

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI**

O.A NO. 549 OF 2010

COL. NARENDRA KUMAR YADAV

...APPLICANT

VERSUS

UNION OF INDIA AND OTHERS

...RESPONDENTS

FOR APPLICANT

M/S.K. RAMESH & ARCHANA, ADVOCATES

FOR RESPONDENTS

LT. COL. NAVEEN SHARMA

CORAM

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER

HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T

22.09.2010

- 1.** This application – O.A No. 549 of 2010 – is filed for setting aside the letter dated 18.8.2010 read in conjunction with the letter dated

1.9.2010, whereby the applicant was summoned as a witness for ongoing Court of Inquiry, which was reconvened for compliance of Army Rule 180.

2. The brief facts, which are relevant for the disposal of this application, are: The applicant joined the Indian Army on 9.6.1979. On 28.2.2006, he retired from service on attaining the age of superannuation. But his retiral benefits were not paid to him. Alleging disciplinary action, it was stated that the applicant could not be given his retiral benefits and even recovery was sought to be made from his pension. The applicant, therefore, filed W.P (C) No. 9262 of 2009 before the Delhi High Court, which was subsequently transferred to this Tribunal and numbered as T.A No. 117 of 2009, stating that the applicant had already retired from service and more than three years had already elapsed since his retirement, which prevented any disciplinary proceedings being initiated against him. The respondents took the stand that since there was a Directorate of Vigilance (DV) ban against the applicant, his post retiral benefits could not be finalised and they invoked Rule 3B of the Pension Regulations for the Army 1961 part I, which empowered them to reserve their right to withhold or reduce the pension of

a person against whom any departmental or judicial proceedings were pending or instituted after retirement in respect of an event which took place not more than four years before such institution. They were silent about the further action taken against the applicant pursuant to the DV ban imposed on 13.7.2006. Thereafter, based on the submission made by the respondents that the DV ban in respect of the applicant was lifted and no disciplinary action against him was pending, this Tribunal (Bench No. I) allowed T.A No. 117 of 2009 on the following lines:

“9. We allow this petition and direct that all the retiral benefits should be released forthwith and the money recovered by the bank shall be released immediately to him as nothing remains against the petitioner. All orders passed by the PCDA, Allahabad are quashed. Petitioner’s retiral benefits should be released within a period of three months from today. Arrears should be paid to the petitioner with interest @ 12% per annum. Petitioner is also entitled to the cost of Rs.10,000/- from the respondents.”

Now a fresh Court of Inquiry is being initiated against the applicant, which is barred by limitation under Army Act Section 123. Such initiation of a fresh Court of Inquiry is only to harass the applicant and deprive him of his retiral benefits.

3. The application is resisted on behalf of the respondents contending, inter alia, that the fresh Court of Inquiry is to collect evidence so as to enable the authorities to make up their mind about the involvement of the applicant and other officers in respect of the offence committed by them. The impugned order, along with summons in accordance with Army Act Section 135 was issued to the applicant to afford him adequate opportunity to cross examine the witnesses. But it seemed that the applicant did not want to make use of such opportunity. No prejudice would be caused to the applicant even if on the basis of the Court of Inquiry, a General Court Martial is convened, as it would not be barred by Army Act Section 123. Further, this Tribunal has no jurisdiction, in view of the provisions contained in Rule 6 of the Armed Forces Tribunal (Procedure) Rules 2008, as the applicant is a resident of Haryana. However, on this point of jurisdiction, it

was conceded by learned counsel for the respondents that the applicant was last posted in Delhi and so this Tribunal has jurisdiction under Rule 6 of the Armed Forces Tribunal (Procedure) Rules.

4. As regards the maintainability of this application under Section 14 of the Act 2007, this Tribunal has power to take cognizance of any application of an aggrieved person against the order passed in connection with his service matters. As has been mentioned above, against the denial of his retiral benefits, the applicant, who retired in 2006, approached this tribunal by filing an application, wherein the respondents having stated that no DV ban was there against the applicant, the appeal of the appellant (T.A No. 117 of 2009) was upheld by the Court No.1 of the Principal Bench of the Armed Forces Tribunal, New Delhi. A fresh court of inquiry is now being initiated. The impugned notice shows that it was issued with a view to afford the applicant an opportunity under Army Rule 180, which would ultimately result in depriving him of getting retiral benefits. It is, therefore, interlinked with service matters.

