RESERVED

COURT NO. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH,

LUCKNOW

O.A. No. 312 of 2015

Wednesday, this the 4th day of October, 2017

"Hon'ble Mr. Justice D.P.Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)"

Service No. 122340 "Y" Ex. MER (U/T) Rama Kant Singh, Group "Y" Son of Shyam Bahadur Singh, R/O Village- Semrauna, Post – Bhikharpur, Police Stn.- Kurebhar, Tehsil – Sadar, Pargana – Barausa, Distt. Sultanpur, U.P. Pin - 228121 …….... **Applicant**

Ld. Counsel appeared for the applicant – Shri S.B. Tiwari, Advocate

Versus

1. Union of India, Secretary to Govt of India Ministry of Defence, South Block, New Delhi – 1100112.

2. The Chief of the Naval Staff, Integrated HQS, M.O.D. (Navy), New Delhi – 110011.

3. The Commodore, Bureau of Sailors, Cheetah Camp, Mankhurd, Mumbai 400088.

4. Principal Controller of Defence Accounts (Pension), Draupatighat, Allahabad (U.P.) 211014.

5. The CDA (Navy) Pension Cell, No. 1 Cooperage Road, Mumbai – 400039.

-------**Respondents**

Ld. Counsel appeared for the Respondents - Shri V.P.S. Vats, Advocate, Central Govt. Standing Counsel

ORDER

"Per Hon'ble Mr. Justice Devi Prasad Singh, Member (J)"

1. Present O.A has been preferred by the Applicant under section 14 of the Armed Forces Tribunal Act, 2007, being aggrieved with the impugned order of discharge on account of alleged medical disability.

2. Shorn of unnecessary details, the facts of the case are that the Applicant was enrolled in the Indian Navy on 30.07.1997 and was discharged on 28.02.1998. It is alleged that the Applicant being down with fever and weakness was admitted to INHS Nivarini a Naval Hospital co-located with INS Chilka. Consequent to medical examination, he was diagnosed as a case of Thalassemia Intermedius (a condition where there is excess destruction of red blood cells consequent to relative preponderance of foetal haemoglobin compared to adult haemoglobin in the blood). According to the respondents, the disease Thalassemia Intermedius is a genetic disease and he was suffering from the disease before his enrolment in the Indian Naval Services. Hence he was denied disability pension since according the respondents, the same was not attributable to naval services. The Medical Board has adjudged that the condition rendered the individual disabled upto an extent of 16-19% based upon his

ability to carry out quotidian tasks. Being aggrieved with the decision of Invalidment from service, the Applicant filed a writ petition it being Writ Petition No 48612 of 2004 in the High Court of Judicature at Allahabad which stood transferred to Armed Forces Tribunal at Lucknow and was renumbered as TA No 1388 of 2010.

3. It is also alleged that the Applicant had undergone an Appeal medical Examination at AH (R&R) in the month of August 2006 wherein the Specialist concerned (Haematology) had certified that there was no evidence of disability under question (Thalassemia Intermedius). Hence he was certified to be medically fit. Inspite of directions issued by the Tribunal, the respondents have not produced the original record of medical report. It would appear that the Applicant moved an Application under RTI (Annexure A-7) which was responded with a note that the record has been lost in transit (Annexure A 124 to the T.A.). The Applicant preferred first appeal for grant of disability pension which was forwarded by the Base Hospital Delhi to CABS vide order dated 12.12.2006 (Annexure 3) but according to the respondents, the records were not received by CABS attributing it to loss of documents at GPO Mumbai which could not be traced out till date. The father of the Applicant was advised to submit fresh appeal but he declined to do so. However, in the month of August, the Applicant's case was reconsidered by the Medical Board

which held that the Applicant was not suffering from the disease in question (supra). This fact has been admitted in para 10 of the counter affidavit. For ready reference, para 10 of the counter affidavit is reproduced below.

> *"10. That, while the Applicant was discharged on the ground of 'Haemolysis or Hemoglobinopathy', it appears that his case was reconsidered by the appellate medical board in month of Aug 2006, which apparently held that the applicant was not suffering from the said disease, further comments can be offered only on perusal of proceedings of the said appeal medical board, which are not held in record."*

4. So far as the disease of Thalassemia is concerned, according to the medical dictionary, the same has been defined as under:

> "Thalassemia: A group of genetic disorders that involve underproduction of hemoglobin, the indispensable molecule in red blood cells that transports oxygen and carbon dioxide. All forms of hemoglobin are made up of two molecules: heme and globin. The globin part of hemoglobin is made up of four polypeptide chains. In normal adult hemoglobin (Hb A), the predominant type of hemoglobin after the first year of life, two of the globin chains are identical to each other and are called the alpha chains. The other two chains, which are also identical to each other but are different from the alpha

> chains, are called the beta chains. In fetal hemoglobin (Hb F), the predominant hemoglobin during fetal development, there are two alpha chains and two different chains called gamma chains. In thalassemia, there is a mutation (change) in one or both of the alpha or beta globin chains. Depending on which globin chain is affected, the mutation leads to underproduction or absence of that globin chain, a deficiency of hemoglobin, and anemia. The carriers of heterozygous forms of alpha and beta thalassemia have red cell anomalies that range from very mild to severe".

5. According to the dictionary as well as averments contained in para 14 of the counter affidavit, in the hospital, the Applicant was treated with Anti Malaria drug which resulted in subsidence of fever. The relevant portion from para 14 of the counter affidavit is reproduced below.

> "That the contents of para no.3 filed by the applicants. The appellant joined INS Chilka (Naval Training Base) on 30 Jul 1997 as Matric Entry Recruit under trainee (MER/UT).The screening tests prior to selection do not have test for Thallasemia, and consequently, the disability suffered by him could not have been rule out at this stage. The individual developed fever and weakness in Oct 1997 and was admitted to INHS Nivarini, a Naval hospital co-located with INS Chilka. He was noted to have pallor (paleness), hepatosplenomegaly (enlargement of Liver and spleen) and Low haemoglobin. The undertrainee was referred to

Command Hospital (Eastern Command), Koklata, which is a tertiary care medical centre, for further management. At this hospital, he was initially treated with anti-malaria drugs, which resulted in subsidence of fever. However, his haemoglobin was considerably low and he also had few immature Red Blood Cells (Reticulocytes) in his blood. The blood smear also contained markedly deformed Red Blood Cells which were not uniform in size (anisopoikilocytosis) with only 20% normal RBC. This raised the suspicion of anaemia being due to rapid destruction of Red Blood Cells (Haemolytic anaemia) for which the probable cause was Thallassaemia of the intermedius variant in the opinion of the super-specialist medical officer (Classified Specialist in Medicine and Medical Oncology) treating the individual. Consequently, the blood sample of the individual was subjected to Haemoglobin electrophoresis at a Civil Laboratory, which reported that the electrophoresis was matched with the blood form umbilical cord of a control subject, and was positive for HbF variant. It is pertinent that foetal blood (including blood from umbilical cord) contains this type of haemoglobin (HbF). This type of haemoglobin is replaced by normal haemoglobin over the course of the first year of life. However, in some person suffering from Thallaesemia, HbF persists into adult life, with increased possibility of destruction of the RBCs in varying amounts. In the present instance, since the individual did not have extensive haemolysis, he was diagnosed as having Thallassaemia intermedius. It is noteworthy that the disease can

> range and vary between mild to severe during life. Since this is not condition with a definitive treatment, the individual was recommended to be invalided out of service.

6. The case set up by the respondents is that since the disease is based on genetic condition which cannot be attributable to military service. From a perusal of the record, it appears that the original diagnosis of the Applicant was anaemia which was later-on medically opined as Thalassemia Intermedia.

7. In the present case, from the counter affidavit, it appears that the Applicant was suffering from malaria and was given anti malaria drug which is entirely different from the disease of Thalassemia intermediate which is a genetic disease. Thalassemia has been defined as under:

> *"Thalassemia is a genetic blood disease. People born with this disease cannot make normal haemoglobin which is needed to produce healthy red blood cells. Thalassemia is not infectious and cannot be passed from one individual to another by personal contact."*

8. According to medical literature, Thalassemia has been defined as under:

> *"Regular blood transfusions are the only treatment available to patients with thalassemia. It allows thalassemia patients to live relatively normal lives, however, a cure remains to be found for this*

disease. The genetic cause of thalassemia was one of the first genes discovered in the 1970s, yet 30 years later, gene therapy still eludes thalassemia patients.

Most thalassemia major patients require transfusions every 2-4 weeks, depending on the individual's consumption of the infused cells. While regular transfusions greatly contribute to the quality and length of life of thalassemia major patients, they also leave patients with an excess of iron in their bodies. This dangerous side effect is known as iron overload.

Regular blood transfusions provide thalassemia patients with the red blood cells they need to survive. Once these red blood cells are broken down, however, the body is left with an excess of iron.

Although iron is essential to the body, excess iron can lead to organ failure and death. It is necessary that this excess iron be removed, or chelated, because it stores in the vital organs of the body, such as the heart and liver.

Nowadays, drugs designed to remove excess iron (iron chelators) have significantly changed the prognosis of thalassemia major. Patients can grow and develop normally, with relatively normal heart and liver functions. Adult patients are living well and some have children of their own. Medical advances continue and promise to improve the life expectancy and quality of life further for those living with thalassemia."

9. According to an Article written by Marie B. Martin, RN and Craig Bultler, undoubtedly, the Thalassemia is a genetic or inherited blood disorder and it is inheritable also. The learned Author discussed the Thalassemia as under:

> *"Beta thalassemia intermedia is a genetic (or "inherited") blood disorder that is sometimes called Cooley's or Mediterranean anaemia or sometimes simply called thalassemia. Beta-thalassemia intermedia, the milder form of the disorder, reduces the body's ability to produce "adult" haemoglobin and causes anaemia. Your child is missing one of the "ingredients" to make normal adult hemoglobin. Hemoglobin is a part of the red blood cell.*
>
> *Thalassemia intermedia is less clinically severe than beta-thalassemia major. Often, people just use the term "thalassemia" to refer to any person with either thalassemia intermedia or thalassemia major. The distinction is the need for chronic red blood cell transfusions for "major" and no or intermittent transfusions for intermedia. (The DNA testing that helps determine thalassemia cannot reliably predict whether a child is major or intermedia; that determination is dependent upon the transfusion needs of the individual.) Thalassemia intermedia is an inherited disease. In order for a child to get thalassemia intermedia, both parents must carry the trait for thalassemia. If both parents carry the trait (also known as "thalassemia minor"), there is a 1-in-4 chance with*

each pregnancy that the child will be born with the severe from of the disease.

People who carry the thalassemia trait do not have ill effects from the carrier state and usually are unaware that they carry it. They may be told that they are slightly anaemic and have "small red blood cells".

No. Just as you cannot control what colour eyes your child will inherit, you cannot control whether your child will inherit thalassemia. You can, however, be tested prior to pregnancy then review the results with a genetic counsellor.

Unlike in thalassemia major, where the degree of severity of anaemia is more uniform from patient to patient, there is a great deal of variation in the severity of the anaemia. "

10. From the medical literature, undoubtedly thalassemia is an outcome of hereditary record but also it appears that ordinarily it is not curable and treatment is not the ante-malaria drug or the treatment provided by the hospital to the Applicant during the course of hospitalisation. There appears to be an error of judgment on the part of the respondents while discharging the Applicant from service. We have called for record to verify from the original record with regard to treatment provided to the Applicant and whether he was actually suffering from thalassemia intermedia but the

respondents have failed to produce the record. 11.In view of the above, though the Applicant has been discharged from service because of alleged disability suffering from thalassemia intermedia but the respondents have failed to produce the record. The treatment given to the Applicant does not seem to relate to thalassemia as prescribed by the Medical Literature. Admittedly, disability was cured at a later stage which is not possible in the event of the disease from which the Applicant was suffering i.e thalassemia intermedia.

Missing of record

11. In the present case, it appears that the original records are missing which according to the respondents had happened during transit for which the Applicant cannot be blamed. The applicant's records seem to have been lost during pendency of the proceedings before different forums including High Court. Otherwise also during pendency of proceedings, the medical records could not have been weeded out. Hence an adverse inference may be drawn against the respondents in view of the law settled by the Apex Court in which Hon'ble Supreme Court in the case reported in ***State, Inspector of Police vs. Surya Sankaram Karri*****,** 2006 AIR SCW 4576 held that a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the Court of

Law, fails and/or neglect to produce the same, an adverse inference may be drawn against him. The law gives exclusive discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-à-vis the facts of the particular case. The discretion conferred by Section 114 of the Evidence Act is an inference of a certain fact drawn from other proved facts. The Court applies the process of intelligent reasoning which the mind of a prudent man would do under similar circumstances unless rebutted.

12. Apart from the above in August 2006, the Applicant had been held to be fit for service. He has been paid service element from 1998 but not the disability pension.

13. Since the Applicant is held to be entitled to disability pension to the extent of 14 to 19% and since he recovered from his health in August 2006, in view of law settled by the Apex Court in the case of **Sukhvinder Singh (supra)**, the Applicant seems to be entitled to disability pension to the extent of 14 to 19% which may be rounded off to 50%.The relevant portion of the aforesaid decision being relevant is quoted below.

> *"7. …….Therefore, on both counts viz. disability to the extent of less than 20 per cent, as well as it having*

been occurred in the course of Military Service, the findings have to be in favour of the Appellant.

8. Paragraph 183 of the Pension Regulations for the Army 1961, (Part-I) stipulates as under:-

"183. The disability pension consists of two elements viz. Service element and disability element which shall be assessed as under:

(1) Service element …..

(2) Disability element ….. ……..

In case where an individual is invalidated out of service before completion of his prescribed engagement/service limit on account of disability which is attributable to or aggravated by military service and is assessed below 20 percent, he will be granted an award equal to service element of disability pension determined in the manner given in Regulation 183 Pension Regulations for the Army Part-I(1961). "

14. In view of the above we are directing for payment of disability pension for the reason that on account of missing of record and pleading, the respondents have failed to establish with regard to Applicant's disability because of thalassemia Intermedia.

15. Now the question that surfaces is what relief may be granted to the Applicant. The payment of disability pension is a beneficial provision under the Army Act and regulations framed there-under. In the present case, two views are possible. Hence the one which is beneficial to the Applicant should be adopted. Admittedly, the applicant was fit for

service during enrolment in July 1997. He was further declared fit during appeal medical examination at A.H.(R/R) in August 2006. No prayer has been made against the order of discharge. The only prayer made by the Applicant is for payment of disability pension.

16. Accordingly, the O.A. is allowed. The Applicant is held entitled to disability pension to the extent of 16 to 19% which on being rounded off, would come to 50% from the date of discharge. Let arrears of disability pension be paid within a period not exceeding four months and in case, arrears is not paid within four months, the applicant shall be entitled to interest at the rate of 9% till the date of actual payment.

17. No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

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

Dated : October, ,2017
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