, the same cannot be ascertained from any source now. In the instant case, no entry of battle casualty has been recorded in the service record of the petitioner. The deceased soldier was granted disability pension, as admissible in the year 1946 and filing of the present O.A. for grant of War Injury Pension cannot be termed as recurring cause of action. The deceased soldier received the disability pension during his life time, but, he had never written for grant of War Injury Pension, as averred in Para 17 of the reply. It is not possible for the respondents to give proper comments on the factual aspects of grant of War Injury Pension to the deceased soldier as the relevant

documents are not available at this belated stage.

6. Heard the learned counsel for the parties and perused the record.

7. Learned counsel for the petitioner submits that the claim is with regard to the grant of War Injury Pension is a recurring cause of action and even if her husband did not raise any such issue during his life time, the present petition cannot be said to be barred by time.

8. It was further submitted that in view of judgment of the Apex Court in the case of K.J.S.Bhutter vs. Union of India & others, Civil Appeal No.5591 of 2006, decided on 31.03.2011, the benefit of War Injury Pension to pre-1996 retirees, is also available. Further, the respondents were under an obligation to have examined the case for grant of War Injury Pension to the petitioner or her husband and they have failed to discharge their part of the obligation.

9. In reply, the learned counsel for the respondents submitted that the present petition has been filed after 65 years and, as such, is liable to be dismissed on the ground of laches. Petitioner's husband was discharged from the Army on 19.01.1946 due to Gun Shot Wound. He, during his life time, did not raise any claim with regard to the grant of War Injury Pension and, ultimately, expired on 25th August, 2001. Secondly, there is no material or evidence to show that the said Gun Shot Wound was received by the deceased soldier during Second World War or in any War Operation. In the absence of any such evidence, the petitioner is not entitled to get the War Injury Pension. The relevant service record relating to petitioner's husband, with the passage of time, has been weeded

out and, as such, in the absence of any record showing that the Gun Shot Wound was received during the War Operation, no relief can be granted to the petitioner.

10. Considered the respective submissions of the learned counsel for the parties and perused the record.

11. On hearing the learned counsel for the parties, we find that the following questions arise for our determination:-

i)Whether the present petition is liable to be dismissed on the ground of laches in view of the stand taken by the respondents in their reply ?

ii)Whether petitioner's husband, was entitled to get War Injury pension in respect of gun shot wound who had been invalidated out on 19.01.1946 ?

iii)Whether the present petition is maintainable in view of Section 2 of the Armed Forces Tribunal Act, 2007 ?

12. The facts, with regard to Point No.(i) are not much in dispute and are almost admitted. The respondents have also come out with the case that the husband of the petitioner was enrolled in Army on 30.01.1942 and was invalidated out of service on 19.01.1946. He was granted disability pension vide CDA(P) Lahore PC No.570 Pt. II dated 29th April, 1946 which was amended from time to time. He expired on 25th August, 2001. During this period, i.e. since 1946 to 2001, indisputably, he did not raise any plea for the grant of War Injury Pension to him.

13. The record further shows that after more than eleven years of death of her husband, the petitioner woke up for the first time and served a Legal Notice, dated 08.12.2012, under Section 80 CPC, demanding War Injury Pension. The said notice was replied

by the respondents by their letter dated 26th December, 2012 refuting her claim.

14. There is nothing on record to show that either petitioner's husband or the petitioner herself ever claimed War Injury Pension earlier to the Legal Notice dated 08.12.2012. To overcome the aforesaid plea of limitation or laches, the learned counsel for the petitioner submits that since it is a matter of grant of pension, the cause of action is recurring one and it arises every month.

15. There appears to be no doubt with regard to the proposition that the right to claim pension is recurring cause of action, but, the said proposition is not so wide as has been submitted by the learned counsel for the petitioner. It is dependent on the facts of each case. At the most, the petitioner's husband during his life time could, if was so entitled, say that his right to claim War Injury Pension is recurring cause of action. Inaction on his part for about two decades amounts to acquiescence. After his death, it could not be said that it is surviving recurring cause of action.

16. The petitioner has not come out with a plea that her husband was not aware of his entitlement to get War Injury Pension, if any. There is also no application for condonation of delay in filing the present petition.

17. In the case of UNION OF INDIA VS. TARSEM SINGH : 2008(8) SCC 648, the Apex Court had directed the Union of India to pay Disability Pension inspite of the delay on the ground that it is a continuing wrong. It had been further provided in that decision that in such cases the consequential relief relating to arrears be restricted normally to a period of three years prior to the date of filing to the Writ Petition. On the peculiar facts of the case, it is difficult to hold that theory of continuing wrong, after the

acquiescence by the petitioner's husband due to his inaction, will be available to the petitioner also. The non-payment of War Injury Pension was not considered by the petitioner's husband as "wrong" that is why he never raised any such plea during his life time.

