

A.F.R.
Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transferred Application No. 72 of 2013

Wednesday this the 4th day of October, 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Lt. Gen. Gyan Bhushan, Member (A)

Smt. Suman Devi
Village : Urochak
P.O. : Ralpur
District : Raebareli (U.P.)

.....Petitioner

By Legal Practitioner: Shri P.K. Shukla, Learned Counsel
for the petitioner.

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi.
2. Chief Controller of Defence Accounts (Pension) Draupadi Ghat, Allahabad.
3. The Officer Incharge (Records), Armoured Corps Records, Ahmadnagar – 414002 (Maharashtra)

..... Respondents

By Legal Practitioner: Dr Shailendra Sharma Atal, Learned Standing Counsel for the Central Government assisted by Maj Rajshri Nigam, Departmental Representative.

ORDER

“Hon’ble Lt Gen Gyan Bhushan, Member (A)”

1. Initially, the petitioner had filed Civil Writ Petition No 989 of 2001 before Hon’ble The High Court of Judicature at Allahabad, Lucknow Bench which after constitution of the Armed Forces Tribunal has been transferred to this Bench of the Tribunal and registered as T.A. No. 72 of 2013. The petitioner has claimed the following reliefs:-

“(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned rejection letters dated 31.08.1999 and 10.08.2000, contained in Annexures 1 and 2 to the petition.

(b) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay the petitioner the disability/family pension, including the arrears, on the date it become due to her.

(c) Issue, any other suitable writ, order or direction that may be deemed just and proper in the circumstances of the case.

(d) Allow the writ petition with cost in favour of the petitioner.”

2. Factual matrix of the case is that the husband of the petitioner was enrolled in the Army on 22.12.1989 and invalided out of service on 03.11.1998 under Rule 13 (3) Item III (iii) of Army Rules, 1954 due to disease HIV INFECTION WITH DISSEMINATED TUBERCULOSIS. He had rendered 08 years, 10 months and 11 days of Army Service. The Medical Board held before discharge had considered his disability as neither attributable to nor aggravated by military service and assessed the disability as 100% for life. The disability pension claim of the husband of the petitioner was rejected by PCDA (P) Allahabad vide their order dated 05 Jul/Aug 1999. Husband of the petitioner died on 21.09.1999. After death of her husband petitioner submitted an appeal dated 22.10.1999 against rejection of disability pension claim of her

husband and also for grant of family pension which was also rejected by First Appellate Committee vide order dated 10.08.2000. Aggrieved, the petitioner had filed Civil Writ Petition No. 989 of 2001 which has been transferred to this Bench of the Tribunal and registered as T.A. No. 72 of 2013.

3. Heard Shri PK Shukla, learned counsel for the petitioner, Dr Shailendra Sharma Atal, learned counsel for the respondents assisted by Maj Rajshri Nigam, Departmental Representative and perused the record.

4. Learned counsel for the petitioner submitted that at the time of enrolment, the petitioner was considered medically and physically fit to join the Army. On 17.06.1994 the husband of the petitioner was posted to 24 Rastriya Rifles Battalion in J&K and on 24.01.1997 he fell ill and was treated in Command Hospital, Udhampur and disease detected was **HIV with disseminated Tuberculosis**. He was posted back to his unit 11 Armed Regt in Sep 1999 and was again examined by Medical Authorities on 10.09.1998 and on 03.11.1998 he was medically boarded out from Army Service without any pension. Husband of the petitioner expired on 21.09.1999.

5. It has been alleged that husband of the petitioner had Consensual Sex with Sex Worker (CSWS) in 1992, but, since the husband of the petitioner is no more in this world, he cannot defend his case, and the accusation that the husband had sexual contact with CSWS amounts his character assassination and he is not alive to defend his case. With regard to the allegation that the husband of the petitioner had died due to HIV with disseminated tuberculosis, which was caused due to sexual relation with CSWS, he submitted that the disease of AIDS need not be caused only due to sexual relation with a person having the said disease, but it can also be due to many other reasons.

6. Learned counsel for the petitioner has relied on following judgment for grant of disability pension/family pension to the husband of the petitioner:-

(a) **Bombay High Court Judgment in the case of X – Petitioner Vs Transport Ministry, Government of Maharastra and Others in Writ Petition No. 6291 of 2012 decided on 18.10.2013.**

(b) **Karnatka High Court in the case of Sri Narayanappa –Vs Management of Strides Arco, Ltd - in Writ Appeal No. 6569 of 2012 decided on 27.03.2013.**

(c) **Delhi High Court in the case of Ex Const Badan Singh Vs Union of India, in Civil Writ Petition No. 388 of 2000 decided on 22.03.2002.**

7. Learned counsel for the petitioner submitted that keeping in view the fact that the petitioner is a widow of a soldier, disability pension as also family pension be granted to her.