5. This Tribunal, in exercise of its powers vested under Section 14 of the Act 2007, is under obligation to take all relevant facts and circumstances into consideration and decide on the admitted position and in the absence of a proper reply from the side of the respondents as to whether any case is made out, it can interfere on the basis of the materials on record. While considering the validity of the impugned notice, it is to be considered whether the proceedings would be barred by Army Act Section 123. However, the Tribunal will be free to satisfy itself whether any case as such is made out for interfering with the court of inquiry. For that purpose, the following points are to be taken into consideration: (a) whether adjudication of this application would involve any disputed question of fact and whether the same could satisfactorily be resolved; (b) whether the application reveals all material facts; (c) whether the applicant has any alternative or effective remedy for resolving the dispute; (d) whether ex facie it is barred by limitation; (e) whether the grant of relief would be against any public policy or barred by any valid law; and (f) such other factors.

6. It is the admitted position that the applicant retired from service 28.2. 2006 and the present application under Army Rule 180 appears to have been resorted to in the year 2010. The relief which has been sought by the applicant impugning the notice to appear in the court of inquiry is circumscribed by factors like limitation, res judicata, estoppel, acquiescence, etc. As has been stated above, at the time of hearing of T.A No. 117 of 2009, a categoric statement was made on behalf of the respondents by producing the letter dated 14.1.2010 that "DV ban in respect of Col. Narender Kumar Yadav (Retd) has been lifted vide Indarmy (DV-2) Letter C/06290/WC/461/NKY/AG/DV-2 Jan 14". This was for the purpose of releasing the retiral benefits. Therefore, the present notice is issued with ulterior motive so as to negate the entitlement of the retiral benefits made available to the applicant pursuant to the order dated 12.3.2010 of this Tribunal (Bench No.1). Such action on the part of the respondents makes the present proceedings barred by the principles of estoppels and acquiescence.

7. As regards the point of limitation, it shall be useful if we refer to Sub-sections (1) and (2) of Army Act Section 123, which read:

“123. Liability of offender who ceases to be subject to Act:--(1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such persons shall be tried for an offence, unless his trial commences within a period of three years after he had ceased to be the subject to this Act; and in computing such period, the time during which such person has avoided arrest by absconding or concealing himself or where the institution of the proceeding in respect of the offence has been stayed by an injunction or order, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded:

Provided that nothing contained in this sub-section shall apply to the trial of any such person for an offence of desertion of fraudulent enrolment or for any of the offences mentioned in section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial.”

It was contended on behalf of the applicant that a plain reading of the above provisions would make it clear that the limitation prohibits trial by court martial being held on expiry of the period of limitation and such provisions cannot be overridden by any other design which the respondents wanted to

do now. However, this point was agitated on behalf of the respondents contending that a close reading of Section 123 makes it abundantly clear that notwithstanding the fact that the applicant had ceased to be subject of the Army Act, consequent upon his retirement, he could be tried for the offence under the Army Act as the offence was committed prior to his retirement and he could be punished for the same. The stand taken by the respondents would be applicable only when the GCM proceedings are initiated within the period of limitation, as provided in Sub-section (2) of Army Act Section 123. Within the period of limitation, no such proceedings were initiated against the applicant. There is nothing on record to show that the applicant himself created a situation withholding commencement of the court of inquiry or the trial. In the given circumstances, when prima facie substance is being sought to be established against the applicant, the question of limitation would come in the way, in view of Army Act Section 123. If the expiry of the period of limitation for commencement of the court of inquiry was to be given effect to, the person would not be liable to be tried by a court martial to be inflicted with a variety of punishment under Army Act Section 71. It may further be mentioned that when the ultimate proceedings are prohibited by

law, under Army Act Section 123, the same cannot be allowed to be done either directly or indirectly by way of directing the applicant first to face the court of inquiry and then to wait for the next stage that the competent authority may take. The decision in **Jagir Singh v. Ranbir Singh and another** (1979(1) SCC 560) is to be referred to in this regard, wherein the apex Court held thus:

“5. In order to cross the hurdle imposed by Section 397(3) it was suggested that the revision application before the High Court could be treated as an application directed against the order of the Sessions Judge instead of as one directed against the order of the Magistrate. We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute. It is a ‘well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance’ (per Abbot, C.J in **Fox v. Bishop of Chester** – (1824) 2 B & C 635). ‘To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do so, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined’ (**Maxwell, 11th edition, page 109**).”

8. In view of the aforesaid discussion, we hold that the impugned notice dated 18.8.2010 read with the letter dated 1.9.2010 calling upon the

applicant to appear before the court of inquiry is a step in contravention to the provisions of Army Act Section 123. In the result, both the notices are set aside. The court of inquiry, including that part of the court of inquiry, against the applicant shall not be proceeded with, as it is against the provisions of Army Act Section 123. The application is allowed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER