

RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
COURT NO 1

T.A. No. 955 of 2010

Monday, this the 23rd day of November, 2015

**"Hon'ble Mr. Justice Virendra Kumar DIXIT, Judicial Member
 Hon'ble Lt Gen Gyan Bhushan, Administrative Member"**

Jagroop Singh Yadav son of Shri Gokul Singh Yadav, resident of Village
 and Post Office Dharmagatpur Tehsil Saidpur, District
 Ghazipur..... **Petitioner**

Versus

1. Union of India, Ministry of Defence through its Secretary.
2. Appeal Committee of Defence, Ministry of Defence, Union of
 India, New Delhi.
3. Controller, C.D.A. (Pension), Allahabad.
4. Commandant Vaidyut Aur Yantrik Engineer, Abhilekh Karyalaya,
 EME Records, Sikandrabad.

.....**Respondents**

Ld. Counsel appeared for the Petitioner

**- Shri P.N.Chaturvedi,
 Advocate**

Ld. Counsel appeared for the Respondent

**- Mrs. Deepti Prasad Bajpai,
 Senior Central Govt
 Standing Counsel**

ORDER**“Per Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member”**

1. The matter in hand has come up before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, from Hon’ble the High Court at Allahabad and it has been renumbered as Transferred Application No. 955 of 2010.

2. The reliefs claimed in the T.A. filed by the Petitioner are excerpted below :-

“(i) issue a writ, order or direction in the nature of certiorari for quashing the order dated 19.01.1994 (Annexure no.9) passed by the Respondent No.1.

(ii) issue a suitable writ, order or direction in the nature of mandamus the respondents to provide the pension/disability pension to the petitioner in accordance with the army Rules.

(iii) issue any suitable writ, order or direction which this Hon’ble court may deem fit and proper under the circumstances of the present petition.

(iv) award cost of the petition to the petitioner.

(v) issue a writ, order or direction in the nature of mandamus directing the Respondent No.-1 to review their previous sanction and allow the pay and allowances for the period 13.08.1978 to 09.05.1979 to the petitioner.”

3. The facts of the case as are necessary for adjudication of the controversy involved in this case are to the effect that the Petitioner was enrolled in the service of the Army on 14.05.1971 and was -
invalided out on 09.05.1979 based on the recommendation of the Medical Board held on 14.04.1979, which diagnosed him to be suffering from ‘SCHIZOPHRENIA (295)’ and quantified his disability at 60% for indefinite period. The recommendation of the Medical Board was approved on 19.04.1979 by the ADMS, HQ UP Area. The claim for disability pension was rejected by the CDA (Pension) Allahabad vide

the order dated 16.04.1983. The first Appeal preferred against the order of rejection as aforesaid was also rejected vide communication dated 11.04.1985. The second appeal was preferred by the Petitioner on 18.9.1985. It is stated that order, if any, passed on the aforesaid second appeal was neither communicated nor received at the end of petitioner despite several reminders and representation which was lastly preferred on 3.1.1992. The Petitioner then served notice to the respondents under section 80 C.P.C on 03.11.1992. The Petitioner, thereafter, filed writ petition in the High Court of Judicature at Allahabad. The said writ petition was finally disposed of vide order dated 18.8.1993 studded with direction to dispose of the second appeal within three months. In pursuance of the said order, second appeal preferred by the Petitioner was rejected vide the order dated 19.01.1994. The said order was served to the petitioner on 31.01.1994. The Petitioner then preferred a Writ Petition i.e writ Petition No. 34580 of 1994. The said writ petition lingered in the High Court from 1994 till 2010 and ultimately, was transferred to the Tribunal on 24.06.2010. On receipt, the said writ Petition was renumbered as T.A. No. 955 of 2010.

4. We have heard learned counsel for the parties at prolix length and have also been taken through the materials on record.

5. The reliefs sought by the Petitioner are two folds;- firstly that he be granted pension/disability pension and secondly; to allow the pay and allowances for the period 13.08.1978 to 09.05.1979.

6. Learned Counsel for the Applicant submitted that the only ground canvassed for rejection of his claim for disability pension by the respondent-CDA (Pension) was that the disability of the Petitioner was

neither attributable to nor aggravated by Military service and that the disease was opined to be constitutional in nature by the Medical Board. Learned Counsel also submitted that at the time of entry in the military service, he was quite hale and hearty which would be evidenced by the thorough Medical Examination conducted on the person of the Petitioner. Learned Counsel further submitted that in the light of various decisions of Hon'ble The Apex Court, the orders of the respondents rejecting the claim of disability pension and treating his absence from duty *for the period from 13.08.1978 to 09.05.1979 while he was undergoing treatment in the Military Hospital* were unsustainable. To prop up his submission, the Learned Counsel drew our attention to the judgments of Hon'ble The Apex Court's in **Dharamvir Singh Vs. Union of India and Ors reported in (2013) 7 Supreme Court Cases 316**, and **Sukhvinder Singh Vs. Union of India and Ors** reported in **2014 STPL(Web) 468 SC** in which it has been categorically spelt out that when "*disability is not recorded at the time of recruitment, it must be presumed to have been caused subsequently and unless proved to the contrary to be consequence of military service*". Learned Counsel then submitted that the benefit of doubt should, therefore, go to the Petitioner and disability of the Petitioner be ordered to be treated as attributable to and aggravated by military service.

