

(2020) 09 DEL CK 0067

In the Delhi High Court

Case No : Civil Writ Petition No. 6093 Of 2020

Ex Jwo Kewal Krishan Vij

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 08-09-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Arms Forces Tribunal Act, 2007 — Section 30, 31

Citation : (2020) 09 DEL CK 0067

Hon'ble Judges : Rajiv Sahai Endlaw, J;Asha Menon, J

Bench : Division Bench

Advocate : Bharat Singh, Abhay Prakash Sahay, Indira Goswami, Mannu Singh

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

CM No.21897/2020 (for exemption).

1. Allowed, subject to just exceptions and as per extant rules.

2. The application is disposed of.

W.P.(C) 6093/2020.

3. The petition impugns the order dated 17th March, 2020 of the Armed Forces Tribunal, Principal Bench, Delhi (AFT), of dismissal of OA No.1051/2018 filed by the petitioner (impugning the order dated 5th January, 2018, rejecting the claim of the petitioner for disability pension) and seeking mandamus to the respondents Indian Air Force (IAF) to award disability pension, from 1st April, 1979 onwards to the petitioner, along with interest at 12% per annum.

4. This petition under Article 226 of the Constitution of India has been preferred, relying on Balkrishna Ram Vs Union of India (2020) 2 SCC 442.

5. The AFT has dismissed the OA preferred by the petitioner solely on the ground

that the challenge therein, made/filed in the year 2018, to the order dated 7th June, 1979, was belated and could not be considered. It was held that the petitioner was informed as far back as on 7th June, 1979, that the claim of the petitioner for disability pension, after having been invalidated out of the Air Force on 31st March, 1979 (owing to low medical category), had been rejected and the appellant was also informed of the remedy of appeal thereagainst but had not preferred any appeal and allowed the order to attain finality and could not be permitted to challenge the same after more than 38 years.

6. Though no error can be found in the reasoning given by the AFT in the impugned order and we do not consider this to be a fit case, also, for going into the question of maintainability of a writ petition in this Court owing to the provisions of Sections 30 and 31 of the Arms Forces Tribunal Act, 2007, but the counsel for the petitioner has based his claim before this Court solely on the order dated 13th May, 2019 of the AFT in OA No.721/2017 titled Ex-Gunner Vasant Mokashi Vs. Union of India whereby the claim of the petitioner therein, who had also been invalidated out on 28th August, 1978, for disability pension, made in the year 2017, was allowed, though with effect from three years prior to the institution of that petition in the AFT. The contention of the counsel for the petitioner is that though Ex-Gunner Vasant Mokashi supra, similarly placed as the petitioner herein, has been granted disability pension inspite of the same being highly belated but the case of the petitioner, who was a Junior Warrant Officer (JWO), has been rejected.

7. The claim of the petitioner before the AFT was, that (i) the petitioner was enrolled in the IAF in a medically and physically fit condition; (ii) a member of the IAF is to be presumed to be in sound physical and mental condition upon entering service, if there is no note or record to the contrary at the end of the entry and in the event of his subsequently being invalidated out from service on medical grounds, any deterioration in his health is to be presumed due to service conditions; (iii) the petitioner was under stress and strain due to the rigours of service conditions "which may have led to the occurrence of disability"; (iv) the action of the respondents IAF of denying disability pension to the petitioner is illegal; reliance is placed on Dharamvir Singh Vs. Union of India (2013) 7 SCC 316 and on Union of India Vs. Rajbir Singh (2015) 12 SCC 264; (v) for the purpose of determining attributability of disease to military service, what is material is whether the disability was detected at the time of enrolment and if no disability was detected at that time, then it is presumed that disability arose while in service; and, (vi) therefore the disability of the petitioner is to be considered attributable to or aggravated by service and the petitioner is entitled to get disability pension.

8. The case of the respondents IAF before the AFT, as recorded in the impugned order was, that (a) medical documents of the petitioner had been destroyed after expiry of retention period and no information about the assessment and durability of the disability was available; (b) however the available records

showed that the petitioner's disability was considered as neither attributable to nor aggravated by military service; (c) the petitioner was informed about the rejection of his disability pension vide order dated 7th June, 1979 and was advised to prefer appeal against the rejection of the claim, if was not satisfied with the rejection; however the petitioner did not prefer any appeal; and, (d) thereform, it can be presumed that the petitioner was satisfied with the rejection of the disability pension claimed.

9. The AFT has dismissed the OA No.1051/2018 preferred by the petitioner, reasoning that (i) the only question that needed to be answered was whether the decision could be taken of the attributability or aggravation of disease, whose medical documents had been destroyed; (ii) the records showed that the petitioner was enrolled on 11th December, 1964 and was invalidated out after rendering 24 years and six months of service; (iii) the petitioner has been granted service pension; however disability pension claim was rejected by the competent authority and the petitioner was advised to prefer appeal, if not satisfied; (iv) the petitioner did not prefer appeal and instead kept quite; (v) the documents of the petitioners had been destroyed on expiry of retention period and whatever limited information was available in the long roll, indicated that the petitioner's disability was considered as neither attributable to nor aggravated by service; (vi) Supreme Court in *C. Jacob Vs. Director of Geology and Mining Indus. Est.* (2008) 10 SCC 115 has held that a dead or stale claim is not permitted to be revived and a person who sleeps over his right is not entitled for any indulgence; (vii) in the instant case, the petitioner was advised by the respondents IAF vide order dated 7th June, 1979 to prefer appeal if he was not satisfied with the rejection of disability pension; (viii) the act of the petitioner of not preferring any appeal and remaining silent gave rise to a presumption that he was satisfied that he was not entitled to disability pension; (ix) moreover, the respondents IAF having destroyed the medical documents in accordance with the policy on preservation of service documents, the opinion of the Medical Board on why the disability was held to be neither attributable to nor aggravated by service could not be known and without knowing the same, the same could not be overruled; (x) moreover, the law on the importance of the opinion of a Medical Board is well settled in *Union of India Vs. Ex. Rfn Ravinder Kumar* (2015) 12 SCC 291, holding that opinion of medical board should not be overruled judiciously unless there is a very strong medical evidence to do so; it was held that opinion of Medical Board should be given primacy in deciding cases of disability pension and the Court should not grant such pension brushing aside the opinion of the medical authorities recording a specific finding to the effect that the disability was neither attributable to nor aggravated by military service; the Court should not ignore such a finding, for the reason that the Medical Board is a specialized authority composed of expert medical doctors and is the final authority to give opinion regarding attributability and the aggravation of the disability due to military service and the conditions of service resulting in displacement of the individual; and, (xi) since the medical documents of the

petitioner had been destroyed, no decision could be taken in vacuum on attributability or aggravation of the disability, without perusing the reasons based on which the original Medical Board had decided to consider the disability as neither attributable nor aggravated by service.

10. The petitioner, in this petition, in addition to what is already recorded in the impugned order of the AFT, has pleaded that (a) the petitioner was found medically fit in his entire service period of 23 years, in the annual medical checkups; (b) the petitioner was suddenly diagnosed with Generalized Epilepsy - 345; (c) mere weeding out of the medical documents cannot disentitle the petitioner to disability pension; (d) the petitioner is 84 years old who is living in penury, not having sound monetary condition, due to various liabilities and his medical condition is deteriorating day-by-day; (e) the petitioner has not been treated equally as Ex-Gunner Vasant Mokashi supra; (f) at the time of recruitment, a recruit goes through a rigorous medical examination and if any injury / disability is found then a note is endorsed by a medical officer and thereafter he has to go for yearly medical check-up; in that situation, if any disability occurs, then it amounts to attributable and aggravated by military service, as held in Dharamvir Singh supra; (g) even otherwise, a claimant is not to be called upon to prove the conditions of entitlement and has to receive the benefit of any reasonable doubt; thus, if the documents are weeded out by the respondents IAF, the benefit of doubt is to be given to the petitioner and not to the respondents; (h) a claim for disability pension can never be stale; (i) Union of India Vs. Tarsem Singh (2008) 8 SCC 648 on continuing wrongs is invoked; (j) in Angad Singh Titaria Vs. Sukhvinder Singh (2015) 12 SCC 257 and in other judgments, the opinion of the Medical Board has been overruled and thus Ravinder Kumar supra stands diluted; (k) the petitioner is bearing the maintenance of his divorced daughter and her children who are not getting any maintenance; (l) the daughter-in-law of the petitioner is also dumb and deaf; (m) the petitioner has rendered four war services during his entire service and the highly tense war environment led and caused the disease of Generalized Epilepsy - 345; (n) the said disease was detected only in November, 1978, after the petitioner had served for 23 years and 11 months; (o) the petitioner was downgraded to Category-E by the Medical Board and which at that time amounted to 100% disability; and, (p) on 31st March, 1979, the petitioner was invalidated out from service without any disability element.

