ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR

-.-

TA 09 of 2013 (arising out of RSA 2750 of 2002)

Union of India and others …… **Petitioner(s)**

Vs

Dev Raj …… **Respondent(s)**

-.-

For the Applicant/Respondent (s) : Mr Mohit Garg, CGC

For the Respondent/ Petitioner(s) : None

Coram: Justice Prakash Krishna, Judicial Member.
Air Marshal (Retd) SC Mukul, Administrative Member.

-.-

ORDER

21.02.2014

-.-

The Punjab and Haryana High Court by its order dated 14.9.2012 has transferred the R.S.A. No. 2750 of 2002 for its decision to the Tribunal in view of Section 34 of the Armed Forces Tribunal Act.

The facts giving rise to the above case may be noticed in brief.

Ex Sepoy Dev Raj enrolled in the Army, after discharge from Army instituted Civil Suit No. 63 of 1999 before the Civil Judge Senior Division, Jalandhar for declaration to the effect that the plaintiff is entitled to the grant of disability pension after having been placed in low medical category 'EEE'. The plaintiff claimed that he was enrolled in the Army in Dogra Regiment on 24.8.48 at Jalandhar Cantt., was posted on difficult military duties involving stress and strain with the result he fell ill while in active military service and was admitted to Military Hospital for treatment but could not be cured fully and was discharged from service on 26.2.1952 on medical grounds. He was given to understand that he would be granted disability

pension at the time of his discharge but did get nothing. Hence, the suit.

The suit was contested by the defendants who are appellants/petitioners herein, on various grounds including that the suit is barred by time and that the service record of the plaintiff has been weeded out in the year 1978 after expiry of the prescribed period for maintaining the record. However, as per Long Roll maintained by the Records of Dogra Regiment, it was stated that the plaintiff was enrolled in Dogra Regiment on 24.04.48 and was discharged from service on 27.1.52. Except the above, no other information is available with the Records of Dogra Regiment. From the Disability Pension Register, it is evident that the plaintiff's disability was assessed less than 20% by the Medical Board at the time of his discharge. The other plaint allegations were also denied.

The trial court framed the following issues on the basis of the pleadings of the parties :-

(1) Whether the plaintiff is entitled for the grant of disability pension in the terms of para No. 173 of the Pension Regulations for the Army as alleged ?
(2) Whether the suit is within limitation ?
(3) Relief.

The Civil Judge (Senior Division), Jalandhar on the finding that the claim of the plaintiff for pension was rejected vide order dated 9.1.1952, the permanent disability having been found less than 20%, dismissed the suit vide judgment and decree dated 26.2.2001. The plaintiff was informed even at the time of discharge that he would not get any disability pension, his disability being less than 20%. The trial

judge ultimately held that the suit is barred by time as plaintiff has not approached the Civil Court within a period of three years from the year 1952 when the claim was rejected by the CDA(P), Allahabad.

The matter was carried in appeal before the District Judge Jalandhar which came up for hearing before Additional District Judge, Jalandhar being R.C.A. No. 1 of 2001. The First Appellate Court vide its judgment and decree dated 17.11.2001, which is under appeal, set aside the judgment and decree of the trial court by holding that the plaintiff is entitled to the benefit of disability pension for the period of three years and two months prior to filing the present suit i.e. w.e.f. 7.6.1996. The suit was decreed accordingly. The appellate court found that the defendants have failed to establish that the plaintiff suffered less than 20% disability, thus the plaintiff is entitled to get disability pension.

The present petitioners i.e. the defendants of the suit, preferred Regular Second Appeal before the High Court. In the Memo of Appeal, the following law points have been framed :-

(i) Whether in absence of medical documents which have been destroyed by the competent authority as per the instructions prevalent after a lapse of 25 years, can come to a conclusion on its own that disability was 20% and not less ?

(ii) Whether the learned lower appellate court can shift the onus to prove an issue from plaintiff, on to the defendants particularly when the plaintiff is claiming a relief. He has to prove that he was having a disability of 20% or more at the time of discharge ?

