IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of Decision: 14 .05.2014

**CWP No.7277 of 2013**

Ex.Naik Umed Singh …Petitioner

Versus

Union of India & others …Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA**
**HON'BLE MR. JUSTICE FATEH DEEP SINGH**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: M/s Navdeep Singh and R.A.Sheoran, Advocates,
for the petitioner.

M/s S.S.Sandhu; Kunal Dawar; Mohit Malik & Ms. Kamla Malik,
Advocates, for the respondents.

**HEMANT GUPTA, J.**

A large number of writ petitions come up for hearing before this Bench claiming disability pension on account of the discharge from service of the personnel of the Armed Forces. The parties cite quite large selection of judgments in support of their respective stands. Since the issues relating to payment of disability pension arise rather frequently, we framed three questions for consideration for in depth examination in one case, the decision of which can be relevant in deciding other similar cases. However, each of the writ petitions claiming disability pension would be taken up for hearing in the light of the decision on the following issues:

*1. Whether the Armed Forces Tribunal or Writ Court in exercise of power of judicial review can re-examine the report of release*

*Medical Board categorizing the disability either not attributable to Military Service or aggravated by Military Service?*

*2. Whether the disability suffered after enrollment irrespective of its nature, may be constitutional or otherwise, will entitle personnel of the Armed Forces for the disability pension as it would be presumed that such disability is attributable to or aggravated by Military Service?*

*3. Whether the claim of the disability pension can be declined for the reason that it was not raised soon after discharge from the Army on the ground of limitation, even after the record has been weeded out by the authority after the expiry of statutory period and if it is entertainable then what relief the personnel would be entitled to?*

Section 191 of the Army Act, 1950 empowers the Central Government to frame Rules to give effect to the provisions of the Act and also in respect of the matters specified in sub-section (2). The matters empowering the Central Government are the matters relating to dismissal, removal and court martial etc. Section 192 empowers the Central Government to frame regulations in respect of which rules are not contemplated. Since the payment of pension does not fall within the scope of the rule making authority of the Central Government contemplated under Section 191 of the Army Act, 1950, therefore, the Central Government has framed Pension Regulations for the Army in the year 1961. The relevant clauses i.e. 48 and 173 from the Pension Regulations for the Army, 1961 are as under:

**Pension Regulations for the Army, 1961**

"48. (a) Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an officer who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty cases and is assessed at 20 per cent or more.

(b) The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II.

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173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed 20 per cent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."

Regulation 48 provides for disability pension to an Officer and Regulation 173 provides for disability pension to an individual, consisting of service element and disability element, who is invalided out of service on account of a disability, which is attributable to or aggravated by military service in non-battle casualty cases and is assessed at 20 per cent or more. The question whether the disability is attributable to or aggravated by military service is required to be determined under the Rules as in Appendix II. Appendix II contains the 'Entitlement Rules for Casualty Pensionary Awards, 1982' promulgated by Ministry of Defence on 22.11.1983, as amended on 21.08.1984. These Rules apply to service personnel, who become non-effective on or after 01.01.1982. The relevant clauses of the said Rules read as under:

"5. The approach to the question of entitlement of casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:-

**Prior to and During Service**

(a) Member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds, any deterioration in his health which has taken place is due to service.

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**Onus of Proof**

9. The claimant shall not be called upon to prove the conditions of entitlements. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases.

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**Diseases**

14. In respect of diseases, the following rule will be observed:-

(a) Cases in which it is established that conditions of Military Service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(c) If a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service.

15. The onset and progress of some disease are affected by environmental factors related to service conditions, dietary compulsions, exposure to noise, physical and mental stress and strain. Disease due to infection arising in service, will merit an entitlement of attributability. Nevertheless, attention must be given to the possibility of pre-service history of such conditions which, if proved could rule out entitlement of

attributability but would require consideration regarding aggravation. For clinical description of common disease, reference shall be made to the Guide of Medical Officers (Military Pensions) 1980, as amended from time to time. The classification of diseases affected by environmental factors in service is given in Annexure III to these rules.

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**Miscellaneous Rules**

17. **Medical Opinion**: At initial claim stage medical views on entitlement and assessment are given by the IMB/BMB. Normally these views shall prevail for decisions in accepting or rejecting the claim. In case of doubt the Ministry / CCDA (Pensions) may refer such cases for second medical opinion to MA (Pensions) sections in the office of the DGAFMS/Office of CCDA(P), Allahabad, respectively. At appeal stage, appropriate appellate medical authorities can review and revise the opinion of the medical boards on entitlement and assessment.

19. **Aggravation**: If it is established that the disability was not caused by service attributability shall not be conceded. However, aggravation by service is to be accepted unless any worsening in his condition was not due to his service or worsening did not persist on the date of discharge/claim.

20. **Conditions of Unknown Aetiology**: There are a number of medical conditions which are of unknown aetiology. In dealing with such conditions, the following guiding principles are laid down:

(a) If nothing at all in known about the cause of the disease, and presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) If the disease is one which arises and progresses independently of service/environmental factors, then the claim may be rejected."

Annexure I to such Appendix classifies the diseases, which are affected by Climatic Conditions; Stress and Strain; Dietary Compulsions; Training, Marching, Prolonged Standing etc.; Environmental; Altitude; Submarines and in Diving and in Flying duties. It also classifies the diseases not normally affected by service.

Though such Rules are applicable only to the personnel, who become non-effective on or after 01.01.1982, but the substantive provisions of the Rules prior thereto were not very different. Most of the cases now under consideration are in respect of service personnel, who have become non-effective on or after 01.01.1982. In respect of the personnel, who have become non-effective prior to 01.01.1982, the claim of disability pension will be considered in that petition.

Apart from such Regulations contained in Appendix II, reference is made to the instructions issued to the Medical Officers of the Services in the year 2002. Regulation 423 of Chapter VIII, related to Medical Boards and Disposal of Special Cases in respect of determination of the diseases attributable to service, reads as under:

> "**423. Attributability to service** – (a) For the purpose of determining whether the case of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a casual connection with the service conditions. All evidence, both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions, should be of a degree of cogency, which though not reaching certainty, nevertheless carry the high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of doubt could be given more liberally to the individual, in cases occurring in field service/active service areas.

(b) The cause of a disability or death resulting from wound or injury, will be regarded as attributable to service if the wound/injury was sustained during the actual performance of 'duty' in armed forces. In case of injuries which were self-inflicted or due to an individual's own serious negligence or misconduct, the Board will also comment how far the disability resulted from self-infliction, negligence or misconduct.

(c) The cause of a disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the armed forces determined and contributed to the onset of the disease. Cases, in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for service in the armed forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(d) The question, whether a disability or death is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the death certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officer, insofar as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the case and the attendant circumstances can be attributed to service will, however, be decided by the pension sanctioning authority.

(e) To assist the medical officer who signs the death certificate or the Medical Board in the case of an invalid, the CO Unit will furnish a report on:

(i) AFMSF 81 in all cases other than those due to injuries.

(ii) IAFY-2006 in all cases of injuries other than battle injuries.

(f) In cases where award of disability pension or reassessment of disabilities is concerned, a Medical Board is always necessary and the certificate of a single medical officer will not be accepted except in case of

> stations where it is not possible or feasible to assemble a regular Medical Board for such purposes. The certificate of a single medical officer in the latter case will be furnished on a Medical Board form and countersigned by the ADMS (Army)/ DMS (Navy)/ DMS (Air)."

On the basis of such Regulations and/or policy instructions, it is argued that in terms of Clause 5(a), a member of the defence service is presumed to be in sound physical and mental condition at the time of entry in to service except as to physical disabilities noted or recorded at the time of entrance. It is argued that any deterioration in the health of defence personnel is deemed to have taken place due to service [Clause 5(b)]. Referring to Clause 9, it is argued that a member of the service is entitled to benefit of reasonable doubt and is not to prove the conditions of entitlement. The benefit is to be given more liberally to the claimants in field/afloat service cases. It is also pointed out that a disease which led to discharge of an individual will ordinarily be deemed to have arisen in service, if no note was made at the time of his acceptance in service. But if the medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance of service, the disease will not be deemed to have arisen during service. Reference was made to such terms contained in Clause 14(b) of Appendix II. It is argued that in most of the cases, the medical opinion at the time of discharge has not recorded any reason as to why the disease, the reason of discharge, could not have been detected on medical examination prior to entry of the personnel in service. Therefore, in the absence of positive finding of the Medical Board that the disease could not have been detected on medical examination prior to enrollment of an individual in the service, the presumption is that such disease is either attributable to or aggravated by Military Service. Therefore, any opinion of a Medical Board, without finding of non-detection at the time of enrollment, is not sufficient to deny the benefit of disability pension to the defence personnel invalidated out of service on account of disease.

