

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transfer Application No. 568 of 2010

Thursday this the 05th day of May, 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P.R. Gangadharan, Member (A)”

Lt. Col (Retd) H.S.Sharma
(IC 38409 L) Son of Shri J.P.Gautam
Resident of E-50 Industrial Area
Bahadarabad District Haridwar
(Utrakhhand)

..... Applicant

By Legal Practitioner Sri Lalit Kumar

Versus

1. Union of India through Secretary
Ministry of Defence South Block-,
New Delhi
- 2 The Chief of the Army Staff
Integrated Headquarters of Ministry
Of Defence (Army) New Delhi
- 03 The Director General Resettlement
Ministry of Defence West Block
R.K.Puram New Delhi
- 04- The Director General Armed Forces
Medical Services(DGAFMS)
Ministry of Defence, New Delhi
- 05-- PCDA (Pensions)
Allahabad U.P.

-----Respondents

By Legal Practitioner Shri S.K.Rai, Sr.
Standing Counsel

ORDER

Hon'ble Mr. Justice Janardan Sahai"

1. The applicant was commissioned in the Indian Army on 22-12-1979. During his service the applicant suffered about six disabilities. However, the Medical Board found only two disabilities to be attributable to military service namely internal derangement knee DK(Rt) 30% and Head of Fibula- 30%. These disabilities were compositely assessed at 60%. The applicant opted for voluntary retirement on 01-1-2001 which was sanctioned on 02-1-2001 after completing 21 years service. The minimum qualifying service for pension as provided in Regulation 25 of Pension Regulations for the Army 1961 is 20 years. The applicant however was

^{service} granted pension he was not granted disability pension. The applicant's case is that on receiving the PPO he came to know that his pension did not include disability pension. He filed an appeal against refusal of disability pension and he was informed by letter dated 23-5-2006 of the Army Headquarter that his case has been rejected in view of Regulation 50 of the Pension Regulations for the Army, 1961 as he had taken voluntary retirement.

02- On 28-9-2008 the applicant filed a representation to the Army Headquarters which was not answered. He was, therefore, driven to file Writ Petition No.203 of 1999 (S/B) in the High Court of Uttaranchal at Nainital. The papers of the writ petition have been transmitted to the Tribunal in view of the provisions of Section 34 of the Armed Forces Tribunal, Act, 2007

03- We have heard Sri Lalit Kumar, learned counsel for the applicant and Sri S.K.Rai learned Sr. Standing Counsel and Lt. Col. Anil Chandra, departmental representative.

04- To appreciate the contention we shall refer to the relevant provisions^{of} of the Pension Regulations for the Army, 1961 namely Regulations 48, 50 and 53.

Regulation 48 reads as under:

“48(a) Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an officer who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non battle casualty cases and is assessed at 20% or more.

(b) The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix- II.”

The disability of the applicant was assessed at 30% each in respect of the disability no.1 and 2 and both disabilities were found to be attributable to military service. However, the applicant was not invalided out of service but had taken voluntary retirement. Regulation-48 also opens with the words “Unless otherwise specifically provided” We shall now see whether the cases of voluntary retirement have been excluded from the purview of Regulation-48. Regulation-50 of the Pension Regulations is such a regulation. That Regulation reads as under:

"50- An Officer who retires voluntarily shall not be eligible for any award on account of any disability.

Provided that officer who is due for retirement on completion of tenure or on completion of service limits or on completion of the terms of engagement or on attaining the prescribed age of retirement and who seeks pre-mature retirement for the purpose of getting higher commutation value of pension shall remain eligible for disability element."

The first part of Regulation-50 clearly disqualifies an officer who has taken voluntary retirement from being eligible for any award on account of any disability. Learned counsel for the applicant submits that the proviso of Regulation 50 is applicable to his case.

05- The pre-conditions for applicability of the proviso are, (A) that an officer should be due for retirement and (B) that such retirement should be due on account of any of the following contingencies:

- (i) on completion of tenure; or
 - (ii) on completion of service limit; or
 - (iii) on completion of term of engagement. ; or
 - (iv) on attaining the prescribed age of retirement
- (C) Such request for pre-mature voluntary retirement should have been made for the purposes of getting higher commutation value of pension.

