

Court No.1

Reserved Judgment

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 218 of 2012

Thursday this the 30th day of April, 2015

Hon'ble Mr. Justice S.C. Chaurasia, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

SL-2647 M, Lieutenant Colonel, JSS Kakar (Retired),
S/o Late Major Gyanchand Kakar,
R/o Major Kakar House, Shyam Nagar Road, Katora Talav
RAIPUR (CG).

..... Applicant

By Legal Practitioner Shri R. Chandra, Advocate

Versus

1. Union of India, Through the Secretary,
Ministry of Defence, Government of India,
NEW DELHI.
2. Chief of Army Staff, Army Headquarters,
DHQ Post Office, NEW DELHI.
3. The Adjutant General, Adjutant General's Branch
Integrated Headquarter, Ministry of Defence (Army),
Wing No.3, Ground Floor, West Block- III,
R.K. PURAM, NEW DELHI.
4. The Principal Chief Controller of Defence Account
(Pension), Draupadi Ghat, ALLAHABAD (U.P.)

..... Respondents

By Legal Practitioner Mrs. Deepti Prasad Bajpai, Standing
Counsel for the Central Government,

ORDER

“Hon’ble Air Marshal Anil Chopra, Member (A)”

1. The Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, claiming the following reliefs:

- “I) The Hon’ble Tribunal may kindly be pleased to quash that part of the letter dated 29/09/2009 issued by Ministry of Defence which restricts the benefit only to the persons retiring on or after 01/01/2006 and letter dated 05/12/2011 issued by respondent No.3 (Annexure-A/1).*
- II) The Hon’ble Tribunal may kindly be pleased to direct the respondents to grant the disability pension to the applicant w.e.f. 25/01/1992 along with arrears and interest thereon at the rate of 25 percent per annum.*
- III) Any other appropriate order or direction which this Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case including cost of the litigation.”*

2. The factual matrix of the case is that the applicant was commissioned in the Army on 14.03.1971. While taking part in operation Cactus Lily during 1971-72, due to a mine blast, the applicant suffered grievous injury on his left leg which resulted in amputation of left leg below knee.

The injury was held to be attributable to military service. Due to the said injury, the applicant was converted from infantry to general services and he continued to serve the organization with amputated left leg till 1992. He was prematurely retired from service on his own request w.e.f. 25.01.1992. At the time of retirement, the injury was certified to be attributable to military service and it was assessed at 60% (Annexure-A/2).

3. As the applicant had sustained injury on active service and the disability was assessed at 60 percent, the applicant was entitled for grant of disability pension, however, the disability pension has not been granted to the applicant. The applicant made repeated representations to the respondents but, no heed was paid to his request.

4. On a representation submitted by the applicant, it was informed by respondent No.4 that the applicant was not entitled to the disability pension as the applicant was released from service on his own request prior to 01.01.2006 and the provisions of the Army Headquarters letter dated 29.09.2009 were not applicable to the case of the applicant. A copy of the letter dated 26.12.2011 issued by respondent No.4 is marked as Annexure-A/3. Another communication (Annexure-A/1) has been received by the

applicant from respondent No.3, wherein it was informed that as per the provisions of Government of India, Ministry of Defence letter No.16(5)/2008/D(PN)/Policy) dated 29.09.2009, the Armed Forces personnel, who are retained in service despite disability which is accepted as attributable to or aggravated by military service and have foregone lump sum compensation in lieu of that disability, may be given disability element/war injury element at the time of their retirement/discharge on or after 01.01.2006 whether voluntary or otherwise in addition to retiring/service pension or retiring/service gratuity. However, it is mentioned in the said letter of respondent No.3 that since the applicant was retired from service prematurely on 25.01.1992, provisions of letter dated 29.09.2009 were not applicable in his case. The condition of making the benefit available to those individuals who retired on or after 01.01.2006 is absolutely illegal, arbitrary and discriminatory. By this the class within class has been created and the individual has been deprived of the benefit of the new policy only on the basis of their date of retirement.

5. The Hon'ble Supreme Court in number of cases has held that the policy relating to the pension being a

beneficial piece of legislation has to be construed liberally and artificial classification cannot be accepted. The applicant has been deprived of the benefit of disability pension only on the basis of the date of retirement. This condition of policy letter is therefore, liable to be struck down. The applicant had suffered the injury during active service and he has become lame for rest of his life. The injury was certified to be attributable to service and it was assessed at 60%. The applicant did not seek retirement immediately, rather he served the organization in the same condition for the next 20 years and it was in the year 1992, due to compelling domestic problems, he had to apply for premature retirement, which cannot be a ground to deny the benefit of disability pension to the applicant. Hence, the applicant has filed this Original application.

6. Through a Counter Affidavit, the Respondents have submitted that SL-2647M Lt Col JSS Kakkar (Retd) was granted Commission in the Army on 14.03.1971. The officer was prematurely discharged from service on his own request on 25.01.1992. The officer had sustained mine blast injury during Op Cactus Lile and his left leg was amputated. Prior to discharge, he was brought before the duly constituted Release Medical Board (RMB) which

viewed the officer's disability, SYME'S AMPUTATION LEFT LEG (BELOW KNEE) as attributable to military service with degree of disablement @ 60% for two years.

7. That being a premature retirement case, his initial claim for grant of disability pension was not processed as per Para 50 of Pension Regulation for the Army Part-I, 1961, which clearly stipulates that "An officer who retires voluntarily shall not be eligible for an award on account of any disability." Therefore, he is not entitled to the grant of disability pension. Accordingly his claim for disability pension was rejected.

8. That at the outset it is pertinent to mention here that the main eligibility conditions for entitlement to disability pension are given in Regulation 48 of Pension Regulations for the Army, 1961 Part I (henceforth referred to as PRA) which stipulates that unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an officer who is invalided out of service on account of a disability which is either attributable to or aggravated by military service and the disability is assessed at 20% percent or more. A low medical category officer who retires on superannuation or on completion of tenure can also be granted disability

pension under the provision of Regulation 53 of PRA if he fulfills the twin eligibility conditions as stated above. Whether an officer fulfills these twin eligibility conditions for grant of disability pension or not is determined by the competent authorities in the manner that an officer who is in low medical category at the time of retirement/invalidment is required to appear before a Release Medical Board (RMB) before his release from service on superannuation or Invalidating Medical Board (IMB) in case his medical condition does not warrant his retention in service up to the age of superannuation. The board examines the individual and his entire medical history thoroughly in the light of relevant medical provisions and records its assessment/views with regard to extent (percentage) of disability and the aspect of attributability to/aggravation by Military Service or otherwise. The assessment made by the board is only recommendatory in nature as per Rule 17 (b) of Entitlement Rules to Casualty Pensionary Awards to the Armed Forces Personnel, 1982, (E.R. 82) and is subject to review by the Competent Medical Authorities as stipulated in Rules 17 (a) and 27 (c) thereof. The proceedings of the medical board alongwith other medical documents are examined by

the Competent Medical and Administrative Authorities and on the basis of their recommendations the officer's claim for disability pension is either accepted or rejected. Apart from relevant medical/administrative provisions, all such aspect which may have bearing on the case e.g. posting in high altitude, effect of stress and strain and other service conditions are given due consideration.

9. That an officer who sustains injury/injuries in war or war like situation, counter insurgency operations/terrorist action etc. is eligible for war injury pension provided the disability is assessed at 01% or more in invalidment cases and 20% or more in cases where the disability does not lead to his invalidment but he retires on superannuation. However, as per Regulation 50 of Pension Regulations for the Army 1961, Part-I an officer proceeding on voluntary/premature retirement is not entitled to disability pension, even if he otherwise fulfills the twin eligibility conditions for the same as mentioned above is a battle casualty.

10. Disability pension to post-2006 PMR retiree has been allowed to Armed Forces Personnel including Officers as per recommendation of 6th CPC and the same has not been extended to pre-2006 PMR retiree. The case of the

petitioner is totally covered under the judgment passed on 06 July, 2010 in Civil Appeal No. 1002/2006 titled UOI Vs. Lt. Col Ajay Wahi by the Hon'ble Supreme Court, wherein it has been held that an officer is entitled for disability pension, when he is invalided out of service on account of disability attributable to military service or aggravated thereby and shall not be entitled for disability pension in case of voluntary retirement, unless it is found and held that the officer deserved to be invalided out of service on account of disability attributable to military service but the same was not granted to him for unjustified reasons and forced to seek voluntary retirement.

11. Eligibility conditions given at Rules 48 & 53 of the Pension Regulations for the Army 1961, Part-I are applicable to those officers who are being invalided out of service & retires on superannuation or on completion of tenure and not applicable to officers seeking premature retirement/discharge on own request vis-à-vis Rule 50, which says that an officer who retires voluntarily shall not be eligible for an award on account of any disability. The petitioner's contention is wrong and therefore, his claim for grant of disability pension is denied.

