

**Court No. 1 (E-Court)****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 386 of 2020**

Thursday, this the 23<sup>rd</sup> day of September, 2021

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)  
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

(Army No. 6468541-Y), Ex. Nk. Prem Prakash Mishra, Son of Chhote Lal Mishra, Resident of Nai Basti, Sarojani Nagar, Lucknow, U.P.-226008 (**Now deceased**).

- 1/1. Smt. Rekha Mishra, W/o No. 6468541-Y Late Ex. Nk. Pem Prakash Mishra.
- 1/2. Smt. Shobha Agnihotri, aged about 39 years, D/o No. 6468541-Y Late Ex. Nk. Pem Prakash Mishra.
- 1/3. Awdhesh Mishra, aged about 36 years, S/o No. 6468541-Y Late Ex. Nk. Pem Prakash Mishra.
- 1/4. Puneet Mishra, aged about 35 years, S/o No. 6468541-Y Late Ex. Nk. Pem Prakash Mishra.
- 1/5. Pawan Mishra, aged about 31 years, S/o No. 6468541-Y Late Ex. Nk. Pem Prakash Mishra.

..... Applicants

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

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. Adjutant General’s Branch, IHQ of MoD (Army), Room No. 11, Plot No. 108 (West), Brassey Avenue, Church Road, New Delhi-110001.

4. Defence Security Corps Records, PIN-901227, C/o 56 APO.
5. PCDA (Pension), Draupadi Ghat, Allahabad.

.....**Respondents**

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

### **ORDER**

**“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

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 set-aside/quash the letter/order No. G-3/94/620/705 dated 26 July 2005 and letter/order No. Pen/DP(T-5)/6468541Y/Appeal dated 19.06.2020 passed by respondents.*
- B. *To issue/pass an order or directions to the respondents to Grant disability element of disability pension @30% from date of discharge i.e. 31.03.2005 till date of death along with 12% interest on arrear in light of Hon’ble Apex Court judgment.*
- C. *To issue/pass an order or directions to the respondents to grant subsequently benefit of rounding off/broad banding off disability pension @30% to @50% to the applicant from the date of discharge i.e. 31.03.2005 till date of death along with 12% interest on arrear in light of Hon’ble Apex Court judgment and Government letter dated 31.01.2001.*

*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.*

*E. To allow this original application with costs.*

2. During the pendency of Original Application the applicant (Army No. 6468541-Y) Ex. Nk. Prem Prakash Misrha has died on 06.05.2021, hence, his legal heirs have been impleaded as applicant Nos. 1/1 to 1/5.

3. Briefly stated, husband of applicant No. 1/1 (Ex. Nk. Prem Prakash Misrha) was enrolled in the Army Service Corps (AT) of Indian Army on 13.07.1978 and was discharged from service on 31.08.1987 after rendering 08 years, 08 months and 18 days of service. He was re-enrolled in the Defence Security Corps (DSC) on 28.11.1987 and opted to count his former service towards DSC and was discharged from DSC service on 31.03.2005 in Low Medical Category on his own request on compassionate ground after rendering 17 years, 04 months and 03 days of service (aggregate qualifying service of 26 years and 24 day) under Rule 13(3) Item II (iv) of the Army Rules, 1954. Accordingly, the husband of applicant No. 1/1 was granted service pension. At the time of discharge from service, the Release Medical Board (RMB) held at Military Hospital, Bareilly in February, 2005 assessed husband of applicant No. 1/1's disability '**IHD (INF + ANT WALL MI)**' @ 30% for life and opined the disability to be neither

attributable to nor aggravated (NANA) by service. The applicant No.1/1's husband claim for grant of disability pension was rejected vide letter dated 26.07.2005. The applicant No. 1/1's husband preferred First Appeal which too was rejected vide letter dated 19.06.2020. It is in this perspective that the applicant's husband has preferred the present Original Application.

4. Learned Counsel for the applicant pleaded that at the time of enrolment, the husband of applicant No. 1/1 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. The disease of the husband of applicant No. 1/1 was contracted during the service, hence it is attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the husband of applicant No. 1/1 be granted disability element of disability pension as well as arrears thereof, as husband of 1/1 is also entitled to disability element of disability pension and its rounding off to 50%.

5. On the other hand, Ld. Counsel for the respondents contended that disability of the husband of applicant No.1/1 @30% for life has been regarded as NANA by the RMB and was discharged from service on his own request on compassionate grounds, hence applicant is not entitled to disability pension. He pleaded for dismissal of the Original Application.

6. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of two folds:-

- (a) Whether the disability of the husband of applicant No.1/1 is attributable to or aggravated by Military Service?
- (b) Whether the husband of applicant No. 1/1 is entitled for the benefit of rounding off the disability element of disability pension?

7. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. In this case 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)."

8. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the husband of applicant No. 1/1 only by endorsing that the disability '**IHD (INF + ANT WALL MI)**' is neither attributable to nor aggravated (NANA) by

service on the ground being a constitutional disorder, therefore, husband of applicant No. 1/1 is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability element of disability pension to husband of applicant No. 1/1 is cryptic and not convincing and doesn't reflect the complete truth on the matter. The husband of applicant No. 1/1 was enrolled in Indian Army on 13.07.1978 and in DSC on 28.11.1987 and the disability has started after more than 24 years of Army service i.e. in July, 2002. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the husband of applicant No. 1/1 in view of ***Dharamvir Singh vs Union of India & Ors*** (supra), and the disability of the husband of applicant No. 1/1 should be considered as aggravated by military service.

9. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of ***Union of India and Ors vs Ram Avtar & ors*** (Civil appeal No 418 of 2012 decided on 10<sup>th</sup> December 2014). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalided out of service and denying the same to the personnel who have retired on attaining the age of superannuation

or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

*“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.*

*5. We have heard Learned Counsel for the parties to the lis.*

*6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.*

*7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.*

*8. This Court grants six weeks’ time from today to the appellant(s) to comply with the orders and directions passed by us.”*

10. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR 445, Hon’ble Apex Court has observed:-

*“In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone.”*

11. As such, in view of the decision of Hon’ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 30% for life to be rounded off to 50% for life may be extended to the husband of applicant No. 1/1 from three preceding years from the date of filing of the Original Application.

12. In view of the above, the **Original Application No. 386 of 2020** deserves to be allowed, hence **allowed**. The disability of the husband of applicant No. 1/1 is held as aggravated to by Military Service. The respondents are directed to grant disability element of disability pension to the husband of applicant No. 1/1 @30% for life which would stand rounded off to 50% w.e.f. three years preceding the date of filing of Original Application till his death i.e. upto 06.05.2021. The date of filing of Original Application is 31.07.2020. Respondents are further directed to grant family pension to the applicant No. 1/1 in respect of service element of disability pension from the next date of death of her husband i.e.