According to Sri Lalit Kumar an officer who has completed 20 years of service the minimum period required to qualify for a service pension under Regulation- 25 would be deemed to have completed the tenure and attained the age of retirement

The word "due" according to Chambers 21st

Century Dictionary means:

"expected according to timetable or pre arrangement, what is owed; that which can be rightfully claimed or expected, (dues) subscription fees, due to something or someone caused by it or them because of it or them, give someone their due to acknowledge their qualities or achievements especially when disapproving in other ways, in due course in the ordinary way when the time comes;

In Oxford & IBH Modern English Dictionary one of the meanings of 'due' is "expected as scheduled to arrive or be ready / the place is due now". In the context of the proviso to Regulation- 50 it appears that the word "due" means that the officer's retirement is due on account of expected arrival of any of the contingencies, mentioned in the Regulation~~s~~. The officer would not be expecting any of those contingencies to occur in the near future at the stage when the officer has hardly completed the minimum qualifying service of 20 years. The concluding

portion of the proviso contains a condition that such premature retirement has been sought for the purpose of higher commutation value of pension. Now an officer would be getting the highest commutation value of pension when he has put in such number of years as would entitle him to full pension although he still has some period of service remaining ^{but of} and his further continuance in service would give him no benefit for the purposes of pension. At the stage when an officer has put in minimum qualifying period of service, he is not 'due for retirement' nor could he be seeking retirement for the purposes of getting higher commutation value of pension because he will be entitled to a much higher commutation value of pension if he continues in service.

The three conditions in ^{not of} the proviso read together indicate that the proviso would [^] be applicable to a case where the officer has put in only the minimum qualifying service.

06- To appreciate the full import of the proviso, it is necessary also to interpret the four contingencies stipulated in the proviso namely completion of tenure;

completion of service limit; completion of term of engagement; or attaining the prescribed age of retirement. The Pension Regulations do not define any of these terms. However, all these concepts have been dealt with in Rule- 16A of the Army Rules which relates to the subject of retirement in case of officers^{gk}. The two legislations namely Rule 16A and the Pension Regulations are supplementary. Before the enactment of Rule 16 the subject was covered by the Regulations for the Army. As the eligibility for pension is directly related to the subject of retirement ^{and X} Regulation- 50 refers to the various contingencies in which retirement takes place, we have to resort to Army Rule 16A. Rule 16A(i)(a) read with sub- rule (5) relates to retirement on attainment of age limit. Sub- rule (5) prescribes different ages of retirement for officers of different ranks. Reference to attainment of the prescribed age of retirement mentioned in the proviso of Regulation- 50 is therefore attainment of the age mentioned in sub- rule (5) of Rule 16A. The completion of tenure envisaged in the proviso to Regulation- 50 is referable to Army Rule 16A (i) (b) read

with sub Rule (5)(f)(ii) and (g)(ii) and Sub rule- 6 .This provision deals with the tenure of appointment and is applicable to officers of higher rank of Major General or Lieutenant General. An instance relating to the retirement on completion of service limit mentioned in the proviso of Regulation 50 is referable to Note-(a) of Explanation-II of Sub- rule (6) of Rule 16A which provides in respect of substantive Lt. Cols (Time scale) belonging to Defence Research Development and Production Inspection Organization etc. completion of 27 years Commissioned Service. Retirement on completion of the term of engagement does not appear to be specifically mentioned in Rule 16A. Rule 16A(6) Explanation-II (c) however provides that officers of certain departments who had opted to be governed by the age of retirement prior to issue of Government of India Ministry of Defence letter dated 26-7-1984 and 26-7-1985 referred to therein would be governed by the term they have opted for. Such term for which they have opted for can therefore be treated as a special term of

engagement applicable to them. However this condition is not relevant to the present case

07- The contention of learned counsel for the applicant is that the proviso was added to Regulation 50 to carve out an exception to the main rule i.e. exception to the rule of ineligibility of an officer who has taken voluntary retirement, and in case the proviso is so interpreted as to mean that the officer has already completed his tenure or had attained the age of retirement, the proviso would be rendered redundant. In our opinion the contention of learned counsel for the applicant does not have any force. The interpretation we have given to the proviso does not make it redundant, ^{or} ~~and~~ ^{it} would be applicable in cases where the officer is due for retirement but has not retired. These would be cases where the officer seeks premature retirement having put in such length of service that his further continuance in ser-vice would not enhance the commutation value of his pension. Regulation- 50 is applicable where an officer is due for retirement whereas Regulation-53 applies where an officer has retired.

08- Regulation 53 is quoted below:

“53(1)- An officer retired on completion of tenure or on completion of terms of engagement or on attaining the age of 50 years (irrespective of their period of engagement) if found suffering from a disability attributable to or aggravated by military service and recorded by service Medical authorities shall be deemed to have been invalidated out of service and shall be granted disability pension from the date of retirement, if the accepted degree of disability is 20 percent or more and service element if the degree of disability is less than 20 percent. The retiring pension/ retiring gratuity if already sanctioned and paid shall be adjusted against the disability pension service element, as the case may be.

