

RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 161 of 2017

Tuesday, this the 09th day of April, 2019

“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

Army No. 13689652-H Ex. GDSM Biresh Kumar, Son of Netra Pal Singh, Resident of Village and Post Pendhat, P.S. – AKA, Tehsil – Jasrana, District Firozabad, State – Uttar Pradesh.

..... **Applicant**

Ld. Counsel for the Applicant : **Shri Pankaj Kumar Shukla**, Advocate.

Versus

1. Union of India, through Secretary, Ministry of Defence (Army), South Block, New Delhi-110010.
2. Chief of the Army Staff, IHQ MOD (Army), South Block, New Delhi.
3. Director General, Personal Services, Adjutant General’s Branch, Integrated HQ of Ministry of Defence (Army), South Block, New Delhi-110011.
4. OIC Records, Brigade of the Guards, PIN-900746, C/o 56 APO.
5. PCDA (Pension), Draupadi Ghat, Allahabad.

.....**Respondents**

Ld. Counsel for the Respondents. : **Shri Virendra Singh**,
Central Govt. Counsel

ORDER

“Per Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- “A. To issue/pass an order or directions to the respondents to set-aside/quash the arbitrary order of rejection of disability pension to the applicant i.e. letter dated 12.12.2003 (copy not attached), order of rejection of first appeal vide IHQ of MoD (Army) letter dated 25.09.2006, the order of rejection of second appeal vide Government of India, Ministry of Defence letter dated 03.12.2009 and another Rejection of Appeal vide letter no. 13689652/BP/D-Pen(A) Dated 27.06.2011.*
- B. To Issue/pass an order or direction to the respondents to grant disability pension to the applicant from the date of his discharge i.e. 02.02.2003 for two years along with relevant interest on the arrears of dues so accrued.*
- C. To Issue/pass an order or direction to the respondents to reassess the applicant medical condition for further entitlement of disability pension.*
- D. To issue/pass any other order or direction as this Hon’ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant against the respondents.”*

2. Briefly stated facts of the case are that the applicant was enrolled in Indian Army on 28.12.1987 and was invalided out of

service on 02.02.2003 in Low Medical Category under Rule 13(3) III (iii) of the Army Rules, 1954. At the time of invalidment from service, the Invaliding Medical Board (IMB) held at Command Hospital (CTC), Pune on 14.01.2003 assessed his disability “**AIDS (HIV INFECTION + PULMONARY T.B.) B-20**” @ 100% for two years but opined the disability to be neither attributable to nor aggravated (NANA) by military service. The applicant’s First and Second Appeals have been rejected. However, since the applicant was invalided out after completing fifteen years of service he is in receipt of service pension. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Army and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Army. He further pleaded that the applicant was selected to go to United Nations Mission III, Angola as a part of Indian Army Peace Keeping Force. While working with the Peace Keeping Force in Angola the applicant became seriously ill and was shifted to a ADS (Army Hospital) situated at a distance of about 200 Kms away from his Unit (Angola) on 04.06.1997. Ld. Counsel for the applicant claimed that the applicant neither knew the English language nor local African language used in the Hospital and in an unusual incident i.e. four African Women forced themselves on the

applicant and had sex with him in the Hospital. However, due to his language problem and cultural differences the applicant could not take any meaningful action in the Hospital to report this incident. He was discharged from Hospital on 09.06.1997 and returned to India on 10.06.1997. After return to India he told about the incident in the Hospital, to his senior officers but his senior officers neither asked for any inquiry on this matter nor took any other action. Ld. Counsel for the applicant during the hearing stated that African Continent has got 2/3rd of AIDS patient in the World and it is well known that AIDS can be acquired not only by sex but even by other activities like using infected needles in Hospital or infected blade during hair cut etc. He pleaded that considering that the applicant was in a Foreign Land which is known to have 2/3rd of AIDS patients in the World, therefore, the presumption that he acquired AIDS only due to sex with four African women may not be totally correct and the possibility of his acquiring AIDS infection from other sources is also a strong possibility. He pleaded for benefit of doubt to be given to the applicant as the applicant was in Foreign Land which has abnormally high ratio of AIDS patients and urged that disability pension should be granted to the applicant. He further stated that treatment for AIDS through E.C.H.S. Scheme is inadequate because most of the times E.C.H.S. Hospital doesn't have the medicines which have been prescribed for the applicant. In affect the applicant is spending a large sum of money on a monthly basis to buy the medicines which are required to prolong

his life span. He further stated that grant of disability pension will help the applicant in ensuring timely purchase of medicines from open market because most of the times E.C.H.S. Scheme doesn't have the medicines prescribed for him. He concluded by pleading for grant of disability pension to the applicant.

