A.F.R
Reserved
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transfer Application No. 26 of 2012

Wednesday, this 19th day of April, 2017

Hon'ble Mr. Justice D.P.Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Sqn Ldr Rajveer Singh, son of Wg Cdr (Retd.) Gurbax Singh, resident of D-28, Sector-21, Jal Vayu Vihar, Noida-201 301.

..... Petitioner

By Legal Practitioner Col (Retd.) Y.R.Sharma, learned counsel for the petitioner.

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi-110011
2. The Chief of Air Staff, Air Headquarters (Vayu Bhawan), New Delhi- 110011.

..... Respondents

By Legal Practitioner Shri Amit Sharma, learned counsel for the Respondents, assisted by Maj Soma John, OIC Legal Cell

ORDER

Per Justice Devi Prasad Singh, Member (J)

1. Being aggrieved with the impugned order dated 10.06.2011 passed by the Chief of the Air Staff, by means of which the representation of the petitioner dated 22.02.2011 for grant of disability pension was rejected, the petitioner preferred an OA

bearing No. 115 of 2012 before the Armed Forces Tribunal, Principal Bench, New Delhi, which was transferred to this Bench and renumbered as above. After hearing the matter, this Bench rejected the TA vide order dated 13.05.2014 on the ground of delay. However, on appeal, the Hon'ble Supreme Court, vide order dated 31.07.2015 passed in Civil Appeal No(s). 8435-8436 of 2014, set aside the impugned orders dated 04.01.2013, 15.04.2013 and 13.05.2014 and remanded the matter to this Tribunal for rehearing it on merits. The operative portion of the order (supra) of the Hon'ble Supreme Court is reproduced as under:

> *"Having heard learned counsel for the parties, we are of the considered opinion that it is a fit case where the tribunal should have condoned the delay and heard the matter on merits. Accordingly, the impugned orders dated 04.01.2013, 15.04.2013 and 13.05.2014 are set aside and the matter is remanded to the tribunal to hear the T.A. No. 26 of 2012 on merits.*
>
> *The appeals are, accordingly, disposed of. There shall be no order as to costs.*
>
> *Sd./- (Dipak Misra)*
> *Sd./- (Prafulla C. Pant)"*

2. We have heard Col (Retd.) Y.R.Sharma, learned counsel for the petitioner and Shri Amit Sharma, learned counsel for the respondents, assisted by Maj Soma John, OIC Legal Cell, and perused the record.

3. The facts brought on record reveal that petitioner Rajveer Singh was commissioned in Indian Air Force on 16.12.1995 and was inducted into the fighters stream. He flew MIG-21 (BIS) till

February, 1999, after which he was put in low medical category on account of "*Deviated Nasal Septum with Allergic Rhinitis*". After having undergone Septoplasty operation, the petitioner was declared fit for flying by the Medical Board held on 12.10.2000. However, during his first flight after operation, the petitioner developed severe ear pain. On post-flight medical examination, his ear was found to have left tympanic not responsive to '*Valsalva Maneuver*'. After a number of medical examinations, the petitioner was declared permanently unfit for flying, hence he was proposed to be transferred to Administrative Branch subject to his willingness, vide letter dated 29.03.2007 (Annexure A-3). The petitioner showed unwillingness for his transfer to Administrative Branch and voluntarily accepted to be released from service. He gave an application dated 05.10.2007 for premature retirement on medical ground, though he was already transferred to Administrative Branch where he could have served as non-flying branch officer of Indian Air Force. The petitioner's application dated 05.10.2007 was accepted by the competent authority, in consequence whereof premature retirement was granted to him on his own request with effect from 31.01.2008.

4. Categorization of the petitioner permanently below A-3 medical category made him unfit for flying duties under AFI 11/84. Under Para 103 of the Regulations for the Air Force, 1964, a person of Flying Branch, if he or she falls permanently below A-3 medical category, will be transferred to any of the Ground Duty Branches for

which he/she is medically fit, suitable and qualified. The relevant portion of Para 103 of the Regulations for the Air Force, 1964 is reproduced as under:

