COURT NO. 2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
(COURT NO.2)
O.A. No.142 of 2012

IN THE MATTER OF:

SEPOY RAGHUBIR SINGH TOMAR **.....PETITIONER**
Through: Mr. K. Ramesh, Advocate

Vs.

UNION OF INDIA AND OTHERS **.....RESPONDENTS**
Through: Mr. Ajai Bhalla, Advocate

CORAM:

HON'BLE MR. JUSTICE N.P. GUPTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

Date: 07.11.2012

1. By this petition filed on 03.04.2012, the petitioner claims direction to reinstate the petitioner with immediate effect, based on acquittal by High Court of Madhya Pradesh, and for grant of consequential benefits, including ante dated service, seniority and promotion at par with his batch mates.

2. The factual averments made by the petitioner are, that the petitioner was enrolled on 29.10.1990, and was married to one Kiran in the year 1995, who died on 15.09.2000 for which the petitioner faced a charge of dowry death under Section 304-B, and was convicted by the Court of Additional Sessions Judge, Gwalior on 31.07.2001. Based on that conviction, on the same day, the army authorities passed an order

of discharging the petitioner from service, stating that his services were no longer required due to the aforesaid conviction, and was communicated to the applicant through artillery records letter dated 18.03.2003 (Annexure A-1).

3. That conviction was challenged by way of appeal before the High Court, which acquitted the petitioner vide judgment dated 28.02.2008. The petitioner thereupon approached the authorities for reinstatement, and he was replied vide letter dated 18.10.2008 that it is not feasible to reinstate the petitioner back in military service, as he had already completed his terms of engagement on 29.10.2007 i.e. before issue of court order dated 22.02.2008 (17 years as a Sepoy) and that the judgment of High Court does not contain a direction to reinstate the petitioner back into Military service. According to the petitioner, since the discharge was due to conviction, which conviction has been set aside, the respondents should have immediately reinstated the petitioner back into military service, and for that purpose the petitioner has referred to a judgment of this Bench dated 09.01.2012 "***Hav. Deshpal Vs. Union of India"*** being O.A. No.74/2011. According to the petitioner now after acquittal the respondents cannot come with the spacious ground of the petitioner being in jail with other criminals, as this aspect has also been settled by the Armed Forces Tribunal in O.A. No.118/2011 "***Lance Naik Binod Ray Vs. Union of India***", inter alia, with this, rather on this basis, the petitioner has claimed the above relief.

4. In para 3 of the petition, relating to limitation, all that is pleaded is, that applicant declares that application is within limitation prescribed by Section 22 of the AFT Act.

5. This O.A. came up for consideration of this Tribunal on 16.04.2012. On that day, notice was issued, and liberty was given to the respondents to raise objections with regard to limitation. Then, a counter has been filed by the respondents on 14.08.2012, pleading inter alia, that the application is hugely time barred, inasmuch, as the impugned order was passed on 19.11.2009, and the petitioner has given no valid explanation for delay of almost two years, the O.A. deserves to be dismissed on this ground alone. Reply was filed on merits also, supporting the stand taken about the contractual period of engagement having become over, he cannot be reinstated.

6. We may notice that the petitioner has also filed an application under Section 22 of the AFT Act, seeking condonation of delay on 03.04.2011 itself, and the ground given therein seeking condonation of delay is:

> "1. That the Applicant most respectfully puts up an Application for Condonation of delay from the date of the impugned order i.e.. 19 Nov 2009 till date as even after the Applicant got acquitted by the Hon'ble High Court of Judicature of Madhya Pradesh (Jabalpur Bench) on 28 Feb 2008 the Army authorities should have applied their minds and immediately reinstated the Applicant back in military service but did not do so. Even after the

Applicant wrote to the Director General Artillery, Judge Advocate General at Army Headquarters as also Artillery Records, Nasik but he got a vague reply from Artillery records vide letter dated 18 Oct 2008 and 315 Field Regiment vide letter dated 05 Dec 2008 that it was not feasible to reinstate the Applicant back to military service as he had completed his terms of engagement on 29 Oct 2007 (17 years of service as a Sepoy). The Judge Advocate General Department did not even reply to the Application of the Applicant. Therefore, there has been a continuous wrong done by the Army authorities till date and now at this stage the Applicant prays for Condonation in utmost humility, in the light of the Judgement of Hon'ble Supreme Court in Re UOI Vs Tarsem Singh."

7. Thus, the basic ground given for seeking condonation of delay is on the basis of judgment of Hon'ble Supreme Court in the case of "***Union of India Vs. Tarsem Singh***" (2008) 8 SCC 648, being, that it is a continuous wrong done by the army authorities, and therefore, is entitled to maintain the petition.