12. The Review Petition No. 1795/2010 filed against the *ibid* judgment titled *Ajay Wahi Vs. UOI and others* has also been dismissed by the Hon'ble Supreme Court on 26 October, 2010. In the light of the Hon'ble Supreme Court judgment dated 06 July, 2010 passed in the case of Lt Col. *Ajay Wahi (supra)*, the *ibid* application lacks merit and is, therefore, liable to be dismissed.

13. In the Rejoinder affidavit, the applicant has submitted that the applicant, while participating in operation 'Cactus Lily' had suffered the mine blast injury and his left leg was amputated. There cannot be any better claim of a disability pension falling in the category of a disability, attributable to military service. It is not disputed by respondents that the disability was assessed at 60 percent. The applicant had to submit the application for voluntary retirement due to the compelling reasons. The retirement, whether by way of normal retirement or voluntary, does not mitigate the sufferings of an individual and therefore, denying him disability pension on this ground is wholly illegal and arbitrary. The case of Lieutenant Colonel, *Ajay Wahi (supra)* is distinguishable on facts and the ratio laid down in the said case does not apply to the case of the applicant. It is reiterated that the letter dated 29.09.2009 creates a class

within a class without there being any rational for the same. The letter is discriminatory as it makes the benefit of disability pension available to the retirees, who have retired on or after 01.01.2006. The letter specifically states that the disability element at the time of retirement, whether voluntary or otherwise will be given to retirees who have retired/discharged from service on or after 01.01.2006. The applicant has suffered immensely for years and yet served the organization and the country selflessly. He has permanently lost his left leg, and therefore, respondents ought to have granted disability pension.

14. We have heard learned counsels for the parties and perused the record.

15. Learned counsel for applicant has drawn our attention to the AFT Principal Bench judgment dated 07.02.2012 in O.A. No. 336 of 2011 Maj (Retd) Rajesh Kumar Bharadwaj Vs Union of India and others. He has further submitted that there can be no such distinction between the persons, who have sought voluntary retirement prior to 01.01.2006 or subsequently to it. The services rendered by these personnel are to the nation and to make an artificial distinction on the basis of cut-off date is a serious violation of Article 14 of the Constitution of India,

as the persons similarly situated have been treated differently.

16. Relevant portions of the above quoted Principal Bench judgment are reproduced below :

*“A similar question came up before us in the case of **“Lt Col P.K. Kapur (Retd) Versus Union of India bearing O.A. Nos. 139 of 2009 decided on 30.06.2010”** and after reviewing all cases on the subject and considering the law of precedent held that the latest judgment in point of time has to be accepted in the event of conflict of judgments between the two coordinating bench, decision given in the case of **“Union of India & Anr. Versus S.P.S. Vains & Ors. (Supra)”** hold field till it is reviewed. In the case of **Union of India & Anr. Versus S.P.S. Vains & Ors. (Supra)** their Lordships have held that this kind of artificial distinction within the similarly situated persons by putting a cut-off date cannot be said to be rational and reasonable. Following that judgment, we have struck down the notification dated 04.05.2009 to the extent of pre & post distinction of 01.01.2006 in the case of **“Lt Col P.K. Kapur (Retd) Versus Union of India (Supra)”**.”*

*After that in a recent judgment delivered Hon’ble Supreme Court in the case of **“K.J.S. Buttar Versus Union of India and Anr. (Supra)”** their Lordships have further observed that distinction based with regard to Article 14- Disability Pension- Applicant, an ex-captain in Indian Army- Commissioned on 12.01.1969- Suffered serious permanent injuries during service- Invalidated out of service- Injury held attributable to military service and degree of disability assessed at 50%- Released from*

*service in Low Medical Category on 10.04.1997- Granted disability pension w.e.f. 26.07.1979- Prayer for disability to be treated at 75% instead of 50% as per Ministry of Defence letter dated 31.01.2001- Respondent contended that the disability cannot be enhanced to 75% as the relevant provision being para 7.2 of Government of India, Ministry of Defence, letter dated 31.01.2001 is applicable only to those officers who were invalidated out of service after 01.01.1996- Appellant invalidated much before 01.01.1996. Held, such restriction of the benefit is violative of Article 14 and hence illegal. Deoki Nandan Aggarwal's case relied [JT 1991 (3) SC 608]. In case of liberalization of an existing scheme, all are to be treated equally as was the case in hand. But if it is Introduction of a new retiral benefit, its benefit will not be available to all. Letter of the Ministry of Defence dated 31.01.2001 is only liberalization of an existing scheme. **State v. Justice S.S. Dewan** [JT 1997 (5) SC 26] held that the restriction of the benefit to only officers who were invalidated out of service after 01.01.1996 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. V. Deoki Nandan Aggarwal** [JT 1991 (3) SC 608] (Para 11).*

