COURT No.2
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

A.
OA 528/2017
Ex Sigmn Sushil Kumar Goswami ..... Applicant
VERSUS
Union of India and Ors. ..... Respondents

For Applicant : Mr. V. S. Kadian, Advocate
For Respondents : Dr. Vijendra Singh Mahndiyan, Advocate

CORAM
HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

ORDER
13.10.2023

Vide our detailed order of even date; we have allowed the OA 528/2017. Learned counsel for the respondents makes an oral prayer for grant of leave to appeal in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007 to assail the order before the Hon'ble Supreme Court. After hearing learned counsel for the respondents and on perusal of our order, in our considered view, there appears to be no point of law much less any point of law of general public importance involved in the order to grant leave to appeal. Therefore, prayer for grant of leave to appeal stands declined.

(JUSTICE ANU MALHOTRA)
MEMBER (J)

(REAR ADMIRAL DHIREN VIG)
MEMBER (A)

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COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

OA No. 528/2017 with MA No. 982/2023

Ex Sigmn Sushil Kumar Goswami ... Applicant

Versus

Union of India & Ors. ... Respondents

For Applicant : Mr. VS Kadian, Advocate

For Respondents : Mr. VS Mehndiyan, Advocate

CORAM :

HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER(J)
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

O R D E R

Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act,2007, the applicant has therefore filed this O.A and the reliefs claimed in Para 8 - read as under:

"

a) Quash and set aside the impugned order P/14289929/dp-6/NER dated 31.10.2016 and treat the disability of the applicant as attributable to or aggravated by military service. And/or

b) Direct the respondents to grant disability pension (service element as

well as disability element) to the applicant by making correct assessment of his disability and /or by granting benefit of rounding off @50% in terms of Govt. of India, Ministry of Defence letter No. 1(2)/97/D(Pen-C) dated 31.01.2001. and/or

c) Direct the respondents to pay the due arrears of disability pension with interest @12% p.a. from the date of retirement with all consequential benefits.

d) Any other relief which the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case along with cost of the application in favour of the applicant and against the respondents.

BRIEF FACTS

2. The applicant was enrolled in the Indian Army on 20.06.1972 and was invalided out from service on 17.08.1979, rendering 7 years and 2 months of service, having been found medically unfit for further service under item III (iii) of table annexed to Rule 13 (3) of Army Rules, 1954. The applicant was placed in low medical category 'EEE' for the disability "**Low Back Ache**" which was assessed by the IMB @ 11-14% for two years and considered it to be NANA.

3. The claim for the grant of the disability pension was forwarded to the the PCDA (P), Allahabad for adjudication vide Signal Records letter No. P/14289929/DP-3/NER dated 06.10.1979. The PCDA(P), Allahabad rejected the claim of the applicant for the grant of the disability pension vide letter No. G-3/79/12297/V dated 23.11.1979.

4. The applicant, thereafter, submitted petition dated 18.10.2016 for the grant of service element of the disability pension, which was rejected by the respondents vide Signal Records letter No. P/14289929/DP-6/NER dated 31.10.2016, aggrieved by which the applicant has filed the instant O.A. and thus, in the interest of justice, under Section 21(2)(b) of the AFT, Act, 2007, we take up the same for consideration.

CONTENTIONS OF THE PARTIES

5. The learned counsel for the applicant submitted that the applicant was invalided out from service on 17.08.1979 on completion of 7 years and 2 months of service. The learned counsel for the applicant submitted that the applicant was invalided out of service under Army Rule of 1954, Rule 13(3) item III on medical grounds due to permanent low medical

category "EEE". The learned counsel for the applicant further submitted that the IMB assessed the disability 'Low Back Ache' of the applicant @11-14% for two years and considered it to be NANA.

6. The learned counsel for the applicant submitted that para 1 of part III of the opinion of the Invalidment Medical Board states as follows:

"Did the disability exist before entering service?

"Answered "No".

7. The learned counsel for the applicant placed reliance on the verdict of the Hon'ble Supreme Court in the case of ***Deokinandan Prasad Vs. State of Bihar*** AIR 1971 SC page 1409 wherein it was held as under :

> ***" ... that pension is not a bounty payable on the sweet will and pleasure of the Government and that on the other hand, the right to pension is a valuable Right vesting with a Government servant...."***

8. The learned counsel for the applicant further placed reliance on the order of The Armed Forces Tribunal in TA No.

48/2009 in WP (C) 6324/2007 titled as ***Nakhat Bharti Vs. Union of India & Ors.*** wherein it was held that the medical authorities have to record the reason why the disease which was present at the time of acceptance of service could not be detected and that if such cogent reason is not found in the finding of the Medical Board then a presumption has to be drawn that the disease had arisen during the course of service. The learned counsel further submitted that in the instant case the disease of the applicant has to be held to be either attributable to or aggravated by service due to stress and strain of military service as no note of disease in the medical documents was made at the time of enrolment by the Medical Board.

9. The learned counsel for the applicant relied on the paras 33 and 51 of the Guide to Medical Officer(Military Pensions) which reads to the effect :

> ***"33. Assessment of low backache.***
> ***(a) Low backache 20%***
> ***(b) Low backache with neurological Involvement 30-50%***
>
> ***Duration of award in low backache due to musculo-facial strain should be for a maximum***

period of 5 years and in the other causes of low backache, award can be extended for further period depending on clinical and radiological finding.

51. Low backache.

Low backache is a clinical entity which is characterised by pain in the lower back which may be associated with sciatica and neurological deficit.

The causes of low backache are:

(a) Musculofascial strain

(b) Lumbar spondylosis

(c) Facet joint arthropathy

(d) Prolapsed inter vertebral disc

(e) Sacroilitis

(f) Ankylosing Spondylitis

(g) Spondylolisthesis

(h) Trauma Post traumatic low backache will be considered attributable.

Aggravation due to stress & strain of service should be conceded in other cases."

10. The learned counsel for the applicant placed reliance on the verdict of the Hon'ble Supreme Court in the case of ***Sukhvinder Singh Vs. Union of India*** (2014 STPL (WEB)

468 SC) decided on 25.06.2014, wherein it was observed as under :

> "....
>
> ***We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined. Thirdly, there appears to be no provisions authorising the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found***

to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension.

...."

11. The learned counsel for the applicant submitted that the applicant is entitled to invalid pension, if not disability pension, as per regulation 197 of the Army Pension Regulation 1961 during the course of submissions made on 28.08.2023, and confined the prayer made through the present OA to the grant of invalid pension alone.

12. Per contra, the learned counsel for the respondent submit that the applicant was invalided out from service on 17.08.1979, after rendering 7 years and 2 months, having been found medically unfit for further service under item III (iii) of table annexed to Rule 13 (3) of Army Rules, 1954 since, the applicant was in low medical category 'EEE' due to the disability " Low Back Ache".

13. The learned counsel for the respondents submitted that the disability "Low Backache" of the applicant was opined as Neither attributable to Nor aggravated by service and the

medical board also assessed percentage of disability @11-14% (i.e. less than 20%) for two years and composite assessment (for all the disabilities) is less than 20% and hence the applicant cannot be granted disability pension.

ANALYSIS

14. On the careful perusal of the material available on record and also the submissions made on behalf of the parties, we are of the view that it is not in dispute that the applicant was invalided out on medical ground from service on 17.08.1979, after rendering 7 years and 2 months of service, in low medical category 'EEE' due to the disability 'Low Back Ache' which was assessed by the IMB @11-14% for two years and consequently considered it to be neither attributable to nor aggravated by service vide their impugned order.

15. During the course of arguments, the applicant, through his counsel, prayed only for the grant of invalid pension and did not press on the disability pension with regards to the disability of the applicant.

16. After perusal of the records produced before us and arguments advanced by either side, we hold that the applicant is entitled to invalid pension, as the applicant was enrolled in

the Army on 20.06.1972 and was invalided out from service on medical grounds on 17.08.1979 i.e. after rendering 7 years and 2 months of service. In this regard, reliance is placed upon Rule 197 of the Pension Regulation for the Army, 1961 which is reproduced herein below :

> " ***197. Invalid pension/gratuity shall be admissible in accordance with the Regulations in this chapter, to***
> ***(a) an individual who is invalided out of service on account of a disability which is neither attributable to nor aggravated by service;***
> ***(b) an individual who is though invalided out of service on ' account of a disability which is attributable to or aggravated service, but the disability is assessed at less than 20%, and***
> ***(c) a low medical category individual who is retired/discharged from service for lack of alternative employment compatible with his low medical category."***