8. Since the petition is barred by time, on the face of it, in view of the mandate of Section 3 of the Limitation Act read with Section 27 thereof, we have to first deal with the aspect of limitation, in the sense as to whether the petition can be said to be within time, or that the petitioner has made out a case for entitling him to have the delay condoned.

9. We first take up the aspect as to whether the petition can said to be within time in view of the judgment of Hon'ble Supreme Court in ***Tarsem Singh***'s case (supra) being, it being a continuing wrong.

10. Straightaway we come to the judgment of ***Tarsem Singh***'s case (supra).

11. In ***Tarsem Singh***'s case (supra) the individual was invalidated out on 13.11.1983, and approached the High Court in 1999, seeking a direction to be paid disability pension. The writ was allowed by order dated 06.12.2000, and the arrears were restricted to 38 months prior to filing of the writ petition. That judgment was challenged by the individual seeking to lay claim from the date of invalidation. The LPA was allowed by the Division Bench vide judgment dated 06.12.2006, by holding that the individual was entitled to disability pension from the date it fell due, and should not be restricted to a period of three years and two months. This was challenged by Union of India before the Hon'ble Supreme Court, and Hon'ble Supreme Court in paras 4 & 5 considered the aspect of continuing wrong. In para 4 the Hon'ble Supreme Court considered and followed the earlier judgment of Hon'ble Supreme Court in "***Balkrishna Savalram Pujari & Ors. Vs. Shree Dnyaneshwar Maharajsansthan & Ors.***" reported in AIR 1959 SC 798, and rather quoted para 31 of the said judgment, which judgment, was a judgment rendered by Bench comprising of three Hon'ble Judges, and did precisely lay down the dimensions of the aspect, as to

what is continuing wrong for the purposes of Section 23 of the Limitation Act 1908, corresponding to Section 22 of the Limitation Act, 1963. Hon'ble Supreme Court in ***Tarsem Singh***'s case (supra) in para 5 referred to and relied upon yet another judgment of Hon'ble Supreme Court in "***M.R. Gupta Vs. Union of India***" reported in (1995) 5 SCC 628, which again was a case dealing with the aspect of continuing wrong, in the matter of pay fixation. Then the judgment in "***Shiv Dass Vs. Union of India***" reported in (2007) 9 SCC 274 was also considered, and then in para 7 the conclusions were given, to the effect, that normally belated service related claim will be rejected on the ground of delay and latches (where remedies is sought for filing of writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). With this the exception was carved out being of cases relating to continuing wrong, and held that where the service related claim is based on continuing wrong, relief can be granted, even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced; If such continuing wrong creates a continuing source of injury, and also found that even to this, there is an exception, being that if grievous is in respect of any order or administrative decision, which related to, or affected several others also, and reopening of issue would affect the settled rights of third persons, then the claim shall not be entertained.

12. We may pause here and observe that in the present case we are not concerned with this exception to the exception, as in the present case, third parties are not related, nor are likely to be affected.

13. After holding this, Hon'ble Supreme Court found that case to be a case of continuing wrong, and restricted the arrears to the period of three years.

14. In our humble opinion, on the parameters laid down by Hon'ble Supreme Court in ***Tarsem Singh***'s case (supra) itself, read with Hon'ble Supreme Court in ***Balkrishna Savalram Pujari & Ors.*** (supra) it cannot be said that the grievance of the petitioner falls within the four corners of the expression "**continuing wrong**".

15. Then instead of stopping at that, we may further consider the aspect of period of limitation, inasmuch, as in ***Tarsem Singh***'s case (supra) arrears were restricted to the period of three years. Likewise, in ***M.R. Gupta***'s case (supra) also the arrears were restricted to three years. What is required to be seen is, at to after all what is the logic behind restricting the arrears to three years and the answer is available in a Constitutional Bench Judgment fo Hon'ble Supreme Court in the judgment rendered in the case of "***State of M.P. Vs. Bhai Lal Bhai***" reported in AIR 1964 SC 1006 (paras 18 to 21) where the Hon'ble Supreme Court categorically ruled, that Article 226 is not intended to supersede completely the mode of obtaining relief, by an action in a civil Court, or to deny the defences legitimately open in such actions. And