18. It will not be out of place to mention here that in the case in hand, the respondents have come out with the plea that no entry regarding battle casualty has been found recorded in the service record of the petitioner and the case being more than 65 years old, the same cannot be ascertained from any source. Looking to the fact that the husband of the petitioner, who remained alive till 25th August, 2001, did ever raise any dispute for grant of War Injury Pension, it cannot be said that the claim continues to be continuing wrong qua the widow i.e. the petitioner. Even after death of her husband, the petitioner kept quiet for a period over ten years. Taking into consideration the peculiar facts and circumstances of the present case, we are of the opinion that the objection raised by the respondents that the present petition is barred by laches, is well-founded and the question No.(i) is decided according.

19. With regard to question No.(ii), the argument on behalf of the petitioner proceeds on the footings that subsequently, the Government of India awarded War Injury Pension to the soldiers, the petitioner and her deceased husband, are also entitled to get the same. Considerable reliance has been placed upon SAO 8/S85 and AO 1/2003.

19. To begin with, we find that the concept of Liberalised Pensionary Award for War Disabled Servicemen was introduced for the first time by the Ministry of Defence through their letter NO. 200847/PE-C/71. Through this letter, the Government of

India has granted different benefits to War Widows and War Disabled Servicemen. Entitlement for grant of War Injury Pension etc. has been provided for therein. For the sake of convenience, the said letter is being reproduced below in its entirety:-

``No.200847/Pen-C/71
Government of India, Bharat Sarkar
Ministry of Defence,
RAKSHA MANTRAYALAYA
New Delhi, the 24th February, 1972.

To,

The Chief of the Army Staff
The Chief of Naval Staff
The Chief of Air Staff

Subject : *Liberalised pensionary awards for war widows and war disabled servicemen.*

Sir,

In partial modification of the existing rules and orders relating to the grant of special family pensionary awards and disability pension, I am directed to convey the sanction of the President to payments being made , as indicated in Annexures I and II to this letter, in the case of officers and personnel, as well as NCsE of armed forces (including the Army Postal Service and the embodied units of the Territorial Army and officers and personnel of the Defence Security Corps, killed in action or disabled on account of injuries sustained in the recent operations against Pakistan commencing from 3rd December, 1971. The awards sanctioned in this letter will be admissible also in the case of the above categories of personnel killed in action or disabled on account of injuries sustained –

- (i) In the international wars of 1965 (including Kutch and Kargil operations), 1962 and 1947-48 (Kashmir operations), as well as the Goa and Hyderabad operations.*
- (ii)(a) as a result of fighting in war-like operations or border skirmishes, either with Pakistan on the cease-fire line or any other country.*
- (b) while fighting against armed hostiles like Nagas and Mizos.*
- (c) during fighting in service with peace-keeping missions abroad **on or after 15 August 47***
- (iii) During laying or clearance of mines including enemy mines, as also mine-sweeping operations, between one month before the commencement and three months after the conclusion operations ; as per Ministry of Defence letter No.A/14670/Vii/AG/PD4(d)/142-S/Pen-C, dated the 2nd September, 1970 and*

2. The benefits will be admissible with effect from 1st February, 1972

or the date of death or disablement of the serviceman, as the case may be, whichever is later.

3. Payments already made on account of pensionary awards only in respect of any period following the above dates otherwise than in accordance with this letter will be adjusted against payments admissible here under.

4. The awards sanctioned in this letter are in the nature of a special dispensation and will not be subject to alteration as receipt of any revision of pay and pension structure as may be sanctioned in future. Temporary and/or ad-hoc increase in addition to these special awards. However, where and for so long as awards admissible under the existing rules and orders happen to be more favourable than those sanctioned hereunder, the higher entitlements will be applicable and no difference will be allowed as ad-hoc grant. Payment of these increase or reliefs were allowed to be admissible wef 1 Jan 81 vide Min of Def letter No.B/39206/AG/PS4(d)/2417/Pen-C dated 23rd April 81.

5. This issues with the concurrence of Ministry of Finance (Defence) vide their u.o.No.563/Addl.FA(D) of 1972.

Yours faithfully;

Sd/

Under Secretary to the Government of India”

21. The aforesaid letter has provided two categories of personnel killed in action or injury sustained. The first category is of those personnel who were killed or sustained injuries in the international wars of 1965, 1962, 1947-48 (Kashmir Operations) as well as Goa and Hyderabad Operations. The other category, with which we are presently concerned, is of disabled servicemen who were disabled on or after 15th August, 1947.

22. In OA No.2543 of 2012, Tejbir Singh vs. Union of India, decided on 02.05.2014, while interpreting the above letter of Government of India, this Tribunal has held as follows:-

“21. Annexure I to the above letter deals with special family pensionary awards in death cases of officers/JCOs and Ors. Annexure II to the letter deals with war injury pay to officers and PBORs who were invalided out of service on account of disabilities

sustained under the circumstances mentioned in the above letter.

