

(2012) 01 DEL CK 0255

In the Delhi High Court

Case No : Writ Petition (C) No. 148 of 2012

Ex. Sep. Sri Chand

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0255

Hon'ble Judges : J.R. Midha, J;Anil Kumar, J

Bench : Division Bench

Advocate : S.R. Kalkal, Col. Retd, for the Appellant; Himanshu Bajaj, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—Issue show cause notice to the respondents as to why rule nisi be not issued.

2. Mr. Himanshu Bajaj, Advocate, accepts notice on behalf of the respondents and states that no reply to the writ petition is to be filed without prejudice to the rights and contentions of the respondents regarding merit of the case. However, the respondents do not dispute the law laid down by the Supreme Court and the High Court in the various cases holding that regarding the claim of pension/ disability pension, bar of limitation would not apply and if there is a delay in preferring the claim, relief can be molded by denying the pension from the date it is due and payable and restrict the benefits for a period of three years preceding the date when the applicant approaches the Court.

3. With the consent of the parties, the matter is taken up for final disposal.

4. The petitioner has challenged the order dated 6th September, 2011 passed by the Armed Force Tribunal, Principal Bench, New Delhi in O.A.No.290/2011, titled as "Ex.Sepoy Sri Chand v. Union of India & Ors.", dismissing the petition as belated on the ground that the petitioner had retired in the year 1992 and the petition has been filed after 19 years with regard to his pension. Therefore, the

same cannot be entertained at such a belated stage and dismissed the petition.

5. The petitioner has contended that he was enrolled in the regular Army as a Combatant Soldier on 16th October, 1961 and was discharged from the Army service on 1st November, 1976 after completing 15 years and 16 days in the Army service.

6. The petitioner was enlisted again in the Defence Security Corps on 6th August, 1977 and retired on 29th February, 1992 after serving for 14 years and 7 months.

7. The petitioner has contended that since he had completed 14 years and 7 months of service in the Defence Security Corps, his service pension claim should have been submitted by the Defense Security Corps after condoning the deficiency of service for pension under Rule 125 of Pension Regulations for the Army, 1961, Part-I, which contemplates condonation of deficiency in service for eligibility service/reservist pension.

8. According to the petitioner, the minimum length of service required is 15 years as per Regulation 132, Pension Regulation for the Army, 1961, Part-I and the respondents failed to submit the service pension claim of the petitioner and thus, the delay in his case is attributed to the respondent authorities. The petitioner contended that he is a semi literate individual having his origin from a village of Rajasthan in one of the most backward areas and he did not know of his rights. At the time he was informed that since he had not completed 15 years of service, he was not entitled for any service pension. The petitioner had given a legal notice u/s 80 of the CPC on 4th May, 2011 for release of the service pension of the petitioner, which was replied to by letter dated 26th May, 2011 detailing that petitioner had opted for enhanced pension. Since the petitioner asked for a copy of the option letter signed by him, another letter dated 16th July, 2011 was sent under the Right to Information Act, 2005.

9. By reply dated 26th May, 2011, it was revealed that the petitioner had initially enrolled in the Army Medical Corps on 16th October, 1961 and was discharged w.e.f 31st October, 1976 rendering 15 years and 16 days of service in the said establishment. He thereafter, voluntarily got re-enrolled in the DSC service on 6th August, 1977 in the rank of Sepoy (DSC/GD) and his former service pension was suspended and his former service of 15 years 16 days was counted with the DSC service in terms of the policy existing at that time under the Regulation 267 (d) of the Pension Regulations. It was also discussed that upon the issuance of the revised terms and conditions vide Govt. of India, Ministry of Defence, letter No.PC III to ME No. A 00592/DSC-2/54-C/D (GS-IV) dated 3rd March, 1983, the petitioner opted to cease to draw his former service pension and consequently his former service was counted with the DSC service. Therefore, his former pension was suspended w.e.f. 25th January, 1983 i.e. from the effective date of order and his former service was counted with DSC service. Thus, the petitioner had availed the monetary benefit by stepping up of his pay in the DSC service and he was transferred to pension establishment on attaining the age of

superannuation of 55 years w.e.f. 29th February, 1992 under Rule 13 (3) item III (i) of Army Rule, 1954. The petitioner has thus, rendered aggregate qualifying service of 29 years and 7 months by counting his both spells of service for which he was granted the enhanced rate of service pension @ `413/ per month w.e.f. 1st March, 1992 vide corrigendum PPO No. S/C/2075/1991. Therefore it was concluded that the petitioner was not entitled for the grant of the Second Service Pension as he had already been granted the service pension for the aggregate qualifying service rendered by him in both the spells, based on the option exercised by him.

10. For his plea that his claim is not barred by delay and latches, the petitioner relied on 2000 (4) SCT 194 DB (P&H), S.R. Bhanrale Vs. Union of India and others, , Haryana State Electricity Board Vs. State of Punjab and Haryana and Others, , Haryana State Electricity Board v. Station of Punjab; SLR 1992 (3) 662, Roshan Lal v. Union of India; 104 (2003) DLT 5 DB, Ct.Jasbir Singh v. Union of India & Ors.; 2007 (2) SCT 72 (SC), Shiv Dass v. Union of India & Ors.; 2009 (1) AISLJ 371, Union of India v. Tarsem Singh holding that if the issue relates to payment of pension or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of a third party. The petitioner also relied on the decision of this Court in the case of Ex.Sep. Hari Ram v. Union of India & Ors., 2003 (2) SCT 582 (Del) DB; Ex. Cfn Maha Singh Dagar v. Union of India & Ors., O.A.No.64/2009 and Ex. Cra Kulwant Singh Rathee v. Union of India & Ors., T.A.No.184/2009 and the decision of a Division Bench of this Court in W.P. (C) 4817/2011, Ram Niwas Bedharak v. Union of India & Anr., wherein the decision of the Tribunal dismissing the petition on the ground of delay and latches though the petition pertains to pension/disability pension was set aside and the OA filed by the applicant was restored for adjudication on merits by the Tribunal.

11. This Court has heard the learned counsel for the parties. This is not disputed that the Armed Forces Tribunal has dismissed the Original application merely on the ground that it is extremely belated as the petitioner retired back in the year 1992 and the application with regard to his pension has been filed belatedly.

12. The Tribunal has not disputed the fact that the petition related to the pension. The petitioner has relied on a number of judgments the ratio of which is not disputed even by the respondents. However, the Tribunal has not considered as to how the ratio of the precedents relied on by the petitioner is not applicable in the case of the petitioner whose claim is with regard to his pension. A division Bench of this Court in WP (C) 4669 of 2010 titled as Ex.Sigmn Ganga Rama Sharma Vs UOI & ors. decided on 29.4.2011 had held as under:

5. At the first blush, the Tribunal's decision that the claim was extremely belated appears to be plausible, but we note that on the issue of pensionary dues, in the decision reported as Union of India (UOI) and Others Vs. Tarsem Singh, , on the principle of law of continuing wrong, the Supreme Court has held that a judicial remedy pertaining to claim for pension may be invoked belatedly and if invoked

would have to be decided on merits. On this issue of delay, the Supreme Court has held that the Court concerned would take cognizance thereof and if the claim is allowed, the implementation thereof would be restricted to the previous three years, when the claim before the Court was made. The reason is obvious. A money claim preceding three years, from the date when a judicial remedy is invoked would be barred by limitation.

6. The Tribunal ought to have taken note of the legal principle of continuing wrong with respect to limitation and since the Tribunal has not so done, we hold that there is a jurisdictional error in the order dated 25.2.2010 four which we dispose of the petition questioning the order dated 25.2.2010.

13. In Tarseem Singh (supra) at page 649 the Supreme Court had categorically held as under:

4. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and Others, , explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

31. ... It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.

5. In M.R. Gupta Vs. Union of India and others, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1-8-1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held: (SCC pp. 629-30, para 5)

"5. ... The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of

limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion, etc., would also be subject to the defence of laches, etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time-barred...."

6. In *Shiv Dass Vs. Union of India (UOI) and Others*, this Court held: (SCC p. 277, paras 8 & 10)

8. ... The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. ... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will

be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

14. In the circumstances, the Tribunal has committed jurisdictional error in dismissing the Original application of the petitioner seeking pertaining to his pension. In the facts and circumstances, it is appropriate to set aside the order of the Tribunal dated 6th September, 2011 dismissing the OA No.290/2011, titled as "Ex. Sepoy Sri Chand v. Union of India & Ors.", dismissing the same only on the ground that it was extremely belated.

15. Accordingly, the present writ petition is allowed and the order of the Tribunal dated 6th September, 2011 in O.A.No.290/2011 is set aside and the OA No.290/2011 is restored for adjudication on merits by the Tribunal.

16. In the facts and circumstances, the parties are directed to appear before the Registrar of the Armed Force Tribunal, Principal Bench, New Delhi on 1st February, 2012. The Registrar would do the needful on production of certified copy of the present decision. Copy of this order be sent to the Registrar of the Armed Force Tribunal and the copies be also given dasti to the learned counsel for the parties. Considering the facts and circumstances, the parties are, however, left to bear their own costs.