> *"In supersession of the provisions contained in para 103 of the Regulations for the Air (1964), the retention in the Flying Branches or transfer to Ground Duty Branches of Flying Branch Officers whose medical category falls permanently below A.3- i.e. unfit for flying duties, will be governed by the following rules:-*
>
> *(a) Substantive Squadron Leaders and below, whose medical category falls permanently below A.3- i.e. unfit for flying duties due to causes attributable / Non attributable to conditions of service and beyond their control:-*
>
> *(I) Officers whose medical category falls permanently below i.e., unfit for flying duties due to cause attributable to conditions of service and beyond their control, will be transferred to any of the Ground Duty Branches for which they are medically fit, suitable and qualified.*
>
> *(II) Officers whose medical category falls permanently below i.e., unfit for flying duties due to cause non-attributable to conditions of service and beyond their control, will be transferred to any of the Ground Duty Branches, if on ad-hoc consideration; Govt considers them suitable for further retention in service.*
>
> *(III) Officers to be transferred to a Ground Duty Branches will be required to give their willingness for such transfer within 45 days from the date they are informed by the unit about their proposed transfer, failing which they will either be retained in the flying branch or invalided out of service, as Govt may decide,*
>
> *(IV) Transfer to these Ground Duty Branches will be subject to availability of vacancies with the sanctioned establishment of a particular Ground Duty Branch.*

> *(b) Acting/Substantive Wing commanders and above, whose medical category falls permanently below A.3- i.e. unfit for flying duties due to causes Attributable / Non-Attributable to conditions of service and beyond their control- The officers will be retained in the Flying Branch provided their number does not exceed 10% of the staff appointment tenable by Flying Branch Officers in these ranks and Govt on ad-hoc consideration considers them suitable for further retention in service."*

5. It has been argued by learned counsel for the petitioner that since the petitioner was invalided out from service, he is entitled for disability pension. Further submission is that the petitioner could not have been released from service since he was entitled to work in non-flying branches i.e. Ground Duty Branches. The main thrust of the argument is that the order of petitioner's release as well as denial of disability pension to him suffers from the vice of arbitrariness.

6. In response to the arguments advanced by learned counsel for the petitioner, it has been argued by learned counsel for the respondents, assisted by the OIC Legal Cell, that the petitioner's case was considered under the Policy laid down vide Air HO/S 98801/1/PO5 dated 25.11.2004. He was recommended for change of stream i.e. to Transport/Helicopter stream due to his medical category and length of service and subsequently, on BoO held on 09.08,2005, he was re-streamed to Helicopters in view of the existing vacancies at that time. Since the petitioner had submitted first the application for premature retirement, it was allowed and

implemented w.e.f 31.01.2008. In para 29 of the counter affidavit, it has been stated that the petitioner was released in medical category A4G2(P). The disabilities noted in the medical opinion were as under:

> *"(a) DNS (Optd) Old,*
> *(b) Allergic Rhinitis with Eustanchian Tube Dysfunction.*
>
> *The RMB proceedings in respect of the petitioner have regarded the disability of the petitioner as 'Neither Attributable'- 'Nor Aggravated' (NANA) and the composite assessment for the disability has been shown as 30% for life. However, the disability qualifying for disability pension has been assessed as 'NIL' by the competent medical authority."*

7. Further, learned counsel for the petitioner Col (Retd.) Y.R.Sharma submitted that even if the petitioner had not been invalided out prematurely and retired from service voluntarily, he would have been entitled for disability pension in view of the recent development in law with rounding off of 50%. Entitlement is for disability pension as well as for service element. In support of his submissions, learned counsel for the petitioner has relied upon the following case-laws:

(i) *(2013) 7 SCC 316*, **Dharamvir Singh versus Union of India and others.**

(ii) *Civil Appeal No. D-37695 of 2010*, **Union of India and others versus Sqn Ldr Sunil Bhatia**, decided on 03.01.2011.

(iii) *OA No. 2414 of 2012*, **Bharat Mehra versus Union of India and others**, decided on 06.11.2012.

8. **Per contra**, while filing counter affidavit, the respondents have raised the preliminary objections as under:

(i) No statutory or fundamental or any other legal right of the petitioner has been violated by the respondents while processing the application dated 05.10.2007 as well as allowing premature retirement of the petitioner with effect from 31.01.2008; hence the petition lacks merit and is liable to be dismissed.

(ii) Since the petitioner had himself claimed for premature retirement, which was allowed and given effect to from 31.01.2008, he has no right to challenge the order of release nor can he claim disability pension in view of the principle of promissory estoppel.