Reliance is placed upon three Judges' Bench judgment of Supreme Court reported as Veer Pal Singh Vs. Secretary, Ministry of Defence (2013) 8 SCC 83; and two Judges' Bench judgment reported as Dharamvir Singh Vs. Union of India & others (2013) 7 SCC 316. Reference was also made to Division Bench judgments of this Court in Ex Sepoy Bhola Ram Vs. Union of India & others 2008 (2) SCT 380; Union of India & others Vs. Ex Sepoy Ranjit Singh 2009 (3) SCT 22 and LPA No.57 of 2011 titled 'Union of India & others Vs. Ex. Gnr. Sachdev Singh' decided on 03.02.2011.

It is argued that though this Court in exercise of power of judicial review does not sit as Court of appeal over the reasons recorded by Invalidation Medical Board or Review Medical Board, but where no reasons are recorded, though required, before discharge of an individual from the services, this Court will strike down the findings of the Medical Board so as to entitle the defence personnel to the benefit of disability pension.

It is also argued that the pension is not a bounty, but it is earned while working with the defence establishments. Since the pension is payable every month, the denial thereof confers recurring cause of action, which cannot be said to be lost only on account of delay. In appropriate cases, the Court can mould relief so as to restrict the grant of arrears for a period of three years prior to initiation of proceedings more in equity rather than in law.

It is further argued that even if the records have been weeded out, the claim of pension cannot be declined. It would be a question of fact, as to whether the reasons of discharge are available in the long rolls or not. In the absence of any reason in the long rolls, the presumption that discharge was attributable to or aggravated by military service would be presumed.

On the other hand, learned counsel for the respondents relied upon two Bench Supreme Court judgments in Dental Council of India Vs. Subharti K.K.B. Charitable Trust & another (2001) 5 SCC 486; Union of India & others Vs. Surinder Singh Rathore (2008) 5 SCC 747; Union of India & others Vs. Ram Prakash (2010) 11 SCC 220; Om Prakash Singh Vs. Union of India & others (2010) 12 SCC 667 and Union of India & another Vs. Talwinder Singh (2012) 5 SCC 480 as well as Division Bench judgment of this Court in LPA No.1046 of 2002 titled 'Jagjit Singh Vs. Union of India & others' decided on 18.04.2012, to contend that opinion of the Medical Board should be given primacy and should not be set aside. The Courts do not sit over the decision of the expert bodies. The jurisdiction of the Courts to interfere with the decision taken by the expert bodies is limited.

Reference is also made to Supreme Court judgments in Union of India & others Vs. Dhir Singh Chhina, Colonel (Retd.) (2003) 2 SCC 382 and Union of India & others Vs. Keshar Singh (2007) 12 SCC 675 in support of the argument that even if no note regarding disease is made at the time of recruitment, still the disability pension can be declined.

In the light of the judgments and the provisions of the Regulations and the instructions, our decision in respect of each of the question is as follows:

*Question No.1*

The extent of power of judicial review of the decisions taken by the experts is not res Integra. In **University Grants Commission Vs. Neha Anil Bobde (2013) 10 SCC 519**, the Supreme court observed that in academic matters, unless there is a clear violation of statutory provisions, the regulations or the notification issued, the courts shall keep their hands off since those issues

fall within the domain of the experts. In another judgment reported as **Heinz India (P) Ltd. & another Vs. State of Uttar Pradesh & others (2012) 5 SCC 443**, the Supreme Court discussed the scope of the judicial review in the following manner:

> "**60.** The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of "judicial review" one is instantly reminded of the classic and oft-quoted passage from *Council of Civil Service Unions* v. *Minister for the Civil Service 1985 AC 374*, where Lord Diplock summed up the permissible grounds of judicial review thus: (AC pp. 410 D, F-H and 411 A-B)
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> > "… Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. …
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> > By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the Judges, by whom the judicial power of the State is exercisable.
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> > By 'irrationality' I mean what can by now be succinctly referred to as '*Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn. (1947) 2 All ER 680 (CA)* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. …
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> > I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be

affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an Administrative Tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

**61.** The above principles have been accepted even by this Court in a long line of decisions handed down from time to time. We may, however, refer only to some of those decisions where the development of law on the subject has been extensively examined and the principles applicable clearly enunciated.

