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COURT NO. 2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
O.A. No. 371 OF 2011

IN THE MATTER OF :

Ex WO D.P. Sharma

.....Applicant

VERSUS

Union of India & Others

.....Respondents

Dated: 21.10.2011

Present: Mr. Sukhbir Singh, counsel for the Applicant.

Mr. V.S. Tomar, counsel for the Respondents with
Wg Cdr Ashish Tripathi

MA No. 414/11

Heard and perused the record.

This application under Rule 33 of Armed Forces Tribunal (Procedure) Rules 2008 has been filed on behalf of the applicant to amend the OA by inserting some grounds to make this application entertainable before this Tribunal. Considering the submissions made and reason assigned in the application, the application is allowed. Amended OA be filed on record. Application stands disposed of accordingly.

OA No. 371/11

Heard and perused the record.

Learned counsel for the respondents raises the objections of territorial jurisdiction and delay in challenging the GCM proceedings. Respondent side is free to take these objections at the time of admission.

As requested, put up for submissions on admission on **16.11.2011**.

M.L. NAIDU
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Dated: 21.10.2011
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#11

**COURT NO. 2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
O.A. No.371 of 2011**

IN THE MATTER OF:

Ex W.O. D.P. Sharma

.....PETITIONER

Through: Mr. Sukhbir Singh, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS

.....RESPONDENTS

Through: Mr. Satya Sehrawat proxy for Ankur Chibber, counsel for the respondents alongwith Wg Cdr. Ashish Tripathi

CORAM:

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

ORDER

Date: 17.10.2012

1. This OA has been filed by the petitioner on 02.09.2011 challenging the impugned findings and sentences of the General Court Martial (GCM) held on 13.02.2006. Second prayer made is for a direction to the respondent No.2 to re-fix the salary in the Pay Band for which the applicant is entitled in accordance with the seniority of the applicant and in rank of Master Warrant Officer (MWO) with applicable allowances and consequent retirement benefits such as leave encashment, gratuity, pension and pension commutation etc. Third prayer made is for direction to the respondents to make the payment of Rs.16.00 lacs approximately, as damages for illegally not granting him

extension of service for 3 years. Fourth prayer made is for direction to refund the amount of Rs.4,37,096/- alongwith interest @18% p.a. w.e.f. 01.12.2009 till the date of refund of the said amount. Other consequential reliefs have also been claimed.

2. The petition came up for consideration on 13.09.2011 and it was noticed that GCM proceedings are of 2006, however since nobody appeared on behalf of the petitioner, the matter was adjourned. On 21.10.2011, application being M.A. No.418/11 made for amendment of the OA was considered. Then, the petitioner filed a petition under Section 22 of AFT Act seeking condonation of delay in filing the OA. Being M.A. No. 414 of 2011

3. Thereafter, after adjournments after adjournments, when the matter last came up before this Bench on 21.09.2012, it was noticed that on the face of it, the petition appears to be barred by time, and not cognizable in view of lack of territorial jurisdiction. Therefore, the matter was adjourned to give one more opportunity and was fixed for today.

4. Thus, the two aspects surfaced on the forefront against the petitioner with respect to maintainability of the petition being firstly, that the petitioner is resident of Ghaziabad, and was posted at Gujarat and the Court Martial was also held there only. In that view of the matter, whether this Bench has territorial jurisdiction, or the matter is required to be heard by the concerned Regional Bench, and the second aspect that surfaces on the forefront is about limitation.

5. We take the aspect of limitation first.

6. Undisputedly, the court martial was held in 2006, and as we get from the O.A. that it has been filed on 02.09.2011, though it was ready on 13.07.2011. We straightaway come to M.A. No.414/2011 filed by the petitioner seeking condonation of delay, and a look at that shows that, in para 2, the stand taken is that the respondents have caused continuing wrong by way of illegally punishing and sentencing the petitioner in the illegal court martial which has caused illegal reduction of rank and recurring/successive wrong fixation of pay. Such fixation of pay is not in accordance with the rules, as such continuing wrong has been committed against the petitioner, which has given rise to the recurring cause of action each time the petitioner was paid a salary and thereafter each time, petitioner is paid his monthly pension.