9. The doctrine of "promissory estoppel" has assumed importance in recent years. Where parties enter into an agreement which is intended to create legal relations between them and in pursuance to such agreement one party makes a promise to the other which he knows will be acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by consideration in the strict sense. But where a promise is made which is not supported by any consideration, the promise cannot bring an action on the basis of that promise. (Vide

AIR 1972 SC 1311, **Turner Morrison and Co. Ltd. versus Hungerford Investment Trust Ltd.)**

10. There is one other reason which comes in the way of the petitioner to challenge the release order, and that is, once he moved an application for premature retirement, which has been accepted and acted upon, then he waived his right to continue bin service. For a waiver, the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. (vide *AIR 1989 SC 1834,* **Provash Chandra Dalui versus Biswanath Banerjee.)** In the present case, the petitioner had voluntarily moved an application for premature retirement, which has been accepted and acted upon, hence he has no right to claim continuance in service on any ground whatsoever.

STATUTORY/FUNDAMENTAL RIGHTS

11. Coming to the first limb of the arguments that the petitioner has got no statutory right to impugn the release order, seems to be correct. The petitioner himself applied for premature retirement, which was considered in pursuance to Air Force Orders and Regulations. Further, on account of drop-out of medical category, the petitioner was shifted to Administrative Branch in accordance to Para 103 of the Regulations for the Air Force. He himself had submitted the application for voluntary retirement (supra). In such a situation, no fundamental right or statutory right of the petitioner has

been violated by the respondents while entertaining the aforesaid application of the petitioner. No substantial illegality or violation of any rule, regulation or Air Force orders has been brought into the notice of the Tribunal. There is also no pleading to the effect that the decision to release the petitioner while entertaining his own application suffers from any illegality or arbitrariness. The burden lies on the petitioner to establish that the order of release was passed in contravention of any statutory provision, which the petitioner has failed to discharge. Moreover, the respondents seem to be correct that once the petitioner had undisputedly moved the application for voluntary retirement/discharge, which has been given effect to by the follow-up action releasing the petitioner from Air Force service, then at latter stage he has no right to raise grievance against his discharge from service. Right of the petitioner to withdraw the application for voluntary retirement was existing only upto the time it was not given effect to, vide *(1989) 9 SCC 559*, **J.N.Srivastava versus Union of India** and *(2002) 3 SCC 437*, **Shambhu Murari Sinha versus Project and Development India and another**. Once the petitioner has been released in pursuance to his own application dated 31.01.2008, he has no right to challenge his release order. Admittedly, the OA was filed in 2012 whereas the petitioner was prematurely retired from service long back i.e. on 31.01.2008. His right to assail the impugned order of release/voluntary retirement,

therefore, ceases in view of the settled proposition of law as laid down by the Hon'ble Supreme Court in catena of decisions.

DISABILITY PENSION

12. The petitioner in his petition has mentioned that he has been invalided out but it has not been disputed that after processing the application dated 05.10.2007 for voluntary retirement, he was released from service on 31.01.2008. However, merely because the petitioner retired voluntarily in pursuance to his own application, it does not disentitle him to avail the benefit of disability pension.

13. It shall be appropriate to consider the law with regard to payment of disability pension and its rounding off. The proposition of law with regard to disability pension has been settled by the Hon'ble Supreme Court and is no more a *res integra.* Hon'ble the Apex Court in the case of **Dharamvir Singh versus Union of India and others,** reported in *(2013) 7 SCC 316*, has observed the provisions of the Pension 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)."

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"31. In the present case it is undisputed that no note of any disease has been recorded at the time of the appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In the absence of any note

in the service record at the time of acceptance of joining of appellant, it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from clause (d) of Para 2 of the opinion of the Medical Board, which is as follows :-

> *"(d) In the case of a disability under (c) the Board should state what exactly in their opinion is the cause thereof.*
>
> ***YES***
>
> *Disability is not related to military service".*

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"33. In spite of the aforesaid provisions, the pension sanctioning authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rule 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from "Generalised Seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service."

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"35. In view of the finding as recorded above, we have no option but to set aside the impugned order passed by the Division Bench dated 31-7-2009 in Union of India v. Dharamvir Singh and uphold the decision of the learned Single Judge dated 20-5-2004. The impugned order is set aside and accordingly the appeal is allowed. The respondents are directed to pay the appellant the benefit in terms of the order passed by the learned Single Judge in accordance with law within three months if not yet paid, else they shall be liable to pay interest as per the order passed by the learned Single Judge. No costs."

14. In a latter judgment i.e. **Sukhvinder Singh Vs. Union of India,** reported in *(2014) 14 SCC 364*, their Lordships of the Apex Court held as under:-

" 8. Paragraph 183 of the Pension Regulations for the Army 1961, (Part-I) stipulates as under:-

"183. The disability pension consists of two elements viz. Service element and disability element which shall be assessed as under:

(1) Service element.....

(2) Disability element.....

In case where an individual is invalidated out of service before completion of his prescribed engagement/service limit on account of disability which is attributable to or aggravated by military service and is assessed below 20 percent, he will be granted an award equal to service element of disability pension determined in the manner given in Regulation 183 Pension Regulations for the Army Part-I(1961). "

"9. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless

proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined……".

15. In **Veer Pal Singh versus Ministry of Defence,** reported in *(2013) 8 SCC 83*, the same principle has been reiterated by the Hon'ble Supreme Court with condition for reassessment of medical condition of the incumbent (in case it is for fixed period) for further entitlement of disability pension, if any. It would be appropriate to quote the relevant portion of the observations made by the Hon'ble Supreme Court in the aforesaid judgment, as under:

"10. Although, the Courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial/quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release / discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable."

Their Lordships distinguished the cases reported in *(2005) 13 SCC 128*, **Controller of Defence Accounts (Pension versus S.**

Balachandran Nair and *(2009) 9 SCC 140* **Ministry of Defence versus A.V.Damodaran** and held that in neither of these two cases, the Court was called upon to consider a situation where the Medical Board had entirely relied upon an inchoate opinion expressed by the psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment. The Hon'ble Supreme Court directed to refer the case to the Review Medical Board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension.

16. In **Union of India and others versus Ram Avtar & others,** *Civil Appeal No. 418 of 2012 dated 10 December, 2014*, the Hon'ble Apex Court nodded in disapproval the policy of the Government of India in not granting the benefit of rounding off of disability pension to the personnel who have been invalided out from service on account of being in low medical category or who has retired on attaining the age of superannuation or completion of his tenure of engagement, if found to be suffering from some disability.

17. In view of Policy Letter No. 1(2)/97/D (Pen-C) dated 31.01.2001 and decision of the Hon'ble Apex Court in the case of **Ram Avtar** (supra), we are of the view that the petitioner is entitled to the benefit of rounding off.

18. In **Shiv Dass versus Union of India** reported in *2007 (3) SLR 445*, in Para 9 of the judgment, the Hon'ble Supreme Court held that the claim of pension is a recurring cause of action and the court may grant pension from three preceding years of the filing of the petition by reconstructing the reliefs. The Hon'ble Supreme Court also considered the matter with regard to delay and laches in preferring a petition for payment of disability pension and held that in appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time. It further held that even where fundamental right is involved, the matter is still within the discretion of the Court, which has to be exercised judicially and reasonably, vide **Durga Prasad versus Chief Controller of Imports and Exports and others,** *AIR 1967 SC 769.*

Their Lordships of the Supreme Court held that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation, the making of another representation on similar lines will not explain the delay. In that situation, the petition be dismissed for delay alone. But simultaneously, the Hon'ble Apex Court held that in 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 facts 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 within a reasonable period of about three years. To quote the relevant portions from the judgment in the case of **Shiv Dass** (supra):

> *"What was stated in this regard by Sir Barnes Peacock in Lindsay Petroleum Company v. Prosper Armstrong Hurd etc., (1874) 5 P.C. 221 at page 239 was approved by this Court in The Moon Mills Ltd. v. M.R. Meher, President, Industrial Court, Bombay and Ors. (AIR 1967 SC 1450) and Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and Ors. (AIR 1969 SC 329), Sir Barnes had stated:*
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>> *"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, if founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or*

injustice in taking the one course or the other, so far as relates to the remedy."

It was stated in State of M.P. v. Nandlal Jaiswal and Ors. (AIR 1987 SC 251), that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in K.V. Raja Lakshmiah v. State of Mysore (AIR 1967 SC 993). There is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In State of Orissa v. Sri Pyarimohan Samantaray, (AIR 1976 SC 2617) making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See State of Orissa v. Arun Kumar (AIR 1976 SC 1639 also).

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."

