

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.586/2012**

% **Date of Decision: 30.01.2012**

Rifleman Ram Bahadur Thapa Petitioner

Through Major K.Ramesh, Advocate

Versus

Union of India & Ors. Respondents

Through Mr.Romil Pathak, Advocate for
Dr.Ashwani Bhardwaj, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE J.R.MIDHA

ANIL KUMAR, J.

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1. The petitioner has challenged the order dated 19th October, 2011 passed by the Armed Forces Tribunal, Principal Bench, New Delhi in O.A No.176/2011 titled as 'Rifleman Ram Bahadur Thapa v. Union of India & Ors.' dismissing the petition seeking the quashing of order dated 1st January, 2007 and the reinstatement of the petitioner back to the military service with seniority and all other consequential benefits.

2. The petitioner was enrolled in the Army on 1st November, 2002 and he was discharged on 1st January, 2007 from the service.

3. The petitioner contended that he could not be discharged from the military service on account of belonging to a low medical category, without holding an Invaliding Medical Board which is a mandatory pre-requisite for discharging a military personnel on medical grounds, in terms of Rule 13 of the Army Rules, 1954.

4. According to the petitioner the Invalidating Medical Board is held only if a person is medically unfit for all forms of military service and when he has reached the last category of A5 or P5 or S5 whereas he was only P2 which is a minor restriction on employability. Therefore, in view of the judgment of the Supreme Court in Union of India & Ors. v. Rajpal Singh, (2009) 1 SCC 216, it is vehemently contended that the petitioner could not have been discharged.

5. The petitioner further relied on the judgment of Naib Subedar Rajpal Singh v. Union of India & Ors., 127 (2006) DLT 470 (DB) which was later affirmed by the Supreme Court in Union of India & Ors v. Rajpal Singh, (2009) 1 SCC 216; and the judgment of W.P(C) No.5946/2007, 'Subedar (SKT) Puttan Lal v. Union of India & Ors' decided on 20th November, 2008.

6. The Tribunal in the impugned order had noted the decisions in the case of Naik Subedar Rajpal Singh (supra) and Subedar Puttan

Lal (supra) and held that the petition suffers from delay since the cause of action of the petitioner's had arisen on 1st January, 2007 when he was discharged from the service, however the petitioner had approached the Tribunal only in the year 2011. Therefore it was held that such inordinate delay could not be condoned and thus the petition was dismissed.

7. The Tribunal in paragraphs 3,4 & 5 of the impugned order dated 19th October, 2011 had held as under:-

“3. In the present case the cause of action arisen to the petitioner on 1st January, 2007 when he was discharged from service. The petitioner has approached this Tribunal by filing a petition in 2011. When petitioner was confronted with this delay part, then petitioner invited our attention to the provision of Section 22(1)(c) of the Armed Forces Act, 2007. Section 22(1)(c) reads as under:

“(c) in a case where the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which jurisdiction, powers and authority of the Tribunal became exercisable under this Act, in respect of the matter to which such order relates and no proceedings for the redressal of such grievance had been commenced before the said date before the High Court.”

4. Learned counsel for the Petitioner has submitted that Petitioner could have come in time within three years from the date this Tribunal has started functioning. According to Petitioner this Tribunal was notified on 6th August 2008 therefore cause of action has arisen to the incumbent within three years immediately preceding and he could come and file a petition before this Tribunal. Even according to the reckoning of the Petitioner, the cause of action has arisen has arisen to

the Petitioner on 1st January, 2007 and even taking three years then he should have filed the petition at best in January 2010 but the petition was filed in 2011. Learned counsel for the petitioner has submitted that Petitioner made a representation on 24th April 2007 which was disposed on 2nd June 2007. Subsequently he has also made another application on 30th January 2009. He has also made an application on 18th January 2010 but that was not disposed of. Therefore learned counsel for the petitioner submits that this period may be condoned. We regret that this cannot be done. Once cause of action has arisen to the Petitioner on 1st January 2007 and he has made an application in April 2007 which was disposed of in June 2007 then repeatedly making an application will not extend the time. The Petitioner could have come in time in 2010 within three years as contemplated in Section 22(1)(c) of the Act.

5. Hence, we do not find any reason to condone this delay and there is no merit in the petition, same is dismissed with no order as to costs.”

8. The learned counsel for the petitioner has also contended that though there is a delay of four years, however, the same can be condoned since under Section 22(1)(c) of the Armed Forces Tribunal Act, 2007 the delay of three years can be accepted and therefore the net delay of one year is too minor a issue, considering the merits of the case. The learned counsel for the petitioner is, however, unable to show any sufficient reason to condone the delay or to get the relief contrary to the ratio of Puttan Lal (supra). In the said decision this Court had held as under:-

“6. We would have disposed of all these writ petitions with the aforesaid directions alone, but we are conscious

of the fact that there are a large number of personnel who have been discharged under the policy which has been held to be illegal by the Supreme Court. This has already started resulting in a spate of petitions before this Court. Such policy decision was taken on 12.04.2007 and is in proximity of time. In order to give option to such other persons who may not have approached the Court till now arising as a consequence of the judgment of the Supreme Court and to avoid such unnecessary spate of litigation before this Court, it has become necessary to issue certain further general directions even in respect of the PBORs who have not approached any Court till date. This is not only in the interest of such persons but also in the interest of the respondents and to avoid unnecessary huge litigation.

