RESERVED
COURT No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 84 of 2010

Thursday, this the 23rd day of November, 2017

"Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal BBP, Sinha, Member (A)"

Sambhu Nath Mishra 1460961 Ex.SP S/o Shri Yadu Nath Mishra C/o N.K. Pathak, H.No. 1/693, Vikas Nagar, Kursi Road, Lucknow.
…….. Applicant

Ld. Counsel for the Applicant : **Shri S.K. Singh, Advocate** (Counsel for the Applicant)

Versus

1. Union of India through Secretary, Ministry of Defence, R.K. Puram, New Delhi- 110011.

2. Union of India, Ministry of Defence of Room No. 227B, Wing Sena Bhawan, New Delhi-110011.

3. Union of India through Chief of Army Staff Head Quarter DHQ PO New Delhi-110011.

4. Union of India through Senior Record Officer OIC records of Bengal Engineer Group, Rurki-247667.

5. P.C.D.A Allahabad Druapadi Ghat, Allahabad (U.P.).

..Respondents

Ld. Counsel for the: Respondents. **Shri Amit Jaiswal, Advocate,** Central Govt Standing Counsel.

Assisted by : **Maj Salen Xaxa**, OIC Legal Cell.

ORDER

"Per Hon'ble Air Marshal BBP Sinha, Member (A)"

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act 2007 for the relief of grant of disability pension from the date the Applicant was invalidated out from Army service.

2. Shorn of unnecessary details, the facts of the case are that the Applicant was enrolled in the Indian Army on 20.12.1977 and was invalidated out from Army service on 13.03.1997 on account of disability which he suffered from "AFFECTIVE PSYCHOSIS (MENIA) 296". The disability of the Applicant was assessed as 50% for two years. The aforesaid disability was opined to be neither attributable to nor aggravated by military service but was regarded as constitutional. The Applicant applied for disability pension which was rejected by the PCDA (P) Allahabad vide communication dated 17.11.1987 on the ground that it was opined to be neither attributable to nor aggravated by military service. No appeal was said to be preferred against the decision of the PCDA (P) Allahabad. Thereafter legal notice dated 28.05.2003 was served followed by a petition dated 18.11.2009 which was also said to be replied. It is in the above backdrop that the present O.A has come to be filed.

3. We have heard learned counsel for the Applicant as also learned counsel for the respondents. We have also traversed upon the relevant papers on record.

4. The applicant is said to have served the Army for a little less than 10 years. One of the grounds urged by the learned counsel for the respondents is that since the Applicant has served less than 10 years, he was not entitled to disability pension in terms of para 198 of Pension Regulations for the Army 1961 (Part-1). The learned counsel for the respondents also supported the decision of the PCDA (P) for denial of disability pension that the disability of the Applicant was neither attributable to nor aggravated by military service.

5. In the instant case, the entire exchange of correspondence has been done by the wife of the Applicant as the Applicant on account of being not in a fit state of mind, was unable to pursue his own case.

6. Since the applicant was enrolled in a medically fit condition and discharged after more than 19 years of service in low medical category and respondents have not produced any documents on record to prove that the disability/disease existed at the time of enrolment, The disability has to be considered as attributable to and aggravated by military service in terms of judgment of ***Dharamvir Singh*** vs. ***Union of India and others***, reported in (2013)7 SCC 316, ***Sukhvinder Singh*** vs. ***Union of India***, reported in (2014)

14 SCC 364, ***Union of India and others*** vs**. *Angad Singh Titaria,*** reported in (2015) 12 SCC 257 and ***Union of India and others*** vs. ***Rajbir Singh,*** reported in (2015) 12 SCC 264 and the applicant is considered entitled for grant of disability pension.

7. In the case of **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316,** Hon'ble The Apex Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words.

> *"29.1. Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).*
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> *29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service [Rule 5 read with Rule 14(b)].*
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> *29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable*

doubt and is entitled for pensionary benefit more liberally (Rule 9).

