

COURT NO.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****M.A. No. 1713 of 2017 In re: O.A. No. Nil of 2017**Tuesday, this the 09th day of January, 2018**“Hon’ble Mr. Justice D.P. Singh, Member (J)
Hon’ble Air Marshal BBP, Sinha, Member (A)”**

14490-G Gp Capt Vijay Suman Sharma (Retd) & Ors

..... **Applicants & others**Ld. Counsel for the : **Shri Harshvardhan, Advocate**
Applicant

1. 14490G GP CAPT VIJAY SUMAN SHARMA (RETD), S/O SHRI SITA RAM R/O 3 G 405, GURJINDER VIHAR, SECTOR CHI II, GREATER NOIDA, UP- 201312
2. 14476-S GP CAPT SP GOYAL (RETD)
S/O SH.SITA RAM GOEL
R/o FLAT NO. D/1124B, GAUR GREEN VISTA.
INDIRAPURAM, GHAZIABAD, UP
3. 14476-S GP CAPT MANOJ KUMAR MISHRA (RETD)
S/O LATE SARAT CHANDRA MISHRA,
FLAT NO, BX-315, TOWER-3, ASHIANA UPVAN,
AHINSA KHAND-2, INDIRAPURAM,
GHAZIABAD, UP-201014
4. 14698-K GROUP CAPT ANIL KUMAR SRIVASTAVA (RETD.),
S/O LATE SHRI BRIJ NANDAN LAL
R/O-J-57-B, SECTOR – 25, NOIDA U.P. – 201310.

5. 14954-R GROUP CAPT RAJESH KATARIA (RETD.)
S/O- SHRI ISHWAR CHANDER KATARIA
2A, NIL GIRI-III, SECTOR 34
NOIDA- 201307
6. 15240-N, GP CAPT RAJIV KUMAR SHARMA (RETD)
S/O SHRI VED PRAKASH SHARMA
R/O FLAT NO, Q-537, JALVAYU VIHAR
GRETER NOIDA, UP
7. 14991G, GROUP CAPT RAKESH CHANDDHA (RETD)
S/O SHRI S R CHADDHA
C001, VICTORIA, GRAND OMAXE, SECTOR 93B,
NOIDA – 201304
8. 14709-L, GROUP CAPT H V SINGH (RETD)
S/O LATE SHRI VIJAY SINGH
A- 11, SECTOR 61, NOIDA
GAAUTAM BUDDHA NAGAR, UP
9. 14945 GP CAPT RAVI SHARMA (RETD)
S/O LATE SHRI K R SHARMA
R/O FLAT NO. B/68 JAL VAYU VIHAR
GREATER NOIDA UP

-----Applicants & Others

Versus

1. UNION OF INDIA, THROUGH THE SECRETARY,
MINISTRY OF DEFENCE, DHQ PO NEW DELHI – 110
011.
2. CHIEF OF THE AIR STAFF,
AIR HQ, VAYU BHAWAN, JDPO, RC,
NEW DELHI – 110 011
3. AIR OFFICER IN CHARGE PERSONNEL
AIR HQ, VAYU BHAWAN, JDPO, RC,
NEW DELHI – 110 011

--- Respondents

Ld. Counsel for the: **Shri Yogesh Kesarwani Advocate,**
Respondents. Addl. Central Government Standing
Counsel

Assisted by : **Gp Capt Shirish Dhakat,** Director PO-5

ORDER (Oral)

1. Present Application has been preferred seeking condonation of delay in filing the O.A which has been jointly filed by Applicants 1 to 9.

2. We have heard learned counsel for the Applicant as also learned counsel for the respondents.

3. According to the learned counsel for the Applicants, the Applicants were holding the rank of Group Captain in the Indian Air Force who attained the age of superannuation after rendering service upto the age of 54 years on 30.09.2007, 30.09.2008, 30.06.2008, 30.09.2007, 31.07.2009, 31.07.2008, 31.08.2008, 31.08.2008, 31.07.2008 and 31.3.2009 respectively. It is submitted that recommendations made by VI Pay Commission made no distinction between select and T.S Ranks and it also abolished the Rank Pay concept and substituted the same with Grade Pay. All Group Captains were given the same Grade Pay of Rs 8700/- per month while all Wing Commanders were given a lower Grade Pay

of Rs 8000/- per month. In pursuance of the recommendations of the VI Pay Commission, the Government of India accorded different criteria for payment of pension to the regularly promoted Group Captain and Group Captains who have been granted time scale. The purpose underlying creation of time scale post of Group Captain after completion of 26 years of service was laudable as held by the Apex Court. However, personnel who had been granted time scale after 26 years of service, in accordance with the policy were required to retire at the age of 54 years while the regularly appointed incumbents posted earlier on the rank of Group Captains were retired at the age of 57 years. The controversy was raked up before the Delhi High Court and the case stood transferred to Principal Bench at Delhi which was registered as T.A No 385 of 2009. The Principal Bench at Delhi decided the pending T.A aforesaid vide order dated 02.05.2013. The operative portion of the judgment of the Principal Bench at Delhi as contained in para 30 of the judgment is reproduced below for ready reference.