17. Lest it be contended that the applicant being invalided out after serving for 7 years and 2 months, however may not be eligible for getting the invalid pension as per Rule 198 of the Pension Regulation for the Army, 1961, which reads as under :

> " ***198. The minimum period of qualifying service actually rendered and required for grant of invalid pension is 10 years. For less than 10 years actual qualifying service invalid gratuity shall be admissible.***"

it is apposite to mention the order of the Armed Forces Tribunal (Regional Bench) Lucknow in ***Ex. Recruit. Chhote Lal Vs. Union Of India & Ors.*** in OA No.368 of 2021, wherein the MoD letter No. 12(06)/2019/D(Pen-Pol) dated 16.07.2020 has been examined in detail. The said MoD letter is reproduced below:

" Subject: Provision of Invalid Pension to Armed Forces Personnel before completion of 10 years of qualifying service- Reg.

Sir,

1. Government of India, Ministry of Personnel, Public Grievances & pensions, Department of Pension & Pensioners „Welfare vide their O.M 21/01/2016-P&PW(F) dated 12th February 2019 has provided that a Government servant, who retires from service on account of any bodily or mental infirmity which permanently incapacitates him from the service before

completing qualifying service of ten years, may also be granted invalid pension subject to certain conditions. The provisions have been based on Government of India, Gazette Notification No. 21/1/2016- P&PW(F) dated 04.01.2019.

2. The Proposal to extend the provisions of Department of Pension & Pensioners Welfare O.M No. 21/01/2016 –P&OW(F) dated 12.02.2019 to Armed Forces personnel has been under consideration of this Ministry. The undersigned is directed to state that invalid Pension would henceforth also be admissible to Armed Forces Personnel with less than 10 years of qualifying service in cases where personnel are invalided out of service on account of any bodily or mental infirmity which is Neither Attributable to Nor Aggravated by Military Service and which permanently incapacities them from military service as well as civil reemployment.

3. Pension Regulation of the Services will be amended in due course.

4. The provision of this letter shall apply to those Armed Forces Personnel were / are in service on or after 04.01.2019. The Cases in respect of personnel who were invalided out from service before 04.01.2019 will not be re-opened.

5. All other terms and conditions shall remain unchanged.

6. This issues with the concurrence of Finance Division of this Ministry vide their U.O No. 10(08)/2016/FIN/PEN dated 29.06.2020.

7. Hindi version will follow."

The AFT, Regional Bench, Lucknow Bench while disposing off the OA No. 368 of 2021 has examined Para 4 of the MoD letter dated 16.07.2020 and has held the said Para 4 of the letter as unconstitutional on the grounds that:

" 20. ....

letter dated 16.07.2020 fails to meet the aforesaid twin test. The letter arbitrarily denies the benefit of invalid pension to those armed forces personnel, who happened to be invalided out from service prior to 04.01.2020. There

cannot be any difference on the ground of invalidment as both in the cases of personnel invalided out before and after 04.01.2020, they faced the similar consequences. In fact, the persons who have retired prior to 04.01.2020 have faced more difficulties as compared to the persons invalided out on or after 04.01.2020. The longer period of suffering cannot be a ground to deny the benefit by way of a policy, which is supposed to be beneficial. Such a provision amounts to adding salt to injury.

21. ....

22. As per policy letter of Govt of India, Ministry of Def dated 16.07.2020, there is a cut of date for grant of invalid pension. As per para 4 of policy letter, "provision of this letter shall apply to those Armed Forces Personnel who were/ are in service on or after 04.01.2019". Para 4 of impugned policy letter dated 16.07.2020 is thus liable to be quashed being against principles of natural justice as such discrimination has been

held to be ultra virus by the Hon'ble Apex Court because the introduction of such cut of date fails the test of reasonableness of classification prescribed by the Hon"ble Apex Court viz (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that differentia must have a rational relation to the objects sought to be achieved by the statute in question".

23. From the foregoing discussions, it may be concluded that the policy pertaining to invalid pension vide letter date 16.07.2020 will be applicable in the case of the applicant also as para 4 of the letter cannot discriminate against the petitioner based on a cut of date.

....."