7. In para 3 of said M.A., it has been pleaded that the petitioner has taken up the matter with the respondents but no action has been initiated for removing the said continuing wrong. Then in para 4 and 5, it has been claimed that the OA has been filed within limitation. Then in para 6, it has been pleaded as under:-

“That without prejudice to the rights and contentions of the applicant, even if there has been any delay in filing the above titled OA, the applicant seeks the indulgence of this Hon’ble Tribunal to condone such delay, if any, in view of the submissions made in the present application and in OA.”

8. Thus, in substance, two stands have been taken by the petitioner, one claiming the OA to be within limitation on the ground of grievance of the petitioner being a continuing wrong, and the other stand taken is seeking condonation of delay, by submitting the pleadings, as mentioned in para 6 above.

9. So far stand taken in para 6 is concerned, in our view, to say the least, no sufficient cause has been pleaded as to how and why the petitioner was deprived from filing the petition within time, as contemplated by Section 22(2). It is a different story that as appears from the O.A. itself that it was ready way back on 13.07.2011 itself, still it has been filed on 02.09.2011. Therefore, the petitioner cannot said to be entitled for any condonation of delay.

10. Then we examine the aspect of the O.A. being within time on the grounds pleaded in the application being the petitioner suffering continuing wrong, and his regularly pursuing the matter with respondent No.2, and the respondent No.2 having paid no heed to the appeal and representations filed by the petitioner.

11. So far as the proceedings and punishments awarded by the court martial are concerned, undisputedly, they cannot described to be falling within the four-corners of the expression "continuing wrong". Though learned counsel for the petitioner stretched his argument much initially, on the basis that since the court martial proceedings itself are wrong, discriminatory and without jurisdiction, and suffer from various

illegalities, the consequences being vested on the petitioner on account of punishments awarded by the court martial, is a continuing wrong, as it resulted into illegal fixation of pay, on account of his reduction of rank, and non-promotion, and obviously, also resulted in wrong fixation of pension and therefore, it is continuing wrong. However, during the course of arguments at the later stage, Learned counsel for the petitioner agreed that so far the proceedings of court martial are concerned, they cannot be said to be continuing wrong, and submitted that, he was illegally denied the promotion to the rank of MWO, and was also illegally denied three years extension of service, which all resulted into wrong fixation of pay, and consequently wrong fixation of pension. Then, another limb of argument submitted was, that even in the rank in which he was discharged finally, his pay was not fixed in accordance with the recommendations of the VIth Pay Commission, and it was consequent upon such wrong fixation of pay, that even without giving any opportunity of hearing to the petitioner, recovery of Rs.4,37,096/- was made from him at the time of his retirement, when he retired on 31.11.2009, and obviously, consequently his pension has been wrongly fixed, which does constitute a continuing wrong and the petition in that regard cannot be said to be barred by time. Then it was submitted that after his retirement, he submitted a representation on 17.08.2010. Then another representation was submitted in November 2010, and then finally a legal notice was served on 31.03.2011, which has been replied

on 23.06.2011, and from that date, the O.A. having been filed on 02.09.2011 is clearly within time.

12. We have considered the submissions, and have gone through the documents produced alongwith the O.A., and some judgments of Hon'ble Supreme Court.

13. At the outset, we may observe that since the punishment awarded by the court martial is of the year 2006, in our view, the challenge to it in the year 2011 cannot be entertained, on the ground of it being barred by time.

14. Then we have to proceed, taking the punishments to stand, and examine as to whether the petitioner is suffering any continuing wrong, and/or the petition is within time.

15. It is a different story that the petitioner has not even produced the order of punishment, despite challenging the findings and the sentence of the court martial. Be that as it may, since we have found the challenge to be being barred by time, we need not detain ourselves on that. However, learned counsel for the respondents has made available for our perusal the sentence imposed, and the sentences imposed are (a) to be reduced to the rank of Corporal (b) to forfeit one year's past service for the purpose of promotion and (c) to forfeit one year's service for the purpose of increased pay and pension.

