

Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 87 of 2016****Monday this 23rd day of April, 2018****Hon'ble Mr. Justice S.V.S. Rathore, Member (J)****Hon'ble Air Marshal B.B.P. Sinha, Member (A)**

No. 4169873-K Ex Nk (TS) Diwan Singh son of Late Shri Hari Singh R/o Dhari PO Brabey District Pithoragarh (Uttarakhand).

..... Applicant

By Legal Practitioner: Shri Parijaat Belaura, Advocate
Learned Counsel for the Applicant.

Versus

1. Union of India through Secretary,
Ministry of Defence, South Block
New Delhi.
2. Officer Incharge,
Records The Kumaon Regiment,
Pin No.-900473 C/0 56 APO.
3. Principal Controller,
Defence Accounts Pension,
Allahabad (U.P).

..... Respondents

By Legal Practitioner: Shri Bhanu Pratap Singh,
Learned counsel for the respondents

ORDER (Oral)

1. This Original Application was decided by the Division Bench of this Tribunal. Since there was difference of opinion between the two Hon'ble Members, therefore, the matter was referred to the Armed Forces Tribunal, Principal Bench, New Delhi and the Hon'ble Chairperson vide his order dated 13th February 2018 has entrusted this matter to the 3rd Member and under the provision of Section 28 of the Armed Forces Tribunal Act, 2007, the case has to be decided by the majority opinion.

2. The instant O.A. was heard by the Division Bench of this Tribunal and vide order 15th January 2018, Hon'ble Mr. Justice D.P.Singh, Member (J) has passed the following order:

“15. O.A. is allowed. Applicant shall be entitled for 75% disability pension after rounding off of his disability from 70% from the date of discharge for the period of five years, followed by fresh Re-Survey Medical Board, to be done within three months from today, to assess his disability for further payment of disability pension.

Cost is quantified to rupees two lacs, which shall be deposited by the respondents within three months from today and shall be released in favour of the applicant by the Registry through a cheque.

Let the necessary acts be done within four months from today. The arrears of pension shall also be paid within four months from today, failing which the applicant shall be entitled for the interest @ 10% per annum till the date of actual payment.”

Hon'ble Member (A) has passed a separate order and the relevant Paragraphs 9, 10 and 11 of the aforesaid judgment are quoted as under :

9. My view is that this case dates back to the year 1994 and at that time the view expressed in Dharamvir's case was not in vogue. Hence for the view expressed in the medical opinion, as not attributable to or aggravated by military service, there should not be any criticism or consequent penalties in the shape of cost as has been done in the instant case. Specifically so when respondents have ensured that the applicant went out in 1994 with service pension.

10. In view of the above, I am of the view that the ends of justice for both the applicant and respondents would be fully met with Applicant's entitlement for 70% disability pension from the date of discharge which shall be rounded off to 75%.

11. It is my considered opinion that imposing penalty for old cases (Pre-Dharamvir judgment) not adjudicated on lines of Dharamvir judgment will not be fair to respondents because it has potential to open Pandora box for similar claims from a large number of Ex Servicemen. Any organisation is dynamic by design and it changes with times. We should normally not impose cost unless there is malafides intent or gross negligence on the part of defaulting party.

3. Since there was difference of opinion, therefore, following questions were framed and the matter was referred to the Principal Bench, which was entrusted to the undersigned.:

*(i) Whether in view of pronouncements of Hon'ble Supreme Court (supra), including the judgment of **Salem Advocate Bar Association** (supra), in a case where a person has suffered on account of commission and omission of employer for about 24 years, imposition of cost is must and accordingly cost has rightly been imposed by one of us (Justice Devi Prasad Singh, Member (J))?*

*(ii) Whether the judgments of Hon'ble Supreme Court are applicable to all pending cases, including the judgments of **Salem Advocate Bar Association, Dharamvir Singh vs. Union of India** (supra), since they have not been made prospective by their Lordships?*

(iii) In payment of disability pension being welfare matter, whether a liberal view should be adopted while deciding the case and awarding cost in view of aforesaid Supreme Court judgments, and denial of cost shall be denial of justice where a person suffered for more than two decades because of commission and omission of respondents?

4. There was difference of opinion between the two Hon'ble Members on the point of imposition of cost, as such, the matter was considered by the Third Hon'ble Member under the directions of Hon'ble Chairperson, AFT, New Delhi. The decision given by the Third Member after hearing the parties, was as under :-

(i) Since the applicant himself was negligent to raise a claim for grant of disability pension and to challenge the order passed in first and second appeals for several years, therefore, the respondents cannot be held responsible for delay in the peculiar facts of this case, because the applicant, for the first time, after the orders passed in appeal in the year 1996, the applicant moved an application under the RTI Act in the year 2014 and thereafter filed this O.A. in the year 2016.

(ii) Admittedly, the judgments given by the Hon'ble Supreme Court in the cases of **Salem Advocate Bar Association vs. Union of India** (2005 (6) SCC 344) and of **Dharamvir Singh vs Union of India & Others** (2014 STPL (Web) 468 SC) apply to all pending cases.

(iii) Admittedly, the payment of disability pension is a welfare provision and for implementation of this welfare provision, a liberal view should be adopted while deciding the cases. Simultaneously, it is also true that taking a liberal view, does not mean that a person should be granted any relief where he is not even legally entitled. In the facts of the instant case when the applicant slept over his rights for several years, therefore, the denial of cost, in the peculiar facts of this case, shall not amount to denial of justice.

5. Law is settled on the point that when there is a difference of opinion among the two Members, then the views expressed by them in their order would only be an opinion and would not be considered as order. At this juncture, we would like to quote Section 28 of the Armed Forces Tribunal Act, 2007, which reads as under :

“Section 28 in the Armed Forces Tribunal Act, 2007

28 Decision to be by majority. —If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ and make a reference to the Chairperson who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Tribunal who have heard the case, including those who first heard it.”

Thus, as per this provision, the case has to be decided as per the majority view.

6. We do not consider it necessary to reproduce the facts as the facts have been mentioned in detail in the opinion expressed by the two

Hon'ble Members earlier, particularly keeping in view that there was no dispute on the facts regarding the reliefs claimed by the applicant. The only difference of opinion was with regard to imposition of cost on the respondents.

7. In this case, there was no dispute that the applicant was entitled to disability pension @ 75% for a period of five years and for the further entitlement of the disability pension, his disability has to be assessed by holding Re-survey Medical Board. There was no difference of opinion on this aspect and the only difference of opinion was with regard to imposition of cost of Rs.Two Lacs on the respondents. Since the opinion of the Third Member is in favour of the opinion expressed by the Hon'ble Member (A), therefore, in view of the majority decision, the cost of Rs.Two Lacs which was imposed by the Hon'ble Judicial Member on the respondents, cannot be imposed. Thus, keeping in view the aforesaid finding of the Third Member, this O.A. is allowed and the operative portion of the O.A. shall now read as under :

8. This O.A. is **allowed**. The applicant shall be entitled to 70% of disability pension which shall be rounded off to 75% from the date of discharge for a period of five years. His further entitlement to the disability pension shall be subject to the out come of the Re-survey Medical Board, which has to be conducted by the respondents within a period of four months from today. The respondents are directed to comply with this order within a period of four months from the date a copy of this order is produced before them, failing which they will have to pay interest @9% per annum on the total amount from the date of its accrual till the date of actual payment.

9. With the aforesaid directions, this O.A. is finally disposed of.

Office is directed to provide copy of this order to the learned counsel for the respondents for onward transmission and to ensure compliance.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: 23rd April, 2018.
PKG