22. *It is thus clear from the said letter that the liberalised pensionary awards were admitted to those armed forces personnel who sustained injuries and were killed in action in operations against Pakistan commencing from 3rd December, 1971. The benefits were also extended to those who were killed in action or disabled on account of injuries sustained :*

(a) In international wars of 1965 (including Kutch and Kargil operations), 1962 and 1947-48 (Kashmir operations), as well as the Goa and Hyderabad operations.

(b) As a result of fighting in war like operations or border skirmishes either with Pakistan on the cease-fire line or any other country.

(c) While fighting against armed hostiles like Nagas and Mizos.

(d) During fighting in service with peace keeping missions abroad.

(e) During laying or clearance of mines including enemy mines, as also mine sweeping operations, between certain periods as given in clause (iii) of para 1 of the said letter.

27. *The circumstances given in the letter clearly indicate that armed forces personnel were held entitled to liberalised pensionary awards when death and disability took place during fight or war like operations or during the circumstances specifically mentioned in para 1(iii) of the above letter."*

23. At this juncture, the learned counsel for the petitioner referred to judgement of the Apex Court in the case of K.J.S.Bhutter (supra). We, however, are of the view that no benefit from that judgment can be derived by the petitioner for the reason that petitioner's husband received the injury on 1st June, 1945, as is apparent from Annexure A-4 (page 32 of the paper book). The grant of War Injury Pension or Liberalised

Pensionary Award under the said letter being the new rights, which were not available to the petitioner's husband at the time of discharge, cannot be extended to the petitioner. In V.KASTURI V. MANAGING DIRECTOR, STATE BANK OF INDIA, BOMBAY , (SC) : AIR (1999) SC 81, the Apex Court, after consideration of its earlier judgments, summarised law in the following manner:-

“19. It is now time for us to take stock of the situation. From the aforesaid resume of relevant decisions of this Court spread over years to which our attention was invited by learned counsel for the respective parties, the following legal position clearly gets projected.

Category I:

20. If the person retiring is eligible for pension at the time of his retirement and if he survives till the time by subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. The line of decisions tracing their roots to the ratio of Nakara's case (supra) would cover this category of cases.

Category II:

21. However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of relevant pension Rules any beneficial umbrella of pension

scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep. The decisions of this Court covering such second category of cases are : Commander, Head Quarter, Calcutta and others v. Capt. Biplabendra Chanda (supra) and Govt. of Tamil Nadu and another v. K.Jayaraman (supra) and others to which we have made a reference earlier. If the claimant for pension benefits satisfactorily brings his case within the first category of cases he would be entitled to get the additional benefits of pension computation even if he might have retired prior to enforcement of such additional beneficial provisions. But if on the other hand, the case of a retired employee falls in the second category, the fact that he retired prior to the relevant date of coming into operation of the new scheme, would disentitle him from getting such a new benefit.”

24. We are of the opinion that the case of the present petitioner, so far as grant of Liberalised Pensionary benefits or War Disability Service benefits are concerned, falls in second category and that too to such persons who were killed in action or disabled on account of injuries sustained during fighting in service with peace keeping missions abroad on or after 15th August,1947. This is one aspect of the matter.

25 In OA No. 654 of 2011 Vijay Shanker Sharma Vs. Union of India & others, decided on 24th September,2014 by us, it has been held while interpreting the Army order dated 24th February, 1972 already reproduced as above that by the said Army order, the Government of India decided to grant war injury pension and special family pension in addition to the then existing pensionary benefits and

thus, it conferred new rights through the said Army order. For the sake of convenience para 19 of the said judgment is reproduced as below :

“On careful consideration of the matter we are unable to agree that the learned counsel for the respondents for two reasons. Firstly Army order dated 24th February, 1972 reproduced above has been issued-partial modification of the existing Rules and orders relating to the grant of special pensionary awards, special family pension and disability pension. Further the narration in the said order is indicative of the fact that the Government of India decided to grant special family pension and disability pension in addition to the then existing pensionary benefits. To put it simply, by means of above army order the Government of India conferred new/ additional benefits to certain class of army personnel who died or survived with the injuries under the circumstances mentioned in the said order, with regard to the entitlement of such army personnel or to his legal representatives and kins. The Government of India has come forward to extend helping hands to the soldiers who lost their lives or got injuries in the Indo Pak war or the like as mentioned in the said order. To put it differently, war injury pension award which was not earlier included in pensionary awards has been included for the first time through the said army order, therefore , it shall be governed and controlled by the terms and conditions of the said AO order, without any external aid. The AO leaves no manner of doubt as to what we have said above. It particularly modifies the existing rules and orders relating to family pensionary awards and disability pension. Para 4 of the above AO army order further strengthens our above opinion which says that the awards sanctioned through this letter are in the nature of additional financial benefits to a class of army personnel.