that it has been made clear more than once, that the power to give relief under Article 226 is discretionary power, which is specially true in case of power to issue writ in the nature of Mandamus. The Hon'ble Supreme Court further observed, that among the several matters, which the High Courts rightly take into consideration in the exercise of that discretion is, the delay made by the aggrieved party in seeking this special remedy, and what excuse there is for it, another is in the nature of controversy of facts, and law, that may have to be decided, as regards the availability of consequential relief, and then, in para 18 it held, that it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court, and to refuse to exercise extraordinary remedy under Article 226. Then in para 21 it has noticed the argument of the counsel that delay is not such as would justify refusal to order refund. It was also argued that assuming the remedy to recovery for amount by action in the civil Court stood barred on the date when the applications were made, would be no reason to refuse relief under Article 226. Hon'ble Supreme Court, to this submission held, that the learned counsel is right in his submission that provision of a limitation act do not as such apply to granting relief under Article 226. However, it further observed "it appears to us however that maximum period fixed by the legislature as the time within which the relief by a suit in z civil Court must be brought may ordinarily be taken the reasonable standard by which the delay in seeking remedy under Article 226 can be measured." Hon'ble Supreme Court further of course

observed that it may consider the delay unreasonable even if it is less then the period of limitation prescribed for a civil action for the remedy, but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable. Then, it was held that the period of limitation prescribed for recovery of money paid by mistake, under limitation act is three years, from the date when the mistake is known, if the mistake was known in those cases on or shortly after 17.01.1956, the delay in making the application should be considered unreasonable. Thus, the constitutional Bench judgment did not clearly give a rationale, for consideration of the aspect of delay, even in case of writ petitions, by referring to the relevant provisions available under limitation act. Though this judgment in ***Bhai Lal Bhai's*** case (supra) has not been referred to in ***Tarsem Singh***'s case (supra) and ***M.R. Gupta***'s case (supra), but then, it has to be reasonably believed, that it is on the basis of this rationale only that the arrears were restricted to three years.

16. With enactment of AFT Act, under Section 22 the limitation to be prescribed to be six months, and according to Section 29(2) of the Limitation Act, when any special or local law prescribed a period of limitation, different from the period prescribed by the Schedule to the Limitation Act, provision of section 3 of the Limitation Act are to apply "as if such period were the period prescribed by the Schedule....." and for the purpose of determination of any period of limitation prescribed by any special or local law the provisions contained in

Section 4 to 24 also do apply, to the extent to which they are not expressly excluded by such special or local law. In that view of the matter, this period of limitation prescribed by Section 22, is deemed to be the period prescribed by the Limitation Act, and the bar indicated by Section 3 of the Limitation Act, enjoining upon the Court to dismiss the petition, if it is barred, although limitation has not been set up as a defence, does very much come in.

17. Then, the period of limitation being six months, in case of petitions to be filed before this Tribunal, is also no more res integra, in view of the judgment of this Tribunal in "***Rakesh Kumar Aggarwal Vs. Union of India & Ors.***" O.A. No.55/2012 decided on 17.02.2012, which in turn proceeds on the basis of the judgment of Hon'ble Supreme Court, as recent as dated 07.03.2011, in case of "***D.C.S. Negi Vs. Union of India***" SLP (Civil) CC No.3709/2011.

18. Thus, we have no hesitation in coming to the conclusion that the grievance of the petitioner cannot be said to be a "continuing wrong" and that the petition should have been filed within a period of six months, and having been not so filed, is clearly barred by time.

19. In view of the above conclusion, now we take up the application filed by the petitioner under Section 22, seeking condonation of delay.

20. As noticed above, the impugned order according to the petitioner is dated 19.11.2009. It is a different story as a look at that

shows that the petitioner was already conveyed, way back by letter dated 18.10.2008, that it is not feasible to reinstate him, as he has already completed the term of engagement on 29.10.2007, i.e. before issuance of the Court's order dated 22.02.2008, and for the reason that the judgment does not contain a direction to reinstate him. Thus, though the limitation started running against the petitioner from the date of this communication dated 18.10.2008, but then, for the sake of argument, and bearing benevolence in favour of the petitioner, even if it were to be taken to start from 19.11.2009, still the petition filed on 03.04.2012 is clearly barred by time. The only explanation given by the petitioner to seek condonation of delay, in the present application under Section 22 is that "the Judge Advocate General Department did not even reply to the application of the applicant. Therefore, there has been a continuous wrong done by the army authorities till date and now at this stage the applicant prays for condonation in utmost humility in the light of the judgment of Hon'ble Supreme Court in "Union of India Vs. Tarsem Singh"".

21. In our humble opinion to say the least except relying upon the stand of the matter being a "continuous wrong", no sufficient cause whatever has been disclosed, as required by Section 22 of the AFT Act, according to which, a cause should be shown, whereby the Tribunal is satisfied, that the applicant had sufficient cause for not making the application within the prescribed period.

22. Thus, in our view, since the application does not disclose any sufficient cause, no ground is made out for condoning the delay either. Consequently, the application filed for condonation of delay is dismissed and resultantly the O.A. is also dismissed as time barred.

M.L. NAIDU
(Administrative Member)

N.P. GUPTA
(Judicial Member)

Dated: 07.11.2012
rsk.