(2) The disability element referred to in clause (1) above shall be assessed on the accepted degree of disablement at the time of retirement, discharge on the basis of rank held on the date on which the wound/ injury was sustained or in the case of disease on the date of first removal from duty on account of that disease.

Note: In the case of an officer discharged on fulfilling the terms of his retirement, his unwillingness to continue in service beyond the period of his engagement should not effect his title to the disability element under the provision of the above regulation.”

The effect of Regulation 53 is that even though an officer may have retired he would be eligible for disability pension from the date of retirement if he is found suffering from a disability attributable to military service. However, even under ^{Regulation 53} Rule-53 the retirement referred to is retirement on completion of tenure or terms of engagement^{or 50} on the officer attaining the age of 50 years

irrespective of the period of engagement. Even in respect of this condition however the requirement that the officer has actually retired is applicable. The situation where an officer can be retired on attaining a particular age after 50 years, before he attains the prescribed age of his retirement, have also been dealt with in Regulation 16A . For example in cases of officers in the rank of Major General the proviso to Rule 16A(5) (f) (i) provides that the officer shall be given two reviews, one at the age of 52 years and the other at the age of 55 years and they may be retired if they are found unsuitable. This would be one of the cases where a person actually retires after 50 years of age but before attaining the age of retirement prescribed for his rank. The Note to Regulation-53 has been relied upon by the counsel for the applicant. The note refers to a case where an officer expresses his unwillingness to continue in service beyond the period of his engagement. Rule 16A(1) provides that an officer shall be retired from service under the orders of the Central Government or authority specified in sub- rule (2). Sub rule (3) of Rule 16A

provides that the order shall specify the date from which retirement shall be effective. Sub – rule(4) of Rule 16A provides that an officer who has attained the age of retirement or has become due for retirement on completion of his tenure, may be retained in service for further period by the Central Government, if the exigency of service so requires. Note to Regulation 53 refers to a situation where the officer has expressed his unwillingness to continue in the extended period of service and Government accepts his request. The Note does not support the contention of the applicant that premature retirement referred to in Rule- 50 proviso means voluntary retirement after minimum service qualifying for pension. For these reasons we are of the view that the case of the applicant who has put in 20 years of service and has sought voluntary retirement would not be covered under the proviso to Regulation- 50.

09- Learned counsel for the applicant has placed reliance on certain decisions of the Principal Bench.

S. J. M.
decision of Brig. K.K.Khajuria Vs. Union of India and

others (T.A.No.176 of 2009) the facts were distinguishable. It appears that the officer had completed full term of his engagement. Ex Hav. Premnath Singh Vs. Union of India and others decided by Principal Bench of the Tribunal on 22-7-2010 (O.A.No.82 of 2010) was a case relating to a person below officer rank which are not governed by Regulation- 50. In Prem Nath Singh there is no consideration of any such provision akin to Regulation- 50. The main issue decided in the case of Prem Nath Singh is regarding cut off date mentioned in the notification dated 19-1-2010. However in these decisions the provisions of Regulation-50 and application of Rule 16A has not been considered.

10- Learned counsel for the applicant relied upon the decision in Mahendra Singh Narwal Vs. Union of India and others 2004 Delhi Law Times 550 which has also been relied upon by the Tribunal in Ex. Hav. Prem Nath Singh's case. Mahendra Singh's case too relates to persons below officer rank and effect of Regulation- 50 was not considered in that case.

11- On the other hand in Union of India Vs. Ajai Wahi (Civil Appeal No.1002 of 2006, decided on 06-7-2010) the Apex Court in para 17 has upheld the validity of Regulation-50 and has observed that Mahendra Singh's Narwal's case has no bearing. In O.A. No.139 of 2009 Lt. Cpt. P.K.Kapur (Retd.) Vs. Union of India and others decided on 30-6-2010 by the Principal Bench of the Tribunal the persons who were being given disability pension were categorized for the purposes of grant of higher or lower pension on the basis of a cut off date of retirement viz 01-1-2006 in view of two Notifications dated 04-5-2009. In that context it was held that the date of retirement could not form a valid basis for classification. Retired persons getting disability pension constituted a separate class. A further classification within that class on the basis of date of retirement amounted to creation of a class within a class without nexus to any object sought to be achieved. In the present case we have found that the applicant is not eligible for grant of disability pension at all and as such the applicant does not belong to the class of persons

getting disability pension and no class within a class has been created. Learned counsel for the applicant did not press the point relating to the validity of cut off date in the notification dated 19-1-2010. In any case cut off date has little relevance in the present case.