The Tribunal in reaching such a conclusion with respect to Para 4 of MoD letter No. 12(06)/2019/D(Pen-Pol) dated

16.07.2020 has placed reliance on the verdicts of the Hon'ble Apex Court in the cases of :

- ***D.S. Nakara and Others Vs Union of India, (1983), SCC 305 ;***
- ***Maneka Gandhi V. Union of India ;***
- ***Sriram Krishna Dalmia v. Sri Justice S.R. Tendolkar and Others1958 AIR 538 1959 SCR 279 ;***
- ***Ramana Dayaram Shetty v. The International Airport Authority of India &Ors 1979 AIR 1628 ;***
- ***State of Punjab &Anr. V. Iqbal Singh 1991 AIR 1532 1991 SCR (2) 790 ;***
- ***Jaila Singh &Anr. V. State of Rajasthan &Ors. 1975 AIR 1436 1975 SCR 428 1976 SCC (1) 602.***

18. To this effect, reliance is also placed on para 27 of the order of ***Lt. A.K. Thapa Vs. Union of India & Ors.*** in OA 2240/2019, Para 27 reads as under :-

"....

27. In view of the law laid down by the Hon'ble Supreme Court in ***Sukhvinder Singh(Supra)*** *and*

in ***Balbir Singh(Supra)*** *on invalidment, the personnel of the Armed Forces who is invalided out is presumed to have been so invalided out with a minimum of twenty percent disability which in terms of the verdict in* ***Sukhvinder Singh(Supra)*** *is to be broadbanded to 50% for life, the incorporation by the respondents vide the MoD letter dated 16.07.2020 of a term of* ***a necessary permanent incapacity for civil re-employment****, is an apparent overreach on the verdict of the Hon'ble Supreme Court in* ***Sukhvinder Singh(Supra)****. Furthermore, the said clause of a requirement of an Armed Forces Personnel to be permanently incapacitated from Military service as well as Civil re-employment is wholly vague and arbitrary and does not take into account the extent of incapacity for Civil re-employment. This is so for the personnel of the Armed Forces who is invalided out with all limbs incapacitated may still have a functional brain and functional voice, may be able to speak, sing, paint and earn a livelihood. The utilisation of the words*

'permanently incapacitates from civil re-employment', apparently requires a permanent brain dead armed forces personnel. We thus hold that the requirement of the Armed Forces Personnel ***'to be permanently incapacitated from civilian employment as well'*** *(apart from permanent incapacitation from military service) for the grant of invalid pension in terms of the MoD letter No. 12(06) /2019 /D (Pen/Pol) dated 16.07.2020 to be wholly arbitrary and unconstitutional and violative of Article 14 of the Constitution of India which is in Part-III of the Fundamental Rights with the sub heading thereto of* ***'Right to Equality'****, and lays down to the effect:-*

"14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 21 of the Constitution of India lays down to the effect:-

"21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 21 protects the ***Right to Livelihood*** *as an integral facet of the* ***Right to life*** *as laid down by the Hon'ble Supreme Court in* ***Narender Kumar Chandla Vs. State of Haryana,*** *1995 AIR 519 and the right to life is one of the basic human rights which even the State has no authority to violate, except according to procedure established by law.*

...."

CONCLUSION

19. We find no reason to differ from the law laid down in **Chhote Lal (supra) and in A.K. Thapa (supra)**, we are therefore of the considered view that the applicant was deemed to be invalided out of service on account of the said disability as the applicant rendered 7 years and 2 months of service and was invalided out before completing his term of initial engagement. Therefore, the applicant is held entitled to invalid

pension, despite the fact that he had not completed the qualifying length of service of ten years.

20. The respondents are thus directed to calculate, sanction and issue the necessary PPO to the applicant within a period of three months from the date of receipt of copy of this order and the amount of arrears shall be paid by the respondents, failing which the applicant will be entitled for interest @6% p.a. from the date of receipt of copy of the order by the respondents. However, as the applicant has approached the Tribunal after a considerable delay, in view of the law laid down in ***Union of India & Ors. Vs. Tarsem Singh 2009 (1) AISLJ 371***, arrears of invalid pension will be restricted to three years prior to the date of filing of O.A. 528/2017.

Pronounced in the open Court on this day of 13 October, 2023.

[REAR ADMIRAL DHIREN VIG]
MEMBER (A)

[JUSTICE ANU MALHOTRA]
MEMBER(J)