(iii) Whether the claim of the plaintiff was hopelessly time barred as he has challenged the order dated 9.1.52 after more than 47 years ?

(iv) Whether in absence of any evidence about percentage of disability, learned lower appellate court on its own can fix the percentage of disability assuming the power of Medical Expert ?

(v) Whether manifest injustice has been done to Union of India ?

The appeal was admitted and the delay in its filing has been condoned by Hon'ble High Court vide order dated 6.7.2004.

Heard Mr. Mohit Garg, CGC learned counsel for the appellants/petitioners. None is present on behalf of the respondent. The record shows that the notice sent by the Tribunal to the respondent has been received back undelivered with the report "Left India". The foreign address of the respondent is not on the record. In this situation, the appeal was heard ex-parte against the plaintiff/respondent.

The learned counsel for the appellants submitted that the suit filed by the plaintiff/respondent is barred by time. Secondly, the disability pension was declined to the respondent on the ground that his disability was less then 20%. There being no evidence to the contrary, it was not open to the Appellate Court to interfere in the matter by setting aside the judgment and decree of the trial court.

Considered the aforesaid submissions of the learned counsel for the appellants/petitioners.

A reading of the plaint would show that the petitioner was discharged from service on 26.2.52. He kept quiet and took no steps for redressal of his grievance with regard to non-grant of disability pension. In Para 5, vague and general allegations have been made that he made representations to the higher authorities but all in vain,

without disclosing the date of any such representation or the authority to whom allegedly such representation was made. In Para 6, it has been stated that a notice under Section 80 CPC dated 17.3.99 was served upon the defendants. The cause of action as per Para 7 of the plaint, accrued to the plaintiff on 26.2.52, the date of discharge and being a recurring cause of action on first day of every month and on 17.3.99, when a legal notice was served…….. The contention of the petitioners/defendants is that the suit for declaration should have been filed within a period of three years from the date of the discharge, when the disability pension was denied to the plaintiff and the cause of action to sue first arose.

The period of limitation for filing a suit for declaration is three years when the right to sue first arises.

A suit for declaration not covered by Article 57 of the Schedule to the Limitation Act, 1963 must be filed within 3 years from the date when the right to sue first arises as per Article 58 of the said Act. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word “first” has been used between the words “sue” and “accrued”. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued.

The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

In Daya Singh & amp; Anr V. Gurdev Singh (dead) by LRs & amp; Ors. (2010) 2 SCC 194 the position was re-stated as follows:

> "Let us, therefore, consider whether the suit was barred by limitation in view of Article 58 of the Act in the background of the facts stated in the plaint itself. Part III of the Schedule which has prescribed the period of limitation relates to suits concerning declarations. Article 58 of the Act clearly says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues."

The Privy Council in a case reported in AIR 1930 PC 270 Bolo v. Koklan has observed as follows:

> "There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

A similar view was reiterated in C. Mohammad Yunus v. Syed Unnissa AIR 1961SC 808 in which the Apex Court observed: (AIR p.810, para 7)

> "The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

The Apex Court has held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right.

Reference may be made to the decision of Apex Court in Khatri Hotels Pvt. Ltd. & amp; Anr. V. Union of India & amp; Anr. (2011) 9 SCC 126 also.

The trial court recorded a finding that cause of action for filing the suit for declaration arose to the plaintiff in the year 1952 i.e. the date of his claim having been rejected by the CDA(P), Allahabad as is evident from Ex. P5. The details contained in Ex. P5, copy of the Register has been admitted to be correct by the plaintiff Dev Raj PW-1 in his cross examination. Even the court below has relied upon Ex. P5 though for a different purpose. The appellate court has proceeded in the matter holding that right to receive pension is a recurring cause of action and cannot be rejected on the ground of delay. Similar kind of plea has been considered by this Tribunal time and again. In the case of **Jaswant Singh Vs Union of India in OA 1111 of 2012** decided on 28.8.2012 and in **OA 1763 of 2011- Smt. Kamla Devi Vs Union of India and others** decided on 15.1.2014, this Tribunal has taken the view that when pension was refused by an order, the petitioner should take steps to get rid of the order by having the same set aside, or declared invalid for whatever reason, it may be permissible to do so. Any person effected by any such order refusing to give pension, should seek redressal against the same within the prescribed period of limitation. Even if cause of action to get correct pension is recurring

cause of action, it does not mean that a person may approach the Court or Tribunal at his convenience, sweet will and leisurely.