12- Learned counsel for the applicant submits that the effect of the proviso to Regulation-50 of Pension Regulation has now been watered down by virtue of Circular dated 29-9-2009 issued by the Ministry of Defence. The applicant has not filed copy of the Circular dated 29-9-2009 but has submitted that the contents thereof have been given in the decision of the Principal Bench of the Tribunal in T.A.No.712 of 2009 Ex. Major Avi Chander Sud Vs. Union of India and others decided on 12-3-2010. Our attention has been drawn to para- 6 of that decision, which is quoted below:

“ 6- We may straight away say that rigour of Regulation-50 has already been watered down by the communication issued by the Ministry of Defence dated 29-9-2009. The relevant paragraph of the said order reads as under:

“In view of the recommendation of Sixth Central Pay Commission, Armed Forces Personnel who are retained

in service despite disability, which is accepted as attributable to or aggravated by Military Service and have foregone lump sum compensation in lieu of that disability, may be given disability element/ war injury element at the time of their retirement/ discharge whether voluntary or otherwise in addition to Retiring/ Service Pension or Retiring/ Service Gratuity.

In view of the fact that rigour of Regulation 50 has been watered down and similar view has been taken by us in the matter of Brig. K.K.Khajuria (Retd) Vs. Union of India and others- T.A.No.176 of 2009. Therefore, this objection now in the changed scenario cannot be sustained. Consequently, we set aside the order passed by the authorities and allow the petition and direct that petitioner shall be entitled to the disability pension along-with retiral benefits which are admissible to the petitioner in the light of order dated 29-9-2009 with interest @ 12%. Petition is accordingly allowed. No order as to costs."

It would be clear from aforesaid para 6 that the Tribunal has relied upon its previous decision in Brig. K.K.Khajuria (T.A.No.176 of 2009). We have already considered Khajuria's case and found it to be distinguishable. It also appears from the facts set out in the order of Ex. Major Avi Chander Sud case that the petitioner therein had put in 13 years of service and also after sustaining disability he was retained in service until he was discharged on 26-2-2008. Relevant portion of the communication/ circular dated 29-9-2009 which has been quoted by the Principal Bench indicates that it was issued on the basis

No.5591 of 2006, decided on 31-3-2011). In that case the appellant appears to have been invalidated out of service, as is clear from the statement of facts in para- 3. This decision is clearly distinguishable on two grounds; firstly, it relates to the case of a short service Commissioned Officer whose maximum service was 10 years at the relevant point of time, and, secondly it appears from the order that the petitioner had been invalidated out of service. In para 3 of the judgment of Supreme Court there is a recital that during the course of his service the appellant suffered serious injuries of permanent nature and was invalidated out of service. In para 18 of the judgment the learned Judges have noted the contention that the appellant was not entitled to the benefit of disability pension as he has retired on completion of short service commission of ten years and has not been invalidated out of service. The learned Judges then observed "In this connection it may be mentioned that the appellant was invalidated out and released in a low medical category

of recommendation the of Sixth Central Pay Commission and was applicable to cases of Armed Forces Personnel who were retained in service despite disability. The recommendation of the Sixth Central Pay Commission came into effect from 01-1-2006. Therefore on the date when recommendation of the Sixth Central Pay Commission became effective the petitioner in that case was continuing in service. However, in this case the petitioner was discharged on his request in 2001 when recommendation of the Sixth Central Pay Commission had not come into existence. The question of applying the recommendation of the Sixth Pay Commission in view of Ministry of Defence letter dated 29-9-2009 therefore does not arise in this case. Moreover, it appears from the decision of Principal Bench that the issue of the applicability of the proviso of Regulation 50 and its interpretation which is the basis of our decision, was not considered.

13- The last decision relied upon by learned counsel for the applicant is the decision of Supreme Court in

K.J.S.Buttar Vs. Union of India and others (Civil Appeal

14- Learned counsel for the applicant further submits that Supreme Court in KJS Buttar case has held that entire service of the appellant would be taken into consideration for the purposes of disability pension. That question does not arise in the present case. In our view the applicant is not entitled to any disability pension at all. The question of consideration of entire service determining pension therefore does not arise here.

15- For the reasons we have given the T.A. is dismissed.

(Lt Gen. P. R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

IA/-

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