26. Now we may consider the cases relied upon by the learned counsel for the petitioner. Great reliance has been placed by him on the Supreme Court’s judgment given in K.J.S.Bhuttar Versus Union of India and others in Civil Appeal No.5591 of 2006,decided on 31st March,2011 in support of his arguments that subsequent grant of war injury pension has been held to be given with retrospective effect. To appreciate the law laid down in the case of K.J.S.Bhuttar (supra) it would be appropriate to notice the facts very briefly. There the officer commissioned in the army on 26th July, 1969 get gunshot wound, left elbow as attributable to military service and was released on 10th April, 1979, was granted disability pension with effect from 26th July,1979. One of the reliefs claimed by him was

that he should be given war injury pension with effect from 01.01.1996 in terms of Government of India Ministry of Defence's letter dated 31st. January, 2001. The Supreme Court considered that plea in para No. 15 of its judgment and has held as follows :

“ It may be mentioned that the Government of India Ministry of Defence had given granting War Injury Pension to pre 1996 retirees also in terms of para 10.1 of Ministry's letter No.1(5)/87/D (Pen-Ser) dated 30.10.1987 (Page 59 Para 8). The mode of calculation however was changed by Notification dated 31.1.2001 which was restricted to post 1996 retirees.”

27. The above quoted portion of the judgment would show that the apex court granted War Injury Pension on the footings that the Government of India, Ministry of Defence had been granting War Injury Pension to pre 1996 retirees also in terms of Government of India ,Ministry of defence' letter dated 30th October, 1987. It was further held that by means of the said letter, the mode of calculation was changed which was restricted to post 1996 retirees. In this factual matrix the apex court accepted the claim of the petitioner therein. There was no issue to grant war injury pension with retrospective effect to those who had retired even prior to 15th August, 1947. The Supreme Court proceeded on the footings that since mode of calculation of War Injry pension was changed, it was made effective from certain date, benefit of change in calculation shall also be available to such retirees who have retired prior to the date specified in the Notification. But it at nowhere held or laid down that the retirees prior to 15th August, 1947, as in the present case ,would also be entitled to get War Injury Pension.

28. At the cost of repetition, it may be noted that the grant of war injury pension has been paid to war wounded army personnel or their family members in case of death who participated in the war, as specified in the army letter dated 24th February, 1972 ,made

effective on or before 15th August, 1947. The fixation of cut of date is within the power of executive and there being no challenge in the present petition, challenging the legality and validity of cut of date i.e. 15th August, 1947, we are of the opinion that the petitioner cannot derive any advantage from the above judgment of the apex court.

29. For the same reason, the reliance has been placed by the petitioner on the case OA No.122 of 2011 Dula Ram Versus Union of India & others, decided on 17th November, 2011 following the judgment in K.J.S. Bhuttar case is misplaced one as the petitioner therein was discharged on 05.01.1973 i.e. after the independence of India.

30. The learned counsel for the petitioner has not brought to our notice any decision granting war injury pension to such retirees who have retired prior to 15th August, 1947.

31. In view of the above, we are of the opinion that the petitioner is not entitled to get war injury pension.

32. Though it was argued by the learned counsel for the petitioner that the injury suffered by the petitioner's husband fall within the ambit and scope of 'war injury' but we are not examining that issue for the reason that the said issue has been raised after a very very long time and the respondents are not in a position to defend as the relevant records have been destroyed and also the issue would or ought to have been raised by the petitioner's husband during his life time and not after his death by his widow.

POINT NO. 3 :

33. The learned counsel for the respondents submits that the

present petition in view of section 2(2) of the Armed Forces Tribunal Act is not maintainable. Elaborating the aforesaid argument, he submitted that the provisions of the Armed Forces Tribunal Act will apply to all persons subject to the Army Act 1950, Navy Act 1957 and the Air Force Act 1950, including their dependents, heirs and successors, in so far as it relates to their service matters. The husband of the petitioner was not subject to Army Act,1950.

34. In reply, the learned counsel for the petitioner rightly submits that this point has not been raised in the written statement and as such he is not in the position to give any reply. The learned counsel for the respondents could not dispute the above objection raised by the learned counsel for the petitioner.

35. Except the above, none of the learned counsel for the parties could place any material with regard to the above issue. In this facts situation, we are leaving the issue undecided, to be decided in a better case.

36. Viewed as above, we are of the opinion that the present petition is liable to be dismissed being barred by time and also in view of our findings on issue No.2. In the result, the petition is dismissed but no order for cost.

(Justice Prakash Krishna)

(Air Marshal(Retd) Naresh Verma)

14 .11.2014

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Whether the judgment for reference to be put on internet-Yes/No.