There is another valid factor to hold that the suit is barred by time and the plaintiff/respondent is not entitled to get any relief. In view of the specific stand taken by the defendants/respondents that the documents have been weeded out after the expiry of the prescribed period for maintaining them. No authority is expected to maintain the entire record relating to service of a person in perpetuity. The first appellate court was not justified in not taking into consideration the Article 58 of the Limitation Act as also the fact that the service record of the plaintiff/respondent has been weeded out. The record was weeded out in the year 1978 and the suit giving rise to the present appeal was instituted in the year 1999 after a long gap since the date of discharge. We, therefore, find sufficient force in the argument of the petitioners that the suit is barred by limitation. The appellate court has not given any reasons as to why in its opinion, the finding of the trial court that the suit is barred by limitation, is not sound.

Then, it was argued that the appellate court committed mistake in awarding disability pension and interfering with the finding of the Medical Board. The appellate court has proceeded to examine the issue on the basis of conjectures and surmises. Admittedly, Ex. P5 is the document on record to show that the percentage of disability suffered by the respondent was less than 20%. In Paras 25 and 26 of the judgment, the appellate court has observed that the percentage was less than 20% but he took the view that without producing report of the medical board, it cannot be said that the plaintiff suffered less than

20% disability forgetting that the case of the defendants that with the passage of time, the medical record has been weeded out. The veracity and genuineness of document Ex. P5 was not put to issue by the plaintiff. As against the said documentary evidence, the plaintiff could not produce any iota of evidence to show that he suffered disability to the extent of 20% or more. We fail to appreciate that how the court below could have held disability 20% or more in the absence of any evidence in support of the above finding. The finding on this issue, by first appellate court is nothing but conjectural and based on surmises. In such matters, as laid down time and again by the Apex Court in **Union of India Vs Jujhar Singh, (2011) 7 SCC 735**, judicial intervention is permissible only in exceptional cases and not in routine manner.

The grant of declaratory decree is discretionary and we are of the opinion that on the facts and circumstances of the case, the declaration sought by the plaintiff/respondent cannot be granted and should have not been granted by the court below.

The plaintiff has not come to the court with clean hands. In the plaint, true and full disclosures of the facts deliberately have not been made. The fact that the claim for grant of disability pension was rejected by the CDA(P), has not been disclosed therein. In the cross-examination, he has to admit that he had challenged the opinion of Medical Board somewhere in the year 1952-53 before the Headquarter Allahabad. In further cross-examination, he states that he does not possess any letter requesting Union of India to grant disability pension. The cross-examination would show that allegations made in the plaint

that he represented the matter to the higher authorities, is wrong. In further cross-examination, he admitted that it is correct that his claim for disability pension was rejected by the CDA(P), Allahabad vide their letter dated 9.1.52. It is correct that “I have filed the present suit after 46/47 years of my removal from service”. Thus it comes out that the factum that his claim for disability pension rejected by CDA(P) was deliberately not disclosed in the plaint, disentitles him to get any discretion as he has not approached the Court with clean hands.

Viewed as above, we find sufficient force in the appeal and are of the opinion that the first appellate court committed illegality in decreeing the suit by granting disability pension. The record further shows that there was no stay order by the High Court staying the operation of the judgment and decree of the court below. In this view of the matter, while allowing the present T.A. and dismissing the suit, the interest of justice would be served by providing that amount, if any, already paid to the respondent, shall not be recovered. Except for that, the respondent shall not be entitled to receive any amount towards disability pension henceforth.

In the result, the TA succeeds and allowed and the judgment and decree of the court below is set aside and that of the trial court is restored. No order as to costs.

(Justice Prakash Krishna)

(Air Marshal (Retd) SC Mukul)

21.02.2014
‘pl’
Whether the judgment for reference to be put up on website – Yes/No