

O.A. No. 307 of 2015
Ex Sgt Amit Kumar Pandey
Vs.
Union of India and others

Wednesday, the 17th day of January, 2018.

(In continuation of judgment and order dated 03.01.2018)

After pronouncement of judgment and before signing the order

Hon'ble Mr. Justice D.P.Singh, Member (J)

1. After pronouncement of judgment, I have noticed that Brother Air Marshall BBP Sinha, Member (A) has relied upon in his dissenting judgment on letter dated 26.02.2013 and letter of DGAFMS dated 10.08.2009. Attention was not drawn during course of arguments to these letters nor the same have been filed. It is well settled law that judgment should be based on pleadings on record and not on extraneous materials which are not part of pleading.

2. I have noticed that this practice is going on in this Tribunal and during course of hearing or after delivery of judgment and even after the judgment is reserved; some Member of the JAG Branch is called upon, records are summoned and thereafter final decision is taken, particularly by the Hon'ble Members (A). Such action behind the back of the parties is not permissible in law. Even if record is produced in pursuance to instructions issued during course of hearing, then all such records which are not part of pleadings cannot be taken into account for delivery of judgment. The only remedy available is to list for

rehearing of the matter giving opportunity to both the sides to advance their arguments with regard to new material brought into notice of the Member. If it is not done, it shall erode people's faith and confidence in the entire system. Whatever the Administrative Members want to do, or want to peruse, that should be done in the Court, which is the age long practice of the Courts and Tribunals, so that either side may have opportunity to express their views on the documents relied upon while writing judgment. Mere filing of a document or pleadings being brought on record is not enough. It is on the part of learned counsel for both the sides to invite attention of the Tribunal to the appropriate pleadings and material on record. Learned counsel representing the Union of India had not invited attention to these letters during course of hearing.

3. Otherwise also, I feel that the letters which I have relied upon do not refer to the order of the DGAFMS dated 10.08.2009 relied upon by Brother Air Marshal BBP Sinha, Member (A) that they are giving any concession. Subsequent letter which has been taken into note does not refer to any letter and simply refers to the medical opinion which is assessed by the doctor to be 50%. It means that the applicant's original medical report was not correct. Ethically, doctor is supposed to give correct opinion without any concession or sympathy whether the injury or disability suffered by a person or a member of the Armed Forces (Air Force in this case). The question which cropped up keeping in view the new material on record that one of the opinion out of two opinions must be

correct and the other incorrect. It requires another Re-survey Medical Board containing large number of experts to review both the medical opinions and submit report. Army has no right to play with the right to livelihood and quality of life of its members in such manner which is protected by Article 21 of the Constitution. No Court, Tribunal or authority, even the Armed Forces, has got right to proceed arbitrarily to pass some order, or issue instructions in violation of the Constitutional ethos.

4. It is well settled that that except by Parliamentary legislature, fundamental rights of members of Armed Forces are also protected by Articles 14 and 21 of the Constitution of India. It has pained me that such Circular has been issued by the Chief of the Air Force where Medical Board has been permitted to give another opinion for the purpose of civil services. It is fraud with the Constitution and such Circulars are being issued unconstitutionally hitting fundamental rights of the members of the Armed Forces. Such Circulars must be ignored and cannot be taken into account being unconstitutional and hit by Article 14 of the Constitution to give two medical opinions (if it happened) of the same person for any reason whatsoever.

5. In such extra ordinary situation I suo motu review and modify order passed on 03.01.2018 to the extent the respondents shall convene fresh Medical Board to assess applicant's disability for payment of disability pension keeping in view the observations made in the body of the present order and thereafter to grant relief as directed in the order dated

03.01.2018. We further direct the Chief of the Air Force/Army to withdraw all such Circulars forthwith to remove the cloud. In case some Regulation/Circular has been issued by Indian Army, that too shall be withdrawn forthwith. Let necessary exercise be done within two months.

6. While parting with, it is appropriate to record observations made by Brother Air Marshal BBP Sinha, Member (A) that he has directed the JAG Branch to bring record in Court-room. But it does not make any difference being denying of opportunity to either side to raise arguments.

Per Hon'ble Air Marshal BBP Sinha, Member (A)

7. The letters are on record and while differing with the judgment I had asked the JAG Branch in Court itself that the letters concerned be given to me for writing reserved judgment and thus the letters were supplied to me.

(Air Marshal BBP Sinha)

(Justice D.P. Singh)

Member (A)

Member (J)

Dated: January 17, 2018

Hon'ble Mr. Justice D.P.Singh, Member (J)

Hon'ble Air Marshal BBP Sinha, Member (A)

Being difference in opinion, we frame the following specific questions of law for adjudication in pursuance to provisions contained in Section 28 of the Armed Forces Tribunal Act, 2007:

- (1) Whether the judgment of the coordinate Bench (Armed Forces Tribunal, Regional Bench, Kolkata) is not binding on the Armed Forces Tribunal, Regional

Bench, Lucknow and the Tribunal has got right to take adverse view than what has been settled against the doctrine of finality?

- (2) Whether Medical Board has got right to give second opinion contrary to the first opinion for enhancement or reduction of medical ailment in pursuance to Circular issued by the Indian Air Force/Army, for some extraneous reasons.
- (3) Whether the conduct of the Medical Officers working in the Armed Forces shall not be governed by Indian Medical Council Act, 1956 and the rules and regulations framed thereunder? Whether the Medical Officers of the Armed Forces have to follow the instructions which may be given in contravention to the provisions of Indian Medical Council Act, 1956 and the rules and regulations framed thereunder?
- (4) Whether by executive instructions, the Armed Forces have right to regulate conduct of Medical Officers of the Armed Forces to do certain thing which is not ethical and goes against the standards of profession provided by the Indian Medical Council Act, 1956 and the rules and regulations framed thereunder?

8. Let the record be forwarded to Hon'ble Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi for appropriate orders in accordance with the provisions contained in Section 28 of the Armed Forces Tribunal Act, 2007 within three days.

(Air Marshal BBP Sinha)

Member (A)

(Justice D.P. Singh)

Member (J)

Dated: January 17, 2018

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