19. In **K.J.S. Buttar versus Union of India and others** reported in *(2011) 11 SCC 429*, the Hon'ble Supreme Court held that a person, who was discharged by retirement in low medical category with a disability and invalided out, was entitled to the benefit of 'broad banding'. Relevant portion from the said judgment in the case of **K.J.S. Buttar** (supra) is reproduced as under:-

" 8. In our opinion, the restriction of the benefit to only officers who were invalided out of service after 1.1.1996 is violative of Article 14 of the Constitution and is hence illegal. We are fortified by the view as taken by the decision of this Court in Union of India & Anr. vs. Deoki Nandan Aggarwal 1992 Suppl.(1) SCC 323, where it was held that the benefit of the Amending Act 38 of 1986 cannot be restricted only to those High Court Judges who retired after 1986.

9. In State of Punjab vs. Justice S.S. Dewan (1997) 4 SCC 569 it was held that if it is a liberalization of an existing scheme all pensioners are to be treated equally, but if it is introduction of a new retrial benefit, its benefit will not be available to those who stood retired prior to its introduction. In our opinion the letter of the Ministry of Defence dated 31.1.2001 is only liberalization of an existing scheme."

"11. In our opinion the appellant was entitled to the benefit of para 7.2 of the instructions dated 31.1.2001 according to which where the disability is assessed between 50% and 75% then the same should be treated as 75%, and it makes no difference whether he was invalided from service before or after 1.1.1996. Hence the appellant was entitled to the said benefits with arrears from 1.1.1996, and interest at 8% per annum on the same.

12. It may be mentioned that the Government of India Ministry of Defence had been granting War Injury Pension to pre-1996 retirees also in terms of para 10.1 of Ministry's letter No.1(5)/87/D(Pen-Ser) dated 30.10.1987 (p. 59 Para 8). The mode of calculation however was changed by Notification dated 31.1.2001 which was restricted to post 1996 retirees. The appellant, therefore, was entitled to the War Injury Pension even prior to 1.1.1996 and especially in view of the instructions dated 31.1.2001 issued by the Government of India. The said instruction was initially for persons retiring after 1.1.1996 but later on by virtue of the subsequent Notifications dated 16.5.2001 it was extended to pre 1996 retirees also on rationalisation of the scheme.

13. As per the Instructions, different categories have been provided by the Government for award of pensionary benefits on death/disability in attributable/aggravated cases. As per Para 10.1 of the Instructions dated 31.1.2001, where an Armed Forces personnel is invalided on account of disability sustained under circumstances mentioned in Category-E(f)(ii) of Para 4.1, he shall be entitled to War Injury Pension consisting of service element and war injury element. Para 4.1 provides for the different categories to which the pensionary benefits are to be awarded. Category-E(f)(ii) of Para 4.1 pertains to any death or disability which arises due to battle inoculation, training exercises or demonstration with live ammunition."

"15. As per Para 6 of these instructions/letter dated 16.5.2001, any person, who is in receipt of disability pension as on 1.1.1996 is entitled to the same benefit as given in letter dated 31.1.2001. Further as per Para 7 of this letter w.e.f. 1.1.1996 the rates of War Injury element shall be the rates indicated in letter dated 31.1.2001. Thus, in our opinion in view of the instruction dated 31.1.2001 read with (sic the Instructions) dated 16.5.2001, the appellant was entitled to the War Injury Pension. It is pertinent to state that reading of Paras 6, 7 and 8 of the Notifications/Circular dated 16.5.2001 makes it absolutely clear that the said benefits were available to pre 1996 retirees also but the rates were revised on 31.1.2001 and the revised rates were made applicable to post-1996 retirees only. But subsequently by means of the Notification dated 16.5.2001 the revised rates were extended to pre-1996 retirees also.

16. At any event, we have held that there will be violation of Article 14 of the Constitution if those who retired/were invalided before 1.1.1996 are denied the same benefits as given to those who retired after that date."

20. Keeping in view the catena of decisions of the Hon'ble Supreme Court dealing with the principle for payment of disability pension and its rounding off, there appears to be no room for doubt that a person, who retires voluntarily or invalided out from service of Armed Forces (in the present case, Air Force), shall be entitled for disability pension and the fraction of disability shall be rounded off to 50% in case it is less than 50%. Disability of 50% but less than 75% be rounded off to 75% and if it is more than 75%, then it may be rounded off to 100%.

21. **To sum up:**

(i) In view of **Dharamvir Singh versus Union of India and others,** reported in *(2013) 7 SCC 316*, **Sukhvinder Singh versus Union of India,** reported in *(2014)14 SCC 364* and **Veer Pal Singh versus Ministry of Defence,** reported in *(2013) 8 SCC 83*, the members of the Armed Forces shall be entitled to disability pension on account of disability which they incur after joining their respective branches of the Armed Forces. Ordinarily in case at the time of joining he/she is found to be medically fit and healthy to serve the Armed Forces, then it may be presumed that he/she has suffered disease/disability because of service rendered in the Armed Forces and aggravated by it.