Now coming to the facts of the present case, notification dated 29.09.2009 has been issued for giving benefit to the persons who have sought voluntary retirement as earlier it was not possible to be given because of the Regulation 50. Regulation 50 contemplates that no person shall be entitled to disability pension if he sought voluntary retirement. But this was watered down by issuing notification dated 29.09.2009 which reads as under;

“No. 16(5)/2008/D(Pen/Policy)

Government of India
Ministry of Defence
Deptt. Of Ex-Servicemen Welfare
New Delhi 29th Sept. 2009

To

*The Chief of the Army Staff
The Chief of the naval Staff
The Chief of the Air Staff*

Subject : Implementation of Government decision on the recommendation of the Sixth Central Pay Commission – Revision of provisions regulating Pensionary Awards relating to disability pension/war injury pension etc. for the Armed Forces Officers and Personnel Below Officer Rank (PBOR) on voluntary retirement/discharge on own request on or after 01.01.2006.

Sir,

The undersigned is directed to refer to Note below Para 8 and Para 11 of the Ministry's letter No. 1(2)/97/D()Pen-C) dated 31.01.2011, wherein it has been provided that Armed Forces Personnel who retire voluntarily or seek discharge on request, shall not be eligible for any award on account of disability.

2. In pursuance of Government decision on the recommendations of the Sixth Central Pay Commission vide Para 5.1.69 of their Report, President if pleased to decide that Armed Forces personnel who are retained in service despite disability, which is accepted as attributable to or aggravated by Military Service and have foregone lump-sum compensation in lieu of that disability, may be given disability element/war injury element at the time of their retirement/discharge whether voluntary or otherwise in addition to Retiring/Service Pension or Retiring/Service Gratuity.

3. The provisions of this letter shall apply to the Armed Forces personnel who are retired/discharged from service on or after 01.01.2006.

4. *Pension Regulations for the three Services will be amended in due course.*
5. *This issue with the concurrence of Ministry of Defence (fin) vide their U.O. No. 3545(fin/Pen) dated 29.09.2009.*
6. *Hindi version will follow.*

Yours faithfully,
(Harbans Singh)
Director (Pen/Policy)

Copy to :-

“As per standard list”.

As per this notification, the benefit has been extended to the Armed Forces personnel as mentioned in paragraph no. 2 of this notification but in paragraph no. 3, they have said that this will be applicable from 01.01.2006 i.e. the persons who have sought voluntary retirement on or after 01.01.2006 will be benefited and rest will not be benefited. Petitioner has retired prior to 01.01.2006, therefore, he has been denied the benefit on account of cut-off date as per notification dated 29.09.2009.

Learned counsel for the respondents has seriously contested before us that Government has financial constraints, therefore, this benefit cannot be extended uniformly to the persons who sought voluntary retirement prior to 01.01.2006. In this connection, learned counsel for the petitioner has invited our attention to the subsequent notification dated 03.08.2010 of PBOR which reads as under ;

“Tele – 23335048

Addl Dte Gen Personnel Services
Adjutant General’s Branch
Integrated HQ of MoD (Army)
DHQ PO, New Delhi – 110011
B/39022/Misc/AG/PS-4 (L)/BC

All legal Cells

All line Dtes

**GRANT OF DISABILITY PENSION TO
PREMATURE RETIREMENT CSES PROCEEDING
ON DISCHARGE PRIOR TO 01 JAN 2006**

1. *Further to this office note No. A/39022/Misc/AG/PS-4 (Legal) dt 22 Feb 2010 on subject matter.*

2. *It is clarified that as and when a pre-2006 retiree PBOR files a court case to claim disability pension which was denied to him merely because he had proceeded on Pre-Mature Retirement, such cases will be immediately processed for Government Sanction through respective Line Dtes and Not contested. Government Sanctions in which cases will also be proposed in the same manner as that followed in cases of Government Sanctions issued in compliance of court cases.*

3. *This arrangement will be affective till MoD/D(Pen/Legal) formulated and issues comprehensive Govt orders.*

4. *It is re-iterated that only those cases where disability pension was denied to a PBOR solely on the grnds that he had proceeded on PMR will be processed for sanction and will not be contested. Which implies that as and when a PBOR files a case of similar nature their case files will be processed for Govt sanction without awaiting court order.*

5. *Contents of this letter are not applicable to officers as PRA, Rule 50 has been upheld by Hon'ble Supreme Court in judgment dt 06.07.2010 in case of Lt Col Ajay Wahi (SLP. No. 25586/2004, Civil Appeal No. 1002/2006).*

7. *All time Dtes are requested to give vide publicity to this letter amongst all Record Offices.*

(Ajay Sharma)

Col
Dir, AG/PS-4 (Legal)
For Adjutant General

Copy to :

MoD/D (Pen/Legal)

JAG Deptt

It has been clarified that as and when a pre 2006 retiree PBOR files a court case to claim disability pension which was denied to him merely because he had proceeded on Pre-Mature Retirement, such cases will be immediately processed for Government sanction through respective Line Dtes and not contested Government sanctions in which cases will also be processed in the same manner as that followed in cases of Government sanctions issued in compliance of court cases. That means Government has relaxed the condition for the PBOR, even if they sought voluntary retirement prior to 2006 they will not be denied the benefits of disability pension as per rules. If the Government can show benevolence for PBOR then why not same benefit can be given to the officers who are far less in number than PBOR.

The plea of the respondents of financial constraints is exploded. The number of PBOR who sought voluntary retirement pre 2006 would be hundred times more than that of officers. Therefore, we think that plea taken by the Government of financial constraints is nothing but an afterthought to somehow justify the administrative action. When this benefit has been extended to PBOR, we see no reason why it should not be released to the officer. More so, the justification of financial constraints pleaded by the respondents is exposed on account of that they have released the benefit

to the PBOR which are larger number than that of officer. Therefore, in our opinion, this artificial distinction which has been sought to be made of pre and post 01.01.2006 is without any rational basis. It is only a ploy to deprive the benefits of disability pension to the officers' rank.

Hence, we strike down the Clause 3 of the notification dated 29.09.2009. It will be open for the petitioner to make their representations to the authority to seek the disability pension benefit in terms of the aforesaid circular and Government will examine the matter and pass appropriate orders in accordance with law. Petition is accordingly allowed. No order as to costs. Both the connected cases bearing OA Nos. 336/2011 stand disposed of in the light of this order. No order as to costs."

17. The applicant has also drawn our attention to AFT Chandigarh Bench judgment dated 07.05.2013 in OA 2952 of 2012 Col (Retd) S.P.S. Bedi Vs Union of India and others. The AFT Chandigarh Bench judgment has mostly relied on the Principal Bench judgment quoted above as such does not need any reproduction.

18. In the instant case, there is no dispute that the disability was 60% attributable to military service. However, the same was not being granted to the applicant on the pretext that he was not entitled to disability pension, as he was released from service at his own request prior to 01.01.2006 and the provisions of the Army Head Quarter

letter dated 29.09.2009 were not applicable to him. The Principal Bench of the Armed Forces Tribunal vide its judgment dated 07.02.2012 passed in O.A. No.336 of 2001, Maj. (Retd.) Rajesh Kumar Bhardwaj vs. Union of India and others, relying on the Hon'ble Supreme Court decision in the case of Union of India and another vs. S.P.S. Vain and others (supra), has struck down the Notification dated 29.09.2009 to the extent of pre and post distinction of 01.01.2006.

19. The applicant retired voluntarily on 25.01.1992. At that time, the policy did not permit the disability pension to be granted to those personnel who had retired voluntarily. The policy for allowing disability pension to those who retired after 01.01.2006 was issued only on 29.09.2009 and had been made applicable with effect from 01.01.2006. The applicant approached this Tribunal on 10.05.2012. Therefore, we feel that the maximum relief, which the applicant can claim is with effect from 01.01.2006.

20. In view of the aforesaid discussion, we are of the view that the instant Original Application deserves to be allowed, partly. The letter dated 05.12.2011 (Annexure A/1) is hereby quashed. The applicant is entitled to get 60%

disability pension with effect from 01.01.2006. No orders
as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice S.C. Chaurasia)
Member (J)

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