8. *Per contra*, learned counsel for the respondents submitted that the husband of the petitioner was initially admitted to 166 Military Hospital on 27 May 1998 for the decease HIV INFECTION WITH DISSEMINATED TUBERCULOSIS and thereafter he was transferred to Base Hospital, Delhi Cantt for further treatment where it was declared that the individual be invalided out from service in Low Medical Category P5. Invaliding Medical Board of the husband of the petitioner was held on 22 Sep 1998 where his disability was considered as neither attributable to nor aggravated by military service and was assessed as 100% for life. Disability Pension claim of husband of the petitioner was processed to PCDA (P), Allahabad and it was rejected vide their order dated 05 Jul/Aug 1999 with an advice to prefer an appeal against the decision of rejection of disability pension.

9. Learned counsel for the respondents submitted that an appeal dated 22 Oct 1999 against rejection of disability pension claim of her husband and grant of family pension was submitted and this appeal of the petitioner was rejected stating that ***“your appeal dated 22.10.1999 has been carefully considered by the First Appellate Committee. Your husband was discharged from service with ID AIDS disease. On perusal of your husbands’ service/medical documents, the Appellate Medical Authority has found that as per the history he has sexual contacts with CSWS during 1992. In view of the fact that your husband disability has been regarded by the Medical Authority as neither attributable to nor aggravated by duties of Military Service, you are not entitled to disability pension under the rules. It is therefore, regretted that your request cannot be acceded to”***.

10. Learned counsel for the respondents further submitted that as per Para 173 of Pension Regulations for the Army, 1961 (Part –I), disability pension may be granted to an individual, who is invalided out of service on account of a disability, which is attributable to or aggravated by military service and is assessed at 20% or over. In the instant case, the deceased’s disability was regarded as neither attributable to nor aggravated by military service, as such, he is not entitled for grant of disability pension. Hence, disability pension claim of her husband’s was rightly rejected. He also submitted that family pension is applicable only to those widow whose husband is in receipt of any type of pension at the time of his death. In the instant case, petitioner’s husband was not in receipt of any type of pension at the time of his death, hence, she is not eligible for grant of family pension.

11. Learned counsel for the respondents submitted that the petitioner has failed to maintain character required for a person serving in the Indian Army. The Medical Authorities had found that as per records he had sexual contact with CSWS during 1992 and this was cause of medical ailment for which in no way the Government is liable to compensate the applicant in the form of disability pension. He

submitted that the Armed Forces Tribunal, Principal Bench, New Delhi in a similar case of **R X & Ors Vs Union of India & Others** in T.A. No. 121 of 2009 has rejected the petition.

12. We have heard learned counsel for the parties, perused the record and considered the argument advanced by them.

13. Ld. Counsels appearing for the parties have relied upon Regulation 173 of the Pension Regulations for the Armed Forces while arguing with regard to entitlement for disability pension. Regulation 173 of Pension Regulations for the Armed Forces is reproduced as under:-

“173. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 per cent or over.

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

Appendix II to Regulation 173 contains classification of diseases for which a person may be granted disability pension. It also contains diseases affected by climatic conditions as argued by Ld Counsel for the applicant. Annexure-III of Appendix-II of the Pension Regulations (supra) is reproduced as under:-

“ANNEXURE III TO APPENDIX II

Classification of Diseases

1. Pulmonary Tuberculosis.
2. Pulmonary oedema.
3. Pulmonary Tuberculosis with pleural effusion.
4. Tuberculosis-Non-Pulmonary.
5. Bronchitis.
6. Pleurisy, empyema, lung abscess, and Bronchiectasis.
7. Lobar Pneumonia.
8. Nephritis (acute and chronic).
9. Otitis Media.
10. Rheumatism (acute and chronic).
11. Arthritis.
12. Myalgia.
13. Lumbago.
14. Local effects of severe cold climate-i.e., frost bite, trench foot and chilblains.
15. Effects of hot climate-i.e., heat stroke and heat exhaustion.

DISEASES AFFECTED BY STRESS AND STRAIN.

1. *Psychosis and Psychoneurosis.*
2. *Hypertension (BP).*
3. *Pulmonary Tuberculosis with pleural effusion.*
4. *Tuberculosis (Non-pulmonary).*
5. *Mitral Stenosis.*
6. *Pericarditis and adherent pericardium.*
7. *Endocarditis.*
8. *Sub-acute bacterial endo-carditis, including ineffective endo-carditis.*
9. *Myocarditis (acute and chronic).*
10. *Valvular disease.*
11. *Myocardial infarction, and other forms of IHD.*
12. *Cerebral haemorrhage and cerebral infarction.*
13. *Peptic ulcer.*

DISEASES AFFECTED BY DIETARY COMPULSIONS.