(ii) In case the Armed Forces set up a defence that an incumbent was suffering from disability from before his joining the service, then burden shall be on the Armed Forces to establish such facts by trustworthy and cogent evidence and circumstances.

(iii) Restriction of benefit with regard to rounding off of disability pension to those armed forces personnel who are invalided out of service after 1.1.1996 is violative of Article 14 of the Constitution and discriminatory. Members of Armed Forces, who have retired voluntarily or have invalided out on account of disability, both shall be entitled to disability pension, subject to fulfillment of necessary conditions (supra).

(iv) All pensioners are equal. They may not be treated unequally.

(v) The fraction of disability shall be rounded off to 50% in case it is less than 50%. The disability of 50% but less than 75% shall be rounded off to 75% and if the disability is more than 75% but less than 100%, then it shall be rounded off to 100%.

(vi) It shall be incumbent upon the Armed Forces to hold regular Resurvey Medical Boards of those members, who have been provided the benefit of disability pension, after expiry of the period of disability provided by the Medical Board in case the disability is for a stipulated period.

22. In view of fore-going discussions, we hold that the petitioner is not entitled to be reverted back to service by setting aside the release order, but so far as disability pension is concerned, he seems to have a case in his favour and disability pension must be paid to him.

23. While parting with the present case, we express our displeasure and bring on record that a number of petitions are being filed in Armed Forces Tribunal only for the purposes of payment of disability pension and its rounding off keeping in view the recent development in law (supra). Payment of disability pension and its rounding off correlate to right of quality of life vis-à-vis right to dignity of life. (Vide *AIR 1985 SC 1133* **P. Nalla Thampi versus Union of India**, *AIR 1981 SC 746*, **Francis Coralie Mullin versus Administrator, Union of Territory of Delhi** and *AIR 1986 SC 180* **Olga Tellis versus Bombay Municipal Corporation.**) Once the

matter has been settled by the Hon'ble Supreme Court (supra), it shall always be appropriate for the respondents to ensure that the judgments of the Apex Court are complied with in letter and spirit without pressing the personnel of Armed Forces to approach the Armed Forces Tribunals for aforesaid relief. Those who have fought for the country, should not be treated like an ordinary citizen or ordinary Government servant whose life is not at stake. It shall be appropriate for the Government of India, Ministry of Defence as well as Armed Forces to revisit the different causes so that mental agony and financial hardships from which an Ex-defence personnel suffers could be averted.

24. Justice V.R.Krishna Iyer in his book SOCIAL JUDTICE-SUNSET OR DAWN, Second Edition has referred to the observation made by a western intellectual and scholar Robert Hardgrove Jr., who had expressed the current Indian dilemma even decades ago thus:

> *"The 'revolution of rising expectations' has become a 'revolution of rising frustrations' as the gap between aspiration and achievement has widened. As demands have increased, as new groups have entered the political system, in the expanding participation, the capacity of the government to respond effectively has not kept pace. But beyond capacity, India has often lacked the will to initiate and respond to rapid change. Under pressure from sectors of society with a vested interest in preserving the inequalities of the status quo, India leadership has been emasculated by the paradoxical position in which it finds itself."*

The observation of learned scholar (supra) seems to fit in our Indian executive set up where even for a just cause, members of Armed Forces are compelled to approach courts, authorities or tribunals. We are very slow and hesitant in responding effectively and efficaciously to keep pace with time and meet the requirement of law. Let us leave no stone unturned to keep pace with time to improve quality of administration. The Defence Ministry as well as the Armed Forces authorities should also gear up to do needful so that for trivial issues, serving or retired members of armed forces are not compelled to approach courts, authorities or Tribunals.

25. Accordingly, T.A is partly allowed. The impugned order dated 10.06.2011 to the extent it denies the disability pension of the petitioner is set aside. The petitioner shall be entitled for disability pension to the extent of 30% for life, which is rounded off to 50%, alongwith consequential benefits, from the date of release. Let the arrears of disability pension be paid to the petitioner within a period of four months, failing which the petitioner shall be entitled for interest on the amount due in pursuance to above at the rate of 10% from the date of release till the date of payment.

There would be no order as to costs.

Bhushan.
19.4.17

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated: 19 April, 2017
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