Court No.1(List B)

Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 1001 of 2010

Monday this the 8th day of May 2017

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

No. 4085968 Ex Rect Gopal Singh Danu
S/o Shri Narayan Singh
R/O Village & Post : Balam
Tehsil : Tharali
District : Chamoli (Uttarakhand)

…….. Petitioner

By Legal Practitioner – Shri R Chandra, Advocate
Learned Counsel for the Petitioner

Versus

1. Union of India through Secretary Ministry of Defence (Army), New Delhi-110011.

2. The Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.

3. Record Officer/Abhilekh Adhikari, Garhwal Rifles Records, Lansdowne, Uttarakhand

…… Respondents

By Legal Practitioner – Shri Asheesh Agnihotri
Learned Counsel for the Central Government

ORDER

"Hon'ble Lt Gen Gyan Bhushan, Member (A)"

1. Initially the petitioner had filed Writ Petition No 1452 of 2007 (S/S) before Hon'ble The High Court of Uttarakhand at Nainital, which after constitution of the Armed Forces Tribunal has been transferred to this Bench of the Tribunal and registered as T.A. No 1001 of 2010. The Petitioner has claimed the following reliefs :-

> *"(a) Issue a writ, order or direction in the nature of certiorari to call for the record of the case and quash the impugned order dated 26.07.2005 passed by the respondents rejecting the appeal filed by the petitioner (Annexure No. 3) & order dated 26.03.2007 (Annexure No. 6) passed by the respondent No. 2.*
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> *(b) Issue a writ, order or direction in the nature of mandamus directing the respondents to pay the disability pension to the petitioner.*
>
> *(c) Issue any other order or direction which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case..*
>
> *(d) Award cost of the petition to the Petitioner."*

2. The factual matrix of the case is that the petitioner was enrolled in the Army on 25.02.2002 and was discharged on 18.03.2003 in low medical category 'S1H5A1P1E1' for the disease "MIXED DEAFNESS B/L FOR IMB V-67". Medical Board assessed his disability as 20% for life and considered it as neither attributable to nor aggravated by military service. The disability pension claim of the petitioner was forwarded to P.C.D.A. (Pension) Allahabad which was rejected on 08.12.2003. The petitioner preferred his First and Second Appeals before the Appellate Committee which were also rejected vide orders dated 26.07.2005 and 26.03.2007 respectively. Aggrieved, the petitioner has filed this Original Application.

3. The delay in filing of the Transferred Application has been condoned vide order dated 20.01.2017.

4. Heard Shri R Chandra, Learned Counsel for the petitioner, Shri Asheesh Agnihotri, Learned Counsel for the respondents and perused the record.

5. Learned Counsel for the petitioner submitted that that at the time of enrolment, when the petitioner's routine medical examination was being done, some abnormality in his ears was detected by the Recruiting Medical Officer and for expert opinion, he was referred to ENT Specialist. After examination by ENT Specialist, he was declared fit for enrolment in the Army. He was sent to Garhwal Rifles Centre for basic military training where he successfully completed 32 weeks of training. During 32nd week of training, when he was participating in a rifle shooting/grenade throwing training, he started getting a whistling sound in his ears. He was treated in various military hospitals and later was referred to Base Hospital Delhi where his disease was diagnosed as 'MIXED DEAFNESS B/L FOR IMB V-67' due to loud explosion which damaged his ear drums permanently for which there is no treatment. He further submitted that at the time of enrollment, the petitioner was considered medically and physically fit to join the Army. The disease has occurred to him due to army training, stress and strain of the military service, as such, keeping in view the large number of judgments passed by the various Benches of Armed Forces Tribunal, his disability must be considered as attributable to and aggravated by military service and he should be granted disability pension. He also made oral prayer for rounding off of his disability pension as per policy letter datetd 31.01.2001.

6. P**er contra**, Learned Counsel for the respondents submitted that as per policy petitioner's disability pension claim was preferred to PCDA (Pension), Allahabad, for adjudication and was rightly rejected as per Paragraph 173 of Pension Regulations 1961 (Part-1), which clearly states that pension may be granted to an individual who is invalided from service on account of disability, which is attributable to or aggravated by military service and percentage of disablement is assessed as 20% or above. Since his disability was considered as neither attributable to nor aggravated by military service it has been correctly denied to him. However, subsequently Ld. Counsel for the respondents conceded that in consonance with various

judgments of Hon'ble The Supreme Court and Armed Forces Tribunals, the petitioner is entitled to disability pension.