1. *Infective hepatitis (Jaundice).*
2. *Diseases of stomach and duodenum.*
3. *Worm infestation and particularly guinea worm and round worm infections.*
4. *Gastritis.*
5. *Food poisoning, especially due to tinned food.*
6. *Gastric ulcer.*
7. *Duodenal ulcer.*
8. *Nutritional disorders.*

DISEASES AFFECTED BY TRAINING, MARCHING, PROLONGED STANDING ETC.

1. *Tetanus, erysipelas, septicaemia and pyaemia etc. Resulting from injuries.*
2. *Ankylosis and acquired deformities resulting from injuries.*
3. *Post traumatic epilepsy and other mental changes resulting from head injuries.*
4. *Internal derangement of knee joint.*
5. *Deformities of feet.*
6. *Osteoarthrititis of spine and lower limb joints.*
7. *Burns sustained through petrol, fire, kerosene oil etc. Leading to scars and various deformities and disabilities.*
8. *Hernia.*
9. *Varicose veins.*

ENVIRONMENTAL DISEASES

1. *Diseases contracted in the course of official duty of attending to a Venereal or septicaemic patient or while conducting a post-mortem examination.*
2. *Diseases contracted on account of handling infectious material, poisonous chemicals and radioactive substance.*

DISEASES AFFECTED BY ALTITUDE

1. *High altitude pulmonary oedema and pulmonary hypertension.*
2. *Acute mountain sickness.*
3. *Psychosis, Psychoneurosis, suicide.*
4. *Thrombosis.*

DISEASES AFFECTED BY SERVICE IN SUBMARINES AND IN DIVING.

1. *Acoustic trauma resulting from continuous noise and vibrations.*
2. *Effects of exposure to high levels or toxic gases.*
3. *Droplet infections.*
4. *Neurosis and psychosomatic disorders.*
5. *Effects of barotraumas.*
6. *Decompression sickness.*
7. *Dysbaric osteo-necrosis.*

DISEASES AFFECTED BY SERVICE IN FLYING DUTIES

1. *Otitic barotraumas.*
2. *Altitude decompression sickness.*
3. *Hypoxia.*
4. *Explosive decompression.*
5. *Long duration G.*

DISEASES NOT NORMALLY AFFECTED BY SERVICE

1. *Malignant disease (Cancer and Carcinoma).*
2. *Sarcoma (except in cases of sarcoma of bone with a history of injury due to service, on the site of development of the growth).*
3. *Epithelioma.*
4. *Rodent ulcer.*
5. *Lymphosarcoma.*
6. *Lymphadenoma except of viral aetiology.*
7. *Leukaemia (except radiation effect).*
8. *Pernicious anaemia (Addison's disease).*
9. *Osteitis deformans (Paget's disease).*
10. *Gout.*
11. *Acromegaly.*
12. *Cirrhosis of the liver-if alcoholic,*

EYES

13. *Errors of refraction.*
14. *hypermetropia.*
15. *Myopia.*
16. *Astigmatism.*
17. *Presbyopia.*
18. *Glaucoma-acute or chronic, unless there is a history of injury due to service or of disease of the eye due to service."*

14. Though we are of the view that the diseases referred in Appendix II may not be relevant in all cases to decide the medical disability attributable to or aggravated by military service, but unless established otherwise, Appendix II seems to cover the field. A plain reading of Appendix II reveals that it does not contain disease which is sexually transmitted on account of sexual relationship with Consensual Sex with Sex Worker. The petitioner has also not pleaded on record that he might have suffered from such sexually transmitted disease during course of military service and it might have been aggravated by military service. Accordingly, we are of the view that the disease from which the

husband of the petitioner was suffering does not fall within the category because of which he may be given disability pension.

15. Judgment of Hon'ble of The Supreme Court in the case of ***Dharamvir Singh*** reported in (2013) 7 SCC 316 followed by other judgments Hon'ble The Supreme Court has held that in case a person is not suffering from medical disability at the entry level and enrolled in SHAPE-I medical category he/she shall be entitled for disability pension. In Para 27 of the judgment of ***Dharamvir Singh*** (supra) Hon'ble The Supreme Court has given instances of certain diseases which may ordinarily escape attention at the enrolment/entry level. For conveyance sake para 27 is reproduced as under:-

“27. Para 7 talks of evidentiary value attached to the record of a member's condition at the commencement of service; e.g. pre-enrolment history of an injury, or disease like epilepsy, mental disorder etc. Further, guidelines have been laid down at paragraphs 8 and 9, as quoted below:

7. Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record on entry in service was due to a non-disclosure of the essential facts by the member, e.g., pre-enrolment history of an injury or disease like epilepsy, mental disorder etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorization of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may occasionally be direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination.