7. **Per contra**, the submissions of Learned Counsel for the Respondents substantially are that the Petitioner was invalided out of Military Service on account of his disability which, in the opinion of the Medical Board, was constitutional in nature and was neither attributable to nor aggravated by Military Service and that this condition being pre-requisite for grant of disability pension, the claim

for disability pension was rightly rejected. He also propped up the order of rejection of the claim for disability pension in appeal. The Learned Counsel for the Respondent also submitted that the Petitioner was not eligible for grant of disability pension also in terms of Para 9 of Govt. of India Ministry of Defence Letter No. 1(6)/98/D (Pension/Services) dated Feb 03,1998 as he had rendered less than 10 years service.

8. The contention advanced by Learned Counsel for the Respondents that the Petitioner had not completed the minimum period of colour service of 10 years so as to entitle him to disability pension, does not hold good qua the decisions of Hon'ble The Apex Court leaning in favour of the Army Personnel who had been invalided out of service without completing 10 years of colour service. In the light of ex-cathedra decisions on the point, the plea on this count has become stale and no longer holds water.

9. Now the only question that remains for consideration is whether the disease of the Petitioner was either attributable to or aggravated by the Military service.

10. In connection with the above plea, we would like to refer to the decisions of Hon'ble The Apex Court as cited by Learned Counsel for the Petitioner. The first decision is **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316**, in which 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).

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)].

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)."

11. 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.

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

X x x x x x x x x x

(f) Disease which have periodic attacks, e.g. Bronchial Asthma, Epilepsy, CSOM etc."

12. We have traversed upon the relevant medical papers and from a punctilious reading of the medical papers and other allied papers, it would 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 Petitioner was under treatment for the disease at the time of his recruitment or that the disease was hereditary in nature.

13. Having heard the learned Counsel for the parties, we converge to the view that the controversy involved in this case is squarely covered by the Judgment of Hon'ble the Supreme Court in the case of **Dharamvir Singh vs Union of India and others** (supra) wherein Hon'ble The Apex Court has decided the similar controversy and has come to the conclusion that if the Medical Board has not assigned any reason as to why the disease is neither attributable to nor aggravated by military service, the opinion of the Medical Board cannot be countenanced.

14. In the above conspectus, we are of the considered view that the impugned order dated 19.01.1994 passed by the Respondents rejecting his claim for disability pension was not only unjust, illegal but also was not in conformity with rules, regulations and law. The impugned order passed by the Respondents thus deserves to be set aside and the Applicant is held entitled to disability pension @ 60% for life from the date of discharge which would stand rounded off to 75% with interest at the rate of 9% per annum.

15. The next submission advanced by Learned Counsel for the Petitioner is that the Petitioner was denied pay and allowances for the period 13.8.1978 to 09.05.1979 without any valid basis or justification by treating his absence from duty as extraordinary leave sans any pay and allowance. In connection with it, Learned Counsel for the Petitioner mentioned the precise details. To begin with, the Petitioner

had been sanctioned 20 days leave and while on way to his home town, he fell down from running train on 14.6.1978 and he was consequently admitted to Railway Hospital Jabalpur from where he was transferred to Military Hospital Jabalpur on 21.6.1978 on the basis of ID recovered from his pocket. Thereafter he was transferred to Military Hospital Jhansi on 5.10.1978. The petitioner was sent on 28 days sick leave from Military Hospital Jhansi on 28.11.1978 till 25.12.1978. After expiry of the aforesaid sick leave, the Petitioner was admitted to Command Hospital (Central Command) Lucknow on 25.12.1978 for further treatment. On 14.04.1979 the Medical Board was held in which the Petitioner was recommended for being invalided out of service being in medical category 'EEE', and his disability being 60% for indefinite period. In the facts and circumstances of the case, it is submitted, the Respondents erred in treating the leave as extraordinary leave without pay and allowance.

16. From a perusal of the record, it would transpire that the Petitioner during the period from 13.08.1978 to 09.05.1979 was under treatment at Military Hospital as aforesaid. It is nobody's case that the Petitioner absented himself from duty unaccountably. In Para 2 (j) of the counter affidavit, the version is that the case of the Applicant was forwarded to PAO (ORS) EME, Secunderabad for finalization of accounts who refused admittance of pay and allowances for the aforesaid period and advised Respondent no. 4 to obtain Government sanction to regularize the period of absence of the Applicant from duty. On being advised, the Govt sanction was obtained to meet the audit requirement. He further submitted that the case of the Applicant was finalized by PAO (OR) EME, Secunderabad for the period from 14.6.1978 to 12.8.1978 but for the period from 13.8.1978

to 9.5.1979, the petitioner was sanctioned extra-ordinary leave without pay and allowances by the Government of India, Ministry of Defence vide order dated 20.5.1982. In Para 8 of the counter affidavit, it is conceded that the Applicant had long spell of treatment in various military hospital till 09.05.1979.

17. In view of the above, when it is established that the Petitioner had not absented himself unaccountably but was under treatment in various Military Hospitals for treatment, it leaves no manner of doubt that he would be entitled to the salary and allowance for the period he was treated on extra-ordinary leave.

ORDER

18. Thus in the result, the T.A. succeeds and is allowed. The impugned order passed by the Respondents dated 19.01.1994 (Annexure no. 9) in terms of relief No (i) is set aside. Further relief as contained in Relief column No (v) of the writ Petition is also allowed and it is directed that the petitioner shall be paid pay and allowances for the period from 13.08.1978 to 09.05.1979. The Petitioner is held entitled for disability pension @ 75% for life from the date of discharge. Respondents are directed to pay arrears of aforesaid disability pension alongwith interest @ 9% per annum from the date of discharge till the date of actual payment. The Respondents are directed to give effect to the order within three months from the date of receipt of a certified copy of this order.

19. No order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member

(Justice Virendra Kumar DIXIT)
Judicial Member

Date: Nov. ,2015

MH/-