11. The documents filed by the petitioner before the AFT and copies of which have been filed before this Court include, (i) a certificate dated 9th November, 1978 of the President of the Invalidating Board to the effect that the petitioner was fit for suitable employment in civil; (ii) the communication dated 27th October, 2014 of the respondents IAF to the Directorate of Air Veterans on the subject of grant of invalid disability pension to the petitioner and stating that in the absence of service medical documents, the case of the petitioner could not be examined; (iii) the response dated 16th October, 2015 to the query under Right to Information Act, 2005, to the effect that the documents pertaining to

the petitioner have been destroyed after retention for stipulated period; (iv) a representation dated 5th November, 2015 of the petitioner to the Minister of Defence, for grant of disability pension in view of the judgment of the Supreme Court; (v) the communication dated 15th December, 2015 of the respondents IAF to the petitioner, rejecting the representation dated 5th November, 2015 of the petitioner to the Minister of Defence; (vi) communication dated 19th September, 2017 of the petitioner, again for disability pension; and, (vii) profile of the petitioner showing the date of birth of the petitioner as 27th November, 1936 and wherefrom it transpires that the petitioner, at the time of being invalidated out, was about 40-41 years of age and was being paid pension of Rs.36,068/- per month and was having four daughters and had not incurred any wounds or disability in any of the war services and was performing the duties of an Engine Fitter and was having qualifications of Diploma in Technology (Aeronautics) and Diploma in Mechanical Engineering.

12. The aforesaid documents reveal, that (a) though the petitioner from 7th June, 1979 till 2014 was satisfied with the finding returned by the Medical Board and the Invalidating Board to the effect that the Generalized Epilepsy-345, for the reason whereof the petitioner was invalidated out, was not attributable to or aggravated by service, but on pronouncement of Dharamvir Singh supra decided to make a claim for disability pension; (b) though the petitioner started representing in this regard from the year 2014 onwards and each of which representations was rejected immediately, but the petitioner still waited for nearly six years for approaching the Court; (c) the petitioner is a educated technical person but not a combatant and though participated in the wars but only rendering technical services of an Engine Fitter; (d) the petitioner, at the time of invalidating out, was about 40-41 years of age and had been found fit for suitable civil employment and must have enjoyed civil employment for about 20 years after being invalidated out and of which no particulars have been given; and, (e) the petitioner is already getting pension of more than Rs.36,068/- per month.

13. As far as the action of the petitioner, of having started claiming disability pension in the year 2014, on pronouncement of Dharamvir supra, after more than 34 years of being invalidated out, all that can be said is that the judgment of a Court though can furnish a cause of action for an appeal or other remedies thereagainst but cannot be a cause of action for another, unless similarly placed. To gauge, whether the petitioner can be said to be similarly placed as Dharamvir Singh supra, we have perused the said judgment and find, (i) the petitioner therein to be a Sepoy who was boarded out after rendering nine years of service and on the ground of 20% permanent disability, upon being found to be suffering from Generalized Seizure (Epilepsy); (ii) the petitioner therein to have sought his remedies against denial of disability pension, without any undue delay; (iii) the matter to have been decided, applying the Entitlement Rules for casualty Pensionary Awards, 1982, the Guide to Medical Officers (Military Pension), 1980 and the General Rules of Guide to Medical Officers (Military Pensions), 2002, all