The following are some of the diseases which ordinarily escape detection on enrolment:

(a) *Certain congenital abnormalities which are latent and only discoverable on full investigations, e.g. congenital defect of spine, spina bifida, sacralization,*

(b) *Certain familial and hereditary diseases, e.g., haemophilia, congenital syphilis, haemoglobinopathy.*

(c) *Certain diseases of the heart and blood vessels, e.g., coronary atherosclerosis, rheumatic fever.*

(d) *Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given at the time by the member, e.g., gastric and duodenal ulcers, epilepsy, mental disorders, hiv infections.*

(e) *Relapsing forms of mental disorders which have intervals of normality.*

(f) *Diseases which have periodic attacks e.g., bronchial asthma, epilepsy, csom etc.*

8. *The question whether the invalidation or death of a member has resulted from service conditions, has to be judged in the light of the record of the member's condition on enrolment as noted in service documents and of all other available evidence both direct and indirect.*

In addition to any documentary evidence relative to the member's condition to entering the service and during service, the member must carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his pre-service history, etc. so that all evidence in support or against the claim is elucidated. Presidents of Medical Boards should make this their personal responsibility and ensure that opinions on attributability, aggravation or otherwise are supported by cogent reasons; the approving authority should also be satisfied that this question has been dealt with in such a way as to leave no reasonable doubt.

9. *On the question whether any persisting deterioration has occurred, it is to be remembered that invalidation from service does not necessarily imply that the member's health has deteriorated during service. The disability may have been discovered soon after joining and the member discharged in his own interest in order to prevent deterioration. In such cases, there may even have been a temporary worsening during service, but if the treatment given before discharge was on grounds of expediency to*

prevent a recurrence, no lasting damage was inflicted by service and there would be no ground for admitting entitlement. Again a member may have been invalided from service because he is found so weak mentally that it is impossible to make him an efficient soldier. This would not mean that his condition has worsened during service, but only that it is worse than was realized on enrolment in the army. To sum up, in each case the question whether any persisting deterioration on the available evidence which will vary according to the type of the disability, the consensus of medical opinion relating to the particular condition and the clinical history.”

16. Para 27 of the judgment clearly indicates that the sexually transmitted disease has not been taken into account by the Hon’ble The Apex Court rather it has been held in Para 27 (8) that whether the invalidation or disability under military law is to be judged in the light of record of the member’s condition and along with other evidence both direct or indirect, the member must be careful and closely questioned on the circumstances which led to the advent of his disease. The attributability, aggravation of otherwise must be supported by cogent reasons and the approving authority should also be satisfied that this question has been dealt with in such a way as to leave no reasonable doubt.

17. Keeping in view the aforesaid observations of Hon’ble The Apex Court taken up in the context of the present case, we do not find any pleading brought on record by the husband of the petitioner that how and under what circumstances he has suffered from sexually transmitted disease. Learned counsel for the petitioner has not been able to invite attention of the Tribunal towards any material on record which may justify his argument that the husband of the petitioner suffered because of military service and the disease was aggravated because of military service. We have gone through the judgment cited by learned counsel for the petitioner and we find that the factual matrix and circumstances in these cases are totally different from the case in hand and in no way these cases can be compared. On the other hand judgment of Principle Bench Delhi relied upon by the respondents

seems more relevant and applicable in the instant case. As per submission family pension is applicable only to those widow whose husband is in receipt of any type of pension at the time of his death. In the instant case, petitioner's husband was not in receipt of any type of pension at the time of his death, hence, she is not eligible for grant of family pension. As per pension regulations and other policies and rules governing grant of family pension, petitioner is not considered eligible for grant of family pension.

18. Learned Counsel for the petitioner has not been able to make out a case for grant of disability pension, whereas Learned Counsel for the respondents have produced records which establishes that the disability is neither attributable to nor aggravated by military service. We are of the considered view that the petitioner is not entitled to disability pension and accordingly she is also not entitled to grant of family pension as per policy, rules and regulations. However we are of the view that ends of justice will be met, if the petitioner is compensated by paying a sum of Rs 2 lakh as ex-gratia payment in addition to what has already been given to her.

19. Accordingly, T.A. No 72 of 2013 is hereby disposed off with the direction that petitioner shall be paid compensation of Rs 2 lakh as ex gratia payment in addition to what has already been given to the petitioner within four months from the date of receipt of a certified copy of this order. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% from due date till the date of actual payment.

20. Petitioner is not entitled to any other relief.

(Lt Gen Gyan Bhushan)

Member (A)

Dated : October, 2017

RS/-

(Justice S.V.S. Rathore)

Member (J)