7. Insofar as the aforesaid persons are concerned, the following directions are issued:

i) Individual options will be sent by the respondents to such persons within two months making an offer to them to rejoin if they so desire as per the aforesaid directions passed in the present writ petitions. The option letter will indicate that such option has to be exercised within a period of 30 days of the receipt of the letter and in case the retiral and pensionary benefits have been paid to them, such persons must rejoin along with the amount liable to be refunded by them to the respondents which shall also be indicated in the option letter.

ii) The respondents will also give a public notice/advertisement apart from issuing the individual notice in a suitable manner preferably in national newspapers.

iii) It is made clear that such persons will also be governed by all the directions made in respect of the petitioners herein insofar as applicable.

iv) The general directions are applicable only to such of the persons who have been discharged or proposed to be discharged under the policy letter dated 12.04.2007 or those who may have been

discharged earlier but have already approached the competent court by filing a petition.

v) It is pointed out that there may be certain PBORs, which may also include some petitioners, whose normal date of superannuation has already arrived or would arrive before the aforesaid option is issued. In such cases, the persons would be entitled to only the benefit of pay and allowances for the differential period after adjusting any additional benefit arising from the premature discharge. Needless to say that those who decide not to rejoin after their premature discharge would neither be entitled to any pay and allowances nor would be required to repay the amount, if any, paid to them after their premature discharge.”

9. This is not disputed by the learned counsel for the petitioner that the petitioner was discharged on 1st January, 2007 prior to the policy dated 12th April, 2007 which was declared illegal.

10. In para 7(iv) of Puttan Lal (supra) it was clearly held that the directions given in Rajpal Singh (supra) by the Supreme Court would be applicable only to such persons who had already been discharged prior to policy dated 12th April, 2007 or those who had been discharged earlier but had already approached the competent Court by filing a petition.

11. This also cannot be disputed that the petitioner had not filed any petition till the decision in the case of Puttan Lal (Supra) was

rendered on 20th November, 2008 as the petition was filed by the petitioner only on 21st April, 2011.

12. The Tribunal has also considered Section 22(1)(c) of Armed Forces Tribunal Act, 2007 and has considered the petitioner's plea that he could have come within three years from the date the Armed Forces Tribunal had started functioning which was notified on 6th August, 2008. Even after taking into consideration the said date, the petitioner should have filed the petition in January, 2010 but the petition has been filed after a lapse of almost a year in 2011.

13. The Tribunal has also considered the plea that repeated representations had been made by the petitioner and held that it would not extend the time. The learned counsel for the petitioner is unable to show any law or any precedent where it had been held that the time will be extended on account of making repeated representations.

14. The learned counsel for the petitioner has also relied on Union of India & Ors. v. Tarsem Singh, (2008) 8 SCC 648. He contended that boarding out the petitioner without Invalidation Medical Board is a recurring successive wrong. He further contended that even if it is not a recurring successive wrong, not holding an Invalidation

Medical Board before boarding out the petitioner is a single wrongful act which causes a continuing injury to the petitioner.

15. This plea of the petitioner is not sustainable. Continuing wrong was explained by the Supreme Court in *Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798 in para 31 as under

“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.”

The plea of the petitioner is that boarding him out without an Invalidating Medical Board is causing him continuing injury and so it is a ‘continuing wrong’. However, this allegedly wrongful act was complete when the petitioner was boarded out without an Invalidating Medical Board. 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. In *Tarsem Singh* (supra) the official was invalidated out from army service, in medical

category on 13.11.1983 and he had approached the Court in 1999. A single judge had granted arrears of disability pension for thirty eight months before filing the writ petition which decision was not challenged by the authorities. The official was however, not satisfied and had filed a Letters Patent Appeal where it was held that the official was entitled for disability pension from the date it fell due. The Supreme Court had set aside the decision in appeal and had held that delay of sixteen years would affect the consequential claim for arrears and justified granting of arrears only for three years before the writ petition. Relying on *M.R.Gupta v. Union of India*, (1995) 5 SCC 628 it was held that claim for recovery of the arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable and similarly any other consequential relief claimed such as promotion etc. would also be subject to the defense of laches etc. to disentitle such reliefs. It was held by the Supreme Court in para 5 as under:

“5.....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....”

16. Therefore, it cannot be held that the defense of laches will not be applicable for the claim that the petitioner could not be boarded out without holding an Invalidation Medical Board. The case of Tarsem Singh (supra) is apparently distinguishable and the petitioner cannot place reliance on the same to claim his relief.

17. In the circumstances, the decision of the Tribunal not to find any reason to condone the delay and dismissing the petition, cannot be faulted.

18. The learned counsel for the petitioner has not been able to make out any such grounds in the facts and circumstances which will show any illegality, irregularity or perversity in the order of the Tribunal which would require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

J.R.MIDHA, J.

January 30, 2012

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