29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service [Rule 14(c)]. [pic]

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [Rule 14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons [Rule 14(b)]; and 29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 - "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

8. The above judgment has been constantly followed and further explored by the Supreme Court in **Union of India and others v. Rajbir Singh (CA No. 2904 of 2011 decided on 13.2.2015); Union of India and others v. Manjit Singh (CA No. 4357-58 of 2015 (arising out of SLP (C) No. 13732-33 of 2015) decided on 12.5.2015; Union of India v. Angad Singh (CA No. 2208 of 2011 decided on 24.2.2015); KJS Butter v. Union of India**

(CA No. 5591 of 2006 decided on 31.3.2011; Ex. Hav Mani Ram Bharia v. Union of India and others, Civil Appeal No. 4409 of 2011 decided on 11.2.2016; Satwinder Singh v. Union of India OA 621 of 2014 Bharat Kumar Vs UOI & Ors.; OA 1235 of 2014 Hoshiar Singh Vs UOI & Ors. and 480 of 2015 Jasbir Singh Vs UOI & Ors. 18 and others Civil Appeal No. 1695 of 2016 (arising out of SLP (c) No. 22765 of 2011) and decided on 11.2.2016.

9. We also feel called to refer to chapter II of **the 'Guide to Medical Officers (Military Pensions) 2002'** relates to Entitlement and General Principles. Para 7 of the said Chapter talks of evidentiary value of medical records at the commencement of service. For proper appreciation of the controversy involved in this case, the said paragraph is reproduced below:

> *"7. Evidentiary value is attached to the record of a member's condition at the time of 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 an 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."

10. The second limb of the argument is with reference to the medical board holding the disease as a constitutional. We note that this has been recently gone into by the Hon"ble Supreme Court in **Civil Appeal 1695 of 2016, Sukhvinder Singh Vs UOI and Others decided on 11.02.2016**, at Pages 13 and 14, it noted as under:-

In the light of the above, there is no gain saying that a presumption arises in favour of the appellant being fit on the date of his recruitment and the disease subsequently detected being attributable to military service. That presumption is no doubt rebuttable. The question is whether the respondents have been able to rebut the same. Reliance by the learned counsel for the respondents upon the report of the medical board to the effect that the disease is constitutional does not in our view constitute sufficient rebuttal of the presumption.

Be that as it may the Medical Board simply opined that the disease is constitutional. There is no explanation or justification leave alone any cogent analysis of the cause or the basis on which the said opinion is recorded. Simply declaring that the disease is constitutional would not in the facts and circumstances of the case suffice."

11. We have traversed upon the relevant medical papers and from a punctilious reading of the medical papers and other allied papers, it would clearly transpire that no note of any disease had been recorded at the time of his entry in the Military service. The respondents failed to bring on record any document to suggest that the Applicant was under treatment for the disease at the time of his recruitment or that the disease was hereditary in nature. Thus in the light of the well settled law on this count by the Apex Court, the disability of the Applicant is held as attributable to military service.

12. At this stage, the Learned Counsel also called in question the payment of arrears from the date of discharge submitting that it should be restricted to three years prior to filing of the Original Application and in this connection, referred to the decision of Hon'ble the Apex Court in **Shiv Das v Union of India and Ors** reported in **(2008) 2 PLR 573**. We have considered this submission in the light of the various decisions of Hon'ble the Apex Court and looking into the services rendered by the Applicant and regard being had to the facts and circumstances of the case and also looking into the nature of the case, and also considering that the Applicant was invalidated out from service in the year 1997 while the Original Application was filed in the year 2010, we feel called to restrict the payment of arrears to three years

preceding the filing of the Original Application in the light of the decision of Hon'ble the Apex Court in **Shiv Das v Union of India and Ors** (supra). We are of the considered view that the Applicant is entitled to arrears to be paid with interest at the rate of 9% per annum from the date for three years prior to filing of the Original Application till the date of actual payment.

13. Since the petitioner was invalided out of service with 50% disability for two years he is entitled for disability element of disability pension with rounding off disability element as per the judgment rendered by Hon'ble the Supreme Court dated 31.03.2011 passed in CA No. 5591 of 2006 **"K.J.S.Buttar vs. Union of India and others",** read with judgment of this Tribunal dated 22.12.2011. Thus the benefit of rounding off may be allowed. The petition is allowed.

14. Accordingly the O.A. is **allowed**. The impugned orders passed by the respondents are set aside. The respondents are directed to grant disability pension to the applicant @ 50% for life, which would stand rounded off to 75% for life. The respondents are directed to pay arrears from the date for three years prior to filing of the Original Application till the date of actual payment. The respondents are directed to conduct the Resurvey Medical Board for the applicant within four months from the date of submission of certified copy of

this order. The respondents are also directed to give effect to this order within a period of six 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% on the amount accrued from due date till the date of actual payment.

15. No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated: November, 2017
MH/-