"30. Therefore, we are of the considerate view that this distinction which is sought to be made has no legs to stand. Consequently, we allow

this petition and set aside the notification dated 12.06.2009 to the extent which lays down the ages of retirement for the Gp Capt (TS) at the age of 54 years and direct that all the persons who are in the rank of Gp Capt (TS) will be entitled to continue upto the age of 57 years. The order of the petitioner by which he has been sought to be retired at the age of 54 years dated 05.12.2008 is quashed and petitioner is entitled to all benefits upto the age of 57 years. His pension and other emoluments should be worked out and he should be also entitled to arrears of the salary till he attains the age of 57 years."

4. A plain reading of the aforesaid order shows that the Principal Bench held that all persons who were in the rank of Group Captains shall continue in service upto the age of 57 years. However, since the petitioner of that case had already retired, the Principal Bench provided that since order/policy dated 05.12.2008 had been quashed, the petitioner of that T.A shall be entitled to all benefits upto the age of 57 years. Thus the ratio flowing from the judgment of the Principal Bench is two-folds; firstly the continuity of serving officers and secondly entitlement of all benefits of retired officers upto the age of 57 years. The aforesaid judgment of the Principal Bench was taken in

challenge by way of Civil Appeal Nos. 4717 to 4719 of 2013 in the Apex Court. Their Lordships of Apex Court considered the finding of the Principal Bench and upheld the same in totality without any modification and in consequence, dismissed the Appeal vide order dated 19.09.2016. For ready reference, paras 36, 37 and 38 of the decision of the Apex Court are reproduced below.

" 36. The assertion of the appellant that a parity in the retirement age reduces the combat effectiveness of the force has been stoutly denied by the respondents who have asserted that if a Group Captain (Select) or for that an Air Commodore or an Air Vice Marshall gets superseded, his higher age neither automatically impedes the quality and standard of performance of his duties nor does the IAF summarily curtail his residual service as a consequence of his supersession, on the ground that his higher age group may impact combat effectiveness.

37. On the material placed before us and having regard to the rival assertions made by the parties in their respective affidavits the difference in employability of Group captains (TS) is not borne out to justify the classification made by the Government. It is evident from the particulars given by the respondents that

several Group Captains (TS) have held appointments which are also held by Group Captains(Select). If that be so, the difference in the employability of Time Scale officers vis-a-vis select officers appears to be more illusory than real. There does not appear to be any hard and fast rule on the question of deployment or employability of Group Captains (TS) or group captains (Select) for that matter. The Air HQ can, depending upon its perception, order deployment and post any officer found suitable for the job. Deployment remains an administrative matter and unless the same involves any reduction in pay, allowances or other benefits or reduction in rank or status of an officer legally impermissible, such deployment remains an administrative prerogative of the competent authority.

38. Suffice it to say that the basis for classification in question for purposes of age of superannuation which the appellant has projected is much too tenuous to be accepted as a valid basis for giving to the Time Scale Officers a treatment different from the one given to the Select Officers. We are also of the view that concerns arising from a parity in the retirement age of Time Scale and Select Officers too are more perceptual than real. At any rate, such concerns remain to be substantiated on the basis of any empirical data. The upshot of the

above discussion is that the classification made by the Government of India for purposes of different retirement age for Time Scale Officers and Select Officers does not stand scrutiny on the touchstone of Articles 14 and 16 of the Constitution as rightly held by the Tribunal.

39. In the result, these civil appeals fail and are hereby dismissed but in the circumstances without any order as to costs."