**62.** In *Tata Cellular* v. *Union of India (1994) 6 SCC 651* this Court identified the grounds of judicial review of administrative action in the following words: (SCC pp. 677-78, para 77)

"*77*. The duty of the court is to confine itself to the question of legality. Its concern should be:

(*1*) Whether a decision-making authority exceeded its powers?

(*2*) committed an error of law,

(*3*) committed a breach of the rules of natural justice,

(*4*) reached a decision which no reasonable tribunal would have reached or,

(*5*) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(*i*) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(*ii*) Irrationality, namely, *Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn. (1947) 2 All ER 680 (CA)* unreasonableness.

(*iii*) Procedural impropriety."

**63.** Reference may also be made to the decision of this Court in *State of Punjab* v. *Gurdial Singh (1980) 2 SCC 471* where Krishna Iyer, J. noticed the limitations of judicial review and declared that the power vested in the superior courts ought to be exercised with great circumspection and that

interference may be permissible only where the exercise of the power seems to have been vitiated or is otherwise void on well-established grounds. The Court observed: (SCC p. 475, para 8)

> "*8*. … The court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of the executive and judicial circumspection keeps the court lock jawed save where the power has been polluted by oblique ends or is otherwise void on well-established grounds. The constitutional balance cannot be upset."

**64.** There is almost complete unanimity on the principle that judicial review is not so much concerned with the decision itself as much with the decision-making process. (See *Chief Constable of the North Wales Police* v. *Evans (1982) 3 All ER 141 (HL)*.) As a matter of fact, the juristic basis for such limitation on the exercise of the power of judicial review is that unless the restrictions on the power of the court are observed, the courts may themselves under the guise of preventing abuse of power, be guilty of usurping that power.

**65.** Frankfurter, J.'s note of caution in *Trop* v. *Dulles 2 L Ed 2d 630* is in this regard apposite when he said: (L Ed p. 653)

> "… All power is, in Madison's phrase, 'of an encroaching nature'. … Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."

**66.** That the court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant "the feel of the expert" by its own review, is also fairly well settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land. (See *Union of India* v. *S.B. Vohra (2004) 2 SCC 150*, *Shri Sitaram Sugar Co. Ltd.* v. *Union of India (1990) 3 SCC 223* and *Thansingh Nathmal* v. *Supdt. of Taxes AIR 1964 SC 1419*.)

**67.** In *Dharangadhra Chemical Works Ltd.* v. *State of Saurashtra AIR 1957 SC 264* this Court held that decision of a tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless it is shown to be totally unsupported by any evidence. To the same effect is the view taken by this Court in *Thansingh Nathmal case,* where this Court held that the High Court does not generally determine questions which require an

elaborate examination of evidence to establish the right to enforce for which the writ is claimed.

**68.** We may while parting with the discussion on the legal dimensions of judicial review refer to the following passage from *Reid* v. *Secy. of State for Scotland (1999) 1 All ER 481* which succinctly sums up the legal proposition that judicial review does not allow the court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. (AC pp. 541 F-H and 542 A)

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

Recently, in Veer Pal Singh's case (supra), the Supreme Court examined the process of judicial review in respect of opinion of the experts in the cases of claim of disability pension of the personnel from the armed forces. The Court observed that though the Courts are extremely loath to interfere with the opinion of the experts, but there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. The Court observed as under:

> "11. Although, the Courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial / quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release / discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable.
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> 18. In Controller of Defence Accounts (Pension) v. S. Balachandran Nair (2005) 13 SCC 128 on which reliance has been placed by the Tribunal, this Court referred to Regulations 173 and 423 of the Pension Regulations and held that the definite opinion formed by the Medical Board that the disease suffered by the respondent was constitutional and was not attributable to Military Service was binding and the High Court was not justified in directing payment of disability pension to the respondent. The same view was reiterated in Ministry of Defence v. A.V. Damodaran (2009) 9 SCC 140. However, in neither of those cases, this Court was called upon to consider a situation where the Medical Board had entirely relied upon an inchoate opinion expressed by the Psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment."