16. Considered from this standpoint, the question that may be required to be gone into is, as to whether his pay fixation, or denial for promotion etc., are the outcome of giving effect to the sentences awarded by the court martial, or have been done without any basis. If it is claimed that the effects have come, about de horse giving effect to the sentences awarded by the court martial, then probably the things might have required some consideration. But here, as we get from the document produced by the petitioner, being the reply to the legal notice of the petitioner, that it was consequent upon the sentences awarded by the court martial, that the consequences have come about. In as much as, in this communication dated 23.06.2011 (Annexure-J), it has been conveyed that the petitioner was tried for 9 charges and was awarded three sentences, and then details have been given, to the effect that the substantive rank of Warrant Officer was restored as per policy, and his pay was fixed accordingly, in as much as, he was Warrant Officer as on 01.06.2006 in the pay of Rs.13620/- and was reduced to the rank of Corporal, consequently he was fixed in the pay of Rs.9680/-. Then, after six months, he was restored the rank of Sergeant, and was fixed in the pay of Rs.10090/-. Then, after another six months of restoration of rank of Sergeant, he was restored the rank of JWO, and was fixed in the pay of Rs.10970/-, and since six months thereafter, he was restored the rank of Warrant Officer, and was fixed in the pay of Rs.11470/-. Then in July 2008 and July 2009, he was given annual increments, and consequently, in July 2009 his pay came to be fixed Rs.12540/-.

17. That being the position, it is clear that the pay fixation etc., were consequent upon the sentences awarded by the court martial.

18. Then on the aspect of continuing wrong, we may refer to, and relied upon, the judgment of Hon'ble Supreme Court in **Balakrishana Savalram Pujari Waghmare Vs Shree Dhyaneshwar Maharaj Sansthan reported at AIR 1959 SCC 798** wherein the Hon'ble Supreme Court interpreting the import of Section 23 of the Limitation Act, dealing with the aspect of limitation in cases of continuing wrong, has held as under:-

"A continuing wrong is essentially one, that creates a source of continuing injury, as opposed to one that was complete and makes the doer liable for such continuance. A completed injury would not be a continuing wrong, even though it might give rise to continuing damage."

19. This principle was followed by the Hon'ble Supreme Court in **Union of India and others Vs Tarsem Singh, reported in (2008) 8 SCC 648**, by quoting it in extenso. In this judgment, Hon'ble Supreme Court also followed yet another judgment of Hon'ble Supreme Court in **M.R. Gupta Vs Union of India reported in (1995)5 SCC 628**.

20. In our view, this principle applies with all forces to the present case, in as much as, the award of sentence by the court martial, and its

execution (implementation by reduction to rank of Corporal, and giving effect to the other sentences), did tantamount to completed injury.

21. In that view of the matter, simply because that completed injury which is described by the petitioner as continuing wrong or continuing damage, would not bring the case of the petitioner within the meaning of continuing wrong as comprehended by Section 23 of the Limitation Act and thus, it cannot be said that the grievance of the petitioner attracts the principles of continuing wrong, so as to entitled to maintain the present petition.

22. So far as the petitioner continuing to make representations are concerned, in that regard again, we may again observe that the limitation prescribed in Section 22 is six months, and since he was discharged on 30.11.2009, and at that time the recovery was made from him, he was required to either approach this Tribunal, or submit representation, within a period of six months therefrom. While, admittedly, the representation is said to have been submitted on 17.08.2010, and thus submission of the representation, and continuing to subsequently make representations, would not give him any fresh cause of action.

23. In that view of the matter, in our view, the petition is clearly barred by time.

24. That being the position, we do not feel like going into the aspect of territorial jurisdiction and detain ourselves on that.

25. The petition is accordingly dismissed as time barred.

M.L. NAIDU
(Administrative Member)

N.P. GUPTA
(Judicial Member)

Dated: 17.10.2012
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