5. As evident from the judgment of the Apex Court, different scales given to the officers and treating them differently is not sustainable. The parity must be given to the officers working in the time scale and to the officers selected officers. Their Lordships held that at any rate classification made by Govt of India for purposes of different retirement age of time scale officers does not stand scrutiny at the touchstone of Articles 14 and 16 of Constitution of India. Precisely speaking, the finding of Principal Bench At Delhi has been affirmed by the Apex Court. We have been informed that after the aforesaid judgment another O.As were filed in Principal Bench at Delhi vide O.A Nos. 350 and 351 of 2013 and that too were allowed vide judgment and order dated 26.11.2014. We have also been informed by the learned counsel for the

Applicant that the appeal filed by the Union of India against the judgment of Principal Bench has been dismissed but Review is still pending. However, according to unconfirmed sources, the said review stands dismissed. However, we are not concerned with dismissal of the Review but we are concerned with the finality of the judgment which has elaborately dealt with both the circumstances i.e pertaining to serving officers and also pertaining to retired officers with regard to extension of post retiral benefits.

6. It has been vehemently argued by the respondents that since the controversy relates back to the year 2005, the application suffered from inordinate delay and the delay so caused is not to be condoned since the Applicant has failed to show sufficient cause required under section 5 of the Indian Limitation Act read with section 22 of the Armed Forces Tribunal Act, 2007. It is also submitted that whatever delay has been caused, it is on account of omission and commission on the part of the Applicant.

7. After hearing learned counsel for the parties, we are of the view that the argument advanced by learned counsel for the respondents is not sustainable for the

reasons that the Principal Bench at Delhi had entertained the petition in 2013 and decided the same in the same year. Again another petition was filed in the year 2014 against which Civil Appeal was filed which was dismissed by the Apex Court. Accordingly the controversy has been adjudicated by the Principal Bench at Delhi and also by the Supreme Court almost after elapse of 10 or 11 years without holding their objections sustainable. There is a reason behind it and it is that a person who has served in the Armed Forces cannot be imparted discriminatory treatment in the matter of payment of pension or continuance in service for the reason that it is well settled proposition of law that right to livelihood is a fundamental right protected by Article 21 of the Constitution of India. The right flowing from Part III of the Constitution of India cannot be subjected to whimsical treatment of the employer. Once the Apex Court has recorded a finding and set aside the discriminatory policy of Govt of India, then option is open to sufferer to approach the appropriate forum for grant of benefits even if not continuing in service, to pay post retiral benefits in terms of the judgment of the Apex Court. It is trite to say that the Judgment of the Apex Court is law of the land and is binding under Article

141 of the Constitution of India. In our considered view, the delay caused is neither intentional nor deliberate on the part of the Applicant. There is other reason. For the cause of substantial justice, the Tribunal should condone the delay and entertain the matter on merit. Once the policy of 2005 has been set aside and affirmed by the Apex Court then, the time scale Captains cannot be put into doldrums. Virtually once the Supreme Court has set aside the discriminatory policy there is no option except to give equal treatment to the Applicants. It is well settled that pension is not a bounty and every employee has got right to claim pension in pursuance of the statutory provisions. The Applicant cannot be given different treatment, then what has been given to other similarly situated persons in pursuance of the judgment of the Supreme Court.

8. There is one more reason why delay is liable to be condoned. Under the recent OROP Scheme, all employees and officers of the Armed Forces have been treated equally with one rank one pension under the equality clause of Article 14 of the Constitution of India. It is well settled law that equals cannot be treated unequally (vide judgments Management of Coimbatore Vs Secretary Coimbatore

District decided on 23.04.2007, Telangana State Road Transport Vs P. Ramesh, Ganga Sugar Co Ltd Etc vs State of U.P. and others decided on 20.09.1979, Indira Sawhney Vs Union of India and others decided on 13.12.1999, U.P. Power Corpn V Ltd Vs Ayodhya Prasad Mishra & Anr decided on 11.09.2008, Union of India & Ors Vs Muralidharan Menon decided on 04.08.2009, Steel Authority of India & Ors Vs Dibyendu Bhattacharya decided on 29.10.2010 etc).

9. Accordingly since Hon. Supreme Court has set aside the order/policy on account of being discriminatory, it shall be a travesty of justice in case retired personnel are treated differently while granting pension for the services rendered by them. The Court or Tribunal cannot adopt different standard while entertaining the petition for condonation of delay. Once the Principal Bench at Delhi has entertained the petition after condoning the delay of one or two years and rejected the objection raised by the respondents with regard to delay, then keeping in view the judicial propriety and regard being had to the binding nature of the order and judgment of the Apex Court, there is no option left for the Tribunal except to entertain the present petition. Besides, the Tribunal is empowered to

condone the delay for the cause of substantial justice as held by the Apex Court in catena of judgment. As we have held, same group of persons cannot be treated differently, it is a fit case where for the cause of substantial justice we should exercise our powers to condone the delay.

10. In the above conspectus, the cause shown is held to be sufficient and in consequence delay in filing the O.A is condoned.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: 09 January, 2018

MH/-