After observing so, the appeal was allowed and the Army Authorities were directed to refer the case to Review Medical Board for reassessing the medical condition of the personnel.

In view of the larger Bench decision in Veer Pal Singh's case (supra) and the principles of judicial review settled by the Supreme Court, we find that the process of judicial review exercised by this Court or Armed Forces Tribunal in terms of Armed Forces Tribunal Act, 2007 is not an appellate jurisdiction. It is a jurisdiction of judicial review so as to ensure that the authorities remain within the confines of law. The power of judicial review is to examine the decision making process and if the decision making process contravenes the statutory regulations or the instructions issued, to correct the

same. Therefore, if no note of the disease is made at the time of individual's acceptance in military service, it raises a presumption that an individual's discharge or death, will be deemed to have arisen for reasons attributable to or aggravated by service. The exception carved out in Clause 14(b) is that if medical opinion holds for reasons to be recorded that the disease could not have been detected on medical examination prior to acceptance of service, the disease will not be deemed to have arisen during service. Therefore, if the Invalidating or Release Medical Board has not given any categorical opinion that the disease could not have been detected on medical examination; the disease which led to discharge of an individual will be deemed to have arisen in service, then this court in exercise of the power of judicial review will strike down such decision for the reason that the Medical Board has failed to carry out the mandate given to them by the Regulations and the instructions by the Central Government. But, if the Invalidating or Release Medical Board has categorized that the disability is either not attributable to military service or aggravated by military service for the reason that it could not be detected at the time of entry into service, then the said opinion is in terms of the Regulations and instructions issued and cannot be substituted while exercising the powers of judicial review.

*Question No.2*

In terms of Regulations contained in Appendix II, the Armed Forces personnel are not to prove the conditions of entitlement of pension. They are entitled to receive the benefit of doubt [*Clause 9*]. In terms of Clause 14, once it is established that conditions of military service did not determine or contribute to the onset of the disease, but influenced the subsequent course of the disease will fall for acceptance on the basis of aggravation. But if the medical opinion finds that the disease could not have been detected on medical

examination prior to acceptance of service, disease will not be deemed to have arising during service *[(Rule 14(b)*]. Thus, if the Medical Board has not opined that disease could not have been detected on medical examination prior to acceptance of service, opinion of the Medical Board that the disease is not attributable or aggravated by military service would be contrary to the statutory regulations and, thus, the report of the Medical Board would be suspectible and liable to be set aside. In that eventuality, it will not be a case of setting aside the report of the Medical Board only for the reason that in exercising of power of judicial review, another view is being taken but such report will be set aside for the reason that it does not satisfy the parameters specified in the Regulations and the instructions. Thus, in cases where the Medical Board does not disclose the reasons that disease could not have been detected on medical examination prior to acceptance of service, the cause of discharge from armed forces, will be deemed to be aggravated or attributable to military service.

In Dharamvir Singh's case (supra), relied upon by the learned counsel for the petitioner, the Supreme Court examined the regulations/ instructions and concluded as under:

> "28. A conjoint reading of various provisions, reproduced above, makes it clear that:
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> > (i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix II (Regulation 173).
> >
> > (ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged

from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 r/w Rule 14(b)].

(iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. [*Rule 9*].

(iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [*Rule 14(c)*].

(v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [*14(b)*].

(vi) If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [*14(b)*]; and

(vii) It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the "Guide to Medical (Military Pension), 2002 – "Entitledment : General Principles", including paragraph 7, 8 and 9 as referred to above.

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30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in

writing to come to the conclusion that the disability is not due to military service. In fact, non application of mind of Medical Board is apparent from Clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows:

> "**(d)** *In the case of a disability under C the board should state what exactly in their opinion is the cause thereof.* ***YES***
>
> ***Disability is not related to mil. service"***

31. Paragraph 1 of 'Chapter II' – "Entitlement : General Principles" specifically stipulates that certificate of a constituted medical authority vis à vis invalidating disability, or death, forms the basis of compensation payable by the Government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre and post service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and dispute. For the said reasons the Medical Board was required to examine the cases in the light of etiology of the particular disease and after considering all the relevant particulars of a case, it was required to record its conclusion with reasons in support, in clear terms and language which the Pension Sanctioning Authority would be able to appreciate.