7. We have gone through the relevant rules and regulations on the issue on the question of attributability of disability to military service, we would like to refer to the judgment and order of Hon'ble The Apex Court in the case of **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316,** in which Hon'ble The Apex Court had 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).*
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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).*
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> *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]*
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> *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)].*
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> *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*
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> *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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> *XXX XXX XXX*
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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."

8. We would like to recall the judgment on grant of disability pension passed in the case of **Sukhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC, in para 9 of the judgment Hon'ble The Apex Court has held as under:-

"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……".

9. We would also like to refer to the judgment and order of Hon'ble The Apex Court in the case of **Union of India vs. Rajbir Singh, Civil Appeal No. 2904 of 2011 decided on 13.02.2015** in which Hon'ble The Apex Court has held as under:

"16. Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service thus remains unrebutted. Since the disability has in each case been assessed at more than 20%, their claim to disability pension could not have been repudiated by the appellants."

10. In the instant case as per submissions, at the time of enrolment of the petitioner in the Army, Recruiting Medical Officer detected some problem in his ears and he was referred to ENT Specialist for expert opinion who declared him fit for enrolment in the Army. During basic military training when he was participating in a rifle shooting/grenade throwing, he started feeling some whistling sound in his ears due to loud explosion. He was treated at various Military Hospitals where his disability was diagnosed due to 'MIXED DEAFNESS B/L FOR IMB V-67'. We observe that Medical Board in the opinion in the Medical Board Proceedings in Part V at Page 6, Para 2 has mentioned "***Did the disability exist before entering service – Yes",*** and in Para 3 " ***In case the disability existed at the time of entry, is it possible that it could not be detected during the routine medical examination carried out at the time of the entry - Yes, disability was detected by Rtg MO and case was Ref - Declared fit by ENT Spl",*** It clearly comes out that at the time of enrolment the petitioner was considered medically fit to join the army. Recruiting Medical Officer had detected disability but subsequently ENT Specialist had declared the petitioner as fit and accordingly he was enrolled on 25.02.2002. During military training, he

was admitted in Military Hospital Lansdowne initially and later he was treated in various Military Hospitals for the disease detected and was subsequently discharged from service. We are of the view that his case is squarely covered by the decisions of Hon'ble The Apex Court in the cases of **Dharamvir Singh** (supra), **Sukhvinder Singh** (supra) and **Rajbir Singh** (supra) in which it has been clearly postulated that when there is no note of such disease or disability available in the service record of the petitioner at the time of acceptance for Army service, it would be presumed that the petitioner 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.

11. As regards entitlement of rounding off of disability pension, we are of the considered view that the case of the applicant for rounding off is covered by the decision of Hon'ble The Apex Court in the case of Union of India and Ors vs Ram Avtar & ors in Civil Appeal No 418 of 2012 dated 10th December 2014. Accordingly, we are of the view that the applicant is entitled to the benefit of rounding off.

12. On the issue of delay and payment of arrears, we recall the case of **Shiv Dass Vs Union of India reported in 2007 (3) SLR 445** wherein in Para 9 of the judgment, Hon'ble The Apex Court has observed:-

> *"9. In the case of the 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."*

13. Keeping in view the judgments of **Dharamvir Singh**(supra) **Sukhvinder Singh**(supra), and **Rajbir Singh** (supra), we converge to the view that the impugned orders passed by the respondents were not only unjust, illegal but was also not in conformity with rules, regulations and law; and the impugned orders deserve to be set aside. The petitioner is entitled to disability pension @ 20% for life which needs to be rounded off to 50% as

per policy letter dated 31.01.2001 and in terms of decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra).

14. Thus in the result, the **Transferred Application No. 1001 of 2010** is allowed and the impugned orders dated 08.12.2003, 26.07.2005 and 26.03.2007 are set aside. The respondents are directed to grant disability pension to the petitioner @ 20% for life which would stand rounded off to 50% for life. The respondents are also directed to pay arrears of disability pension from three years prior to filing of the Original Application i.e. 01.10.2010 till the date of actual payment. The respondents are directed to give effect to this order within a period of four 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 time stipulated above, the applicant would start earning interest on the amount accrued at the rate of 9% from due date till the date of actual payment.

15. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated : May, 2017

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