4. Per Contra the Ld. Counsel for the respondents pleaded that they have no information about any report of forced sex with the applicant by African women and stated that this is a simple case of IMB opining the disease of the applicant "AIDS" as NANA. Since the disease of the applicant has been opined as NANA, therefore, he is not entitled to disability pension, hence his claim has rightly been rejected. He pleaded for Original Application to be dismissed.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through records and the Invaliding Medical Board proceedings. The only question which needs to be decided by us is as to whether the disease of the applicant is attributable to or aggravated by military service?

6. At a first glance this Original Application appears to be simple case of NANA and not connected with service as opined by the IMB, however, on a second look at this case we find that there are certain additional and compelling factors which need to be considered before arriving at a just decision. These additional and compelling factors are :-

- (a) That the applicant was posted to a Foreign Land in Africa i.e. Angola on duty as a part of Indian Army Peace Keeping Force. As per United Nations statistics and open information available on internet Africa harbours 2/3rd of the total AIDS population of the World which is established to be around 25 Million infected people. It is also an established fact that 71% of AIDS death all over the world have happened in Africa. Thus it is clear that African continent is a high risk zone for possible AIDS infection and Angola where the applicant was sent for duty is also a part of this high risk Zone for AIDS.
- (b) While there has been no Court of Inquiry or response from Army on the complaint of the applicant about forced sex on applicant in Military Hospital near Angola, however, even if we take an adverse inference on this issue and draw a conclusion that the applicant had consensual sex, even then it can't be said with certainty that the primary reason for AIDS infection was due to the so called sex with four African women in the Military Hospital. We can never be sure if the source of infection was an infected needle in the Hospital or some other source.

- (c) Additionally the applicant has admitted that he was forced to have sex by four women in the Military Hospital. Admittedly the Army personnel are regularly briefed on the dangers of AIDS and other sex related diseases. This briefing is more intense for personnel going to Africa, hence, to presume that despite all the briefing the applicant voluntarily indulged in sex with four African women looks unrealistic. The ability of the applicant who didn't know English and local African language to land up in the Company of four African women and have sex with them in a Military Hospital certainly points towards an abnormal situation and therefore prima facie the version of applicant on this matter needs to be given serious consideration and cannot be totally discarded.
- (d) While it is clear that technically a man can't be raped by a women, however, considering the predominant tribal culture of Africa and the associated liberalized culture of sexual behaviour in that region the strong possibility of four women inducing a man into sex by repeated physical attempts is a distinct possibility and cannot be ruled out.
- (e) Due to language and cultural barriers the inability of applicant to report the matter in Military Hospital of a

Foreign Land appears to be realistic possibility. Additionally, since the applicant was discharged from Hospital on 09.06.1997 and routed back to India on 10.06.1997, hence, practically it was possible for the applicant to report this matter to his Officers in India only, which he claims to have done.

- (f) Additionally, we find it significant that despite this aspect of forced sex with applicant and it's reporting to Unit officers in India being a part of Original Application, the Counter by respondents is totally silent on this issue, hence, benefit of doubt, naturally goes in favour of the applicant and non response in Counter amounts to admitting the applicant's version by respondents.

7. Therefore, considering all issue and specially the fact that the applicant was performing the duties in that part of the World which houses 2/3rd population of the AIDS infected people of the World, we would like to extend the benefit of doubt to the applicant in terms of law settled by the Hon'ble Supreme Court in the cases of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316 and ***Sukhvinder Singh Versus Union of India***, reported in 2014 STPL (Web) 468 SC.

8. Since the disability of the applicant was assed as 100% for two years, hence, we are of the opinion that the applicant's disability is to be considered as attributable to military service and

he is eligible for disability pension from the date of his invalidation i.e. 02.02.2003.

9. In view of the above, the **Original Application No.161 of 2017** deserves to be allowed, hence, **allowed**. The impugned orders dated 12.12.2003, 25.09.2006 03.12.2009 and 27.06.2011 are set aside. The disability of the applicant "**AIDS (HIV INFECTION + PULMONARY T.B.) B-20**" @100% for two years is to be considered as attributable to military service with effect from the date of his discharge i.e. 02.02.2003. However, in view of law of limitation, the applicant is not entitled to any arrears on his disability element for the period of two years for which IMB is valid. The respondents are directed to conduct a Re-Survey Medical Board for the applicant and his entitlement to disability element will depend upon the outcome of the Re-Survey Medical Board. Respondents are directed to give effect to the order within four months from the date of receipt of a certified copy of this order failing which the respondents shall have to pay interest @ 9% per annum till the date of actual payment.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

Dated: April, 2019

AKD/-

(Justice S.V.S. Rathore)
Member (J)