promulgated after the petitioner was invalidated out on 31st March, 1979; and, (iv) the Division Bench of the High Court to have decided against the petitioner therein, applying *Union of India Vs. Keshar Singh* (2007) 12 SCC 675. The said facts do not place the petitioner at par with *Dharamvir Singh supra*, for pronouncement of *Dharamvir Singh supra* to furnish any cause of action to the petitioner. The petitioner, who has challenged the findings of Medical Board, after decades of delay and after all records have been weeded out in accordance with law and after all legal and statutory parameters have changed, cannot equate himself with *Dharamvir Singh supra* and cannot seek application of the principles and Rules which have since come into force. Not only so, there is also a difference between the duties performed by *Dharamvir Singh supra* and the duties which the petitioner was performing and which has a vital impact on the test of causation of the disease, even if suffered by *Dharamvir Singh supra* and the petitioner, were to be the same.

14. As far as the reliance by the petitioner on *Ex-Gunner Vasant Mokashi supra* is concerned, though he also had approached belatedly, after 39 years and after his medical records had been destroyed but he was invalidated out due to "neurosis" and which in the case of a Gunner was held by the AFT to be attributable to service. A reading of the order of the AFT does not show the said aspect to have been controverted also by the respondents therein. The relief of grant of disability pension with arrears since three years prior to the institution of the petition, was granted, literally unopposed and cannot constitute a precedent even for AFT, in the case of the petitioner whose claim was opposed. Not only so, the disease from which *Ex-Gunner Vasant Mokashi supra* was found to suffer and the disease from which the petitioner was found to suffer, are entirely different and there is nothing to show that Epilepsy can be said to be attributable to service or aggravated by service as a educated Machine Fitter in the respondents IAF. A Machine Fitter in the respondents IAF is likely to work at the base and not be at the war front, to suffer from any anxieties leading to Epilepsy, as pleaded by the petitioner. In fact the petitioner has not pleaded or shown that Epilepsy can at all be caused or aggravated by tense environment as pleaded by the petitioner. Moreover the petitioner, before the AFT, did not even cite or refer to the order in *Ex-Gunner Vasant Mokashi supra*.

15. There is another aspect of the matter. The petitioner, by delaying the filing of this petition by more than 38 years has not only lead to a situation of the respondents IAF's record being weeded out in accordance with Rules therefor but the medical condition of the petitioner also, in the last 38 years must have changed drastically and no independent assessment even is possible today after such long lapse of time.

16. As far as the contention of the counsel for the petitioner, of the petitioner being entitled to equality with *Dharamvir Singh supra* and *Ex-Gunner Vasant Mokashi supra* is concerned, we have already hereinabove held the petitioner to be not similarly placed as *Dharamvir Singh supra*. As far as the aspect of delay is

concerned, no doubt in Ex-Gunner Vasant Mokashi supra, the AFT condoned the said delay confining the claim for arrears to three years preceding the filing of the petition but from a reading of the order, it appears that there was no serious opposition thereto inasmuch as there is no discussion on the said aspect. On the contrary, the petition filed by the petitioner before the AFT was opposed, by filing a reply including on the ground of delay. The order of condonation of delay is a discretionary order and exercise of discretion to condone the delay in one case in which there is no or not much opposition, does not form a precedent for condonation of delay in another case, though generally, same parameters have to be applied by the Court in all cases. However in exercise of jurisdiction under Article 226 of the Constitution of India, it cannot be said that the discretion exercised by the AFT in the impugned order, to not condone the delay of 38 years, has been exercised illegally or perversely, to invite interference by this Court. The claim for disability pension cannot be equated to a claim for pay / emoluments in accordance with Rules or claim for other recurring payments which if not in accordance with law or contract can be claimed at any time. Disability pension, though payable month-by-month, payment thereof is dependent on a finding of disability attributable to or aggravated by service and in the absence of a finding of disability attributable to or aggravated by service, there can be no claim for disability pension; such finding is a finding of fact and not of law or contract, claim wherefor even if highly belated can be made at any time and granted with arrears for the period within limitation; on the contrary finding, even if erroneous, of "no disability attributable to or aggravated by service" if not challenged within reasonable time attains finality and a claim for disability pension cannot be made at any time, after decades, claiming the same to be a recurring payment. The counsel for the petitioner is misapplying Tarsem Singh supra.

17. We therefore do not find any ground to entertain the petition.

18. Dismissed.