32. In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of 'Entitlement Rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Genrealised seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.

33. As per Rule 423(a) of General Rules for the purpose of determining a question whether the cause of a disability or death resulting from disease

> is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. "Classification of diseases" have been prescribed at Chapter IV of Annexure I; under paragraph 4 post traumatic epilepsy and other mental changes resulting from head injuries have been shown as one of the diseases affected by training, marching, prolonged standing etc. Therefore, the presumption would be that the disability of the appellant bore a casual connection with the service conditions."

Such is the view taken by a number of Division Benches of this Court in A.J.S.Chaudhary Vs. Union of India & others 1998 (2) SLR 615; Dharampal Singh Vs. Union of India 1998 (4) SCT 644 and E. Sepoy Bhola Ram Vs. Union of India & others 2008 (2) SCT 380 as well as in many other cases. All these judgments were reviewed by another Division Bench in CWP No.5424 of 2012 titled 'Krishan Singh Vs. Union of India & others' decided on 17.09.2013, wherein it has been held to the following effect:

> "A perusal of the above case law evidently shows that in various cases in which the Army service personnel was suffering from mental ailment and more particularly the disease of 'Neurosis' from which the petitioner in the present case has also been found to be suffering from were held to be entitled for disability pension. The recent judgment of the Hon'ble Supreme Court in Dharamvir Singh's case (Supra) has settled the issue and the matter is no longer *res integra* and in the absence of disability or disease which is not noticed or recorded at the time of enrollment in the service of the Armed Forces it is to be presumed that the serviceman was of sound physical and mental condition at the time of entry into service. In case he is subsequently discharged from service on medical grounds the onus of proof that deterioration in his health was not due to service conditions lies on the employer and in case of reasonable doubt, the benefit thereof is to go to the employee. Therefore, there is no reason as to why the petitioner in the present case should not be held entitled to the benefit of disability pension."

The learned counsel for the respondents relies upon judgment in Keshar Singh's case (supra). In the said case, the other judgment i.e. Dhir Singh China's case (supra) was considered. In Dharamvir Singh's case (supra),

the Keshar Singh's judgment has been considered. Therefore, in view of the judgment in Dharamvir Singh's case (supra), we have no hesitation to hold that if no note is given of any disease at the time of acceptance of an individual into service, the disease would be deemed to have arisen in service. The Invalidation Medical Board or Review Medical Board has to record a categorical opinion that the disease, the reason of invaliding out of service could not have been detected on medical examination at the time of enrollment. In the absence of any such finding of the Medical Board, the disease would be deemed to have arisen in service.

*Question No.3*

A Full Bench of this Court in Saroj Kumari Vs. State of Punjab, 1998 (3) SCT 664 was dealing with the issue of wrong fixation of pay. It was held that question of delay and laches would not come into play, as it would be a cause of continuing wrong. The Court observed to the following effect:

> "9. After hearing learned counsel for the parties on this point we are of the view that in case where a person invokes the jurisdiction of this Court under Article 226 of the Constitution of India for fixation of his pay under relevant rules/instructions or even on the basis of a judgment of a competent Court, the question of delay and laches would not come in as it would be a case of a continuing wrong and every month the person is paid the salary which according to him is not in accordance with the relevant rules and instructions a fresh cause of action would arise every month. Such a case is not a case of one time action like the case of termination or dismissal from service. As observed by the apex Court in M.R. Gupta's case (supra) that the Court while granting relief regarding the payment of arrears may apply law of limitation. Since a civil suit would be maintainable for realising arrears of three years and two months, the writ Court would be justified in restricting the payment of arrears to three years and two months prior to the filing of the writ petition.
>
> 10. We do not agree with the submission of the learned Advocate General, Punjab, that the writ Court should decline the relief to a person who is claiming correct fixation of his pay in accordance with the relevant rules

> and instructions merely because he has been negligent in approaching the court. If such a person can file a civil suit for the correct fixation of his pay where he can further claim arrears upto a period of three years and two months prior to the filing of the civil suit, there is no reason why such relief should be denied by a writ Court. Apart from the above, it may be noticed that in such cases as the present one where only fixation of pay is sought and arrears are claimed, rights of third party do not intervene during the period the person may not have approached the Court. The correct fixation of pay and the payment of arrