Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

M.A. No. 1804 of 2018
In re:
OA No. (Nil) of 2018

Tuesday, this the 23rd day of October, 2018

"Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)"

Ex Sep Bir Pal (No. 4174180), s/o of Shri Kallu Singh, Village-Nauhari, Post-Vasundhara, P.S. Awargarh, District-Etah (U.P.).

….. Applicant

Ld. Counsel for the Applicant: **Col A.K. Srivastava (Retd), Advocate**

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi-110011.

2. The Chief of Army Staff, IHQ of MoD (Army), South Block, New Delhi110011.

3. OIC Records, The Kumaon Regiment Landsdown (U.K.).

……..Respondents

Ld. Counsel for the Respondents: Dr. Shailendra Sharma Atal, Advocate

ORDER (Oral)

1. By means of this O.A. the applicant has made the following prayers:-

> "(a) Issue/Pass an order or direction of appropriate nature to the respondents to set aside their letter dated 07/07/2018 rejecting the petition of the applicant dated 02/06/2018 **(Annexure No.A-1).**

(b) Issue/Pass an order or direction of appropriate nature to the respondents to set aside the Summary Trial proceedings dated 19/03/1985 **(Annexure No. A-2).**

(c) Issue/Pass an order or direction of appropriate nature to the respondents to set aside the Summary Trial proceedings dated 07/12/1988 **(Annexure No. A-3).**

(d) Issue/Pass an order or direction of appropriate nature to the respondents to set aside the Summary Trial proceedings dated 26/04/1989 **(Annexure No. A-4).**

(e) Issue/Pass an order or direction of appropriate nature to the respondents to set aside the Summary Trial proceedings dated 19/10/1989 **(Annexure No. A-5).**

(f) Issue/Pass an order or direction of appropriate nature to the respondents to grant all consequential benefits.

(g) Allow this application with costs and 18% rate of compound interest."

2. This O.A. has been filed, as per Office report after delay of more than 33 years.

3. Learned counsel for the respondents has raised a preliminary objection that earlier O.A. alongwith M.A. No. 257 of 2017 with M.A. No. 1055 of 2017 & M.A. No. 1236 of 2017 In re: O.A. No. Nil of 2017 was filed by the applicant challenging the discharge order dated 13.11.1989. The Tribunal heard the aforesaid matter on the point of limitation and vide order dated 28.11.2017 it was held by the Tribunal that the applicant has miserably failed to explain the delay in filing the O.A. Accordingly the application for condonation of delay was dismissed and consequently the O.A. was rejected.

4. It is submitted by the learned counsel for the respondents that in the present O.A. the applicant has virtually prayed for the same relief though it has been worded differently, therefore, this O.A. is not maintainable because it has already been held by the Tribunal that the applicant has utterly failed to explain the huge delay.

5. Learned counsel for the applicant has argued that in the earlier O.A. filed by the applicant he had challenged his discharge order while in the instant case he has challenged the order/ letter dated 09.07.2018. The letter dated 09.07.2018 has been annexed as Annexure No.A-1 and it reads as under:-

"Tele Mil: 2028
Tele Civ: 05968-221358
Mail ID: hill.binsar@nic.in

4174180 /SR/SP9Rev)

REGD/SDS
Records The Kumaon Regt
Pin-900473
C/o 56 APO
09 July 2108

No 4174180W Ex Sep
Bir Pal
Vill- Nauhari
PO-Vasundhara
PS- Awargarh
Distt- Etah (UP)

ILLEGAL & ARBITRARY DISCHARGED FROM SERVICE PURSUANT TO 4 RED INK ENTIRES IN R/O NO 4174180 EX SEP BIR PAL

1. Please refer to your petition dated 02 Jun 2018

2. It is submitted that you were enrolled in the Army on 12 Jan 1980 and discharged from service on 13 Nov 1989 being undesirable soldier having four red ink entries with 09 years, 10 months & 01 day service, whereas as per policy 15 years of qualifying service is mandatory to earn

pension. Hence you are not eligible for grant of service pension.

3. The above fact has been communicated to you a number of times vide following letters (Copy enclosed)

   (a) 4174180/SR/SP/Gen dated 20 Jun 2008
   (b) 4174180/SP/SR dated 16 Jul 2016
   (c) 4174180/SP(Rev) dated 13 Oct 2016
   (d) 4174180/SP/(Rev) dated 05 Jun 2017

4. It is further intimated that there is No provision exists for cancellation of discharge certificate.

Enclosures: Four copies only
Copy to:
12 KUMAON - For information please.
PIN- 9113012
C/O 56 APO"

6. A plain reading of the aforesaid letter shows that the applicant has made prayer for cancellation of discharge certificate and being aggrieved by the rejection of the said order he has filed the instant O.A. Thus, we find force in the submission of the learned counsel for the respondents that the applicant has virtually challenged his discharge order. Other prayers of the applicant are to set aside the summary trial proceedings, whereby he was discharged from service as undesirable soldier. It transpires from a perusal of Annexure No.A-1 filed to the O.A. that setting aside of the same would amount to setting aside the discharge of the applicant, which was the prayer in the earlier O.A. filed by the applicant.

7. As per report of the office there is delay of 33 years and 29 days in filing this O.A.

8. We have considered the ground taken by the applicant in his application for condonation of delay. We do not find it sufficient and we are of the considered view that such a delay could not be explained by the applicant and he has miserably failed to explain the delay.

9. The law on the point of delay is well settled. Hon'ble Apex Court in the case of **Union of India vs. M.K. Sarkar** *(2010) 2 SCC 59* has held that the limitation has to be counted from the date of original cause of action and belated claim should not be entertained. At this stage we would like to reproduce the Para-16 of the above judgment which reads as under:-

> " 16. A court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation is with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect."

10. We would like to deal with the issue of limitation raised in the instant case in the light of proposition of law as laid down by the Hon'ble Apex Court in catena of decisions. In the case of **D.Gopinathan Pillai versus State of Kerala and another**,

reported in *(2007) 2 SCC 322,* the Hon'ble Supreme Court has observed as under:

> *"5. We are unable to countenance the finding rendered by the Sub-Judge and also the view taken by the High Court. There is no dispute in regard to the delay of 3320 days in filing the petition for setting aside the award. When a mandatory provision is not complied with and when the delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay, only on the sympathetic ground. The orders passed by the learned Sub-Judge and also by the High Court are far from satisfactory. No reason whatsoever has been given to condone the inordinate delay of 3320 days. It is well-considered principle of law that the delay cannot be condoned without assigning any reasonable, satisfactory, sufficient and proper reason. Both the courts have miserably failed to comply and follow the principle laid down by this Court in a catena of cases. We, therefore, have no other option except to set aside the order passed by the Sub-Judge and as affirmed by the High Court. We accordingly set aside both the orders and allow this appeal."*

While in the case in hand there is delay of more than 33 years (12074 days).

11. In another case reported in 1994 (Supp.) 2 SCC 195- **Ex. Capt. Harish Uppal Vs. Union of India and others** where the controversy was relating to entertainment of a petition filed under Article 226 of the Constitution of India the Hon'ble Supreme Court held that parties should pursue right promptly and not sit over their rights. The party could not be permitted to sleep over their rights and choose to avail the remedy after

inordinate delay. Relevant portion from the case of **Ex. Capt. Harish Uppal** (supra) is reproduced as under:-

> "It is a well settled policy of law that the parties should pursue their rights and remedies promptly and not sleep over their rights. That is the whole policy behind the Limitation Act and other rules of limitation. If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of the Constitution of India – and that is what precisely the Delhi High Court has done. We cannot say that the High Court was not entitled to say so in its discretion."

12. However, in another judgment reported in 1997 (7) SCC 556- **P.K. Ramachandran Vs. State of Kerala and another** their Lordships has cautioned the High Court not to condone the delay in a mechanical manner while deciding the issue relating to application filed under Section 5 of the Limitation Act. Relevant portion from the case of **P. K. Ramachandran** (supra) is reproduced as under:-

> "3. It would be noticed from a perusal of the impugned order that the court has not recorded any satisfaction that the explanation for the delay was either reasonable or satisfactory, which is an essential prerequisite to condonation of delay."……..
>
> "6. Law of Limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extent the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside."…..

13. In a case reported in 2001 (6) SCC 176; **M.K. Prasad Vs. P. Arumugam**, the Hon'ble Supreme Court held that while construing the provisions of Section 5 of the Limitation Act we should keep in mind that after expiration of the period of limitation prescribed for filing an appeal, a right is created in favour of decree holder to treat the decree as binding and that is why discretion to condone the delay has been given to the Courts. Relevant portion from the judgment of **M.K. Prasad** (supra) is reproduced as under:-

> "In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

14. Again their Lordships in the case of **M.K. Prasad** (supra) proceeded to held as under:-

> "Again in State of W.B. v. Administrator, Howrah Municipality and G. Ramegowda, Major v. Special Land Acquisition Officer this Court observed that the expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice where gross negligence or deliberate inaction or

> lack of bona fides is not imputable to the party seeking condonation of delay. Law of limitation has been enacted to serve the interests of justice and not to defeat it. Again in N.Balakrishnan v. M. Krishnamurthy this Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing mala fide or deliberate delay as a dilatory tactic, the court should normally condone the delay."

15. Virtually the applicant has filed the instant O.A. for the same relief, which was prayed in the earlier O.A. by putting the prayer in different words, amounts to abuse of process of the law. Therefore, we hereby **reject** the application for condonation of delay with a cost of Rs.5000/-, which has to be paid by the applicant within a period of one month from today, failing which the same shall be recovered from him as arrears of land revenue.

16. Since the application for condonation of delay in filing the O.A. has been rejected, consequently the O.A is also **dismissed** in view of the discussions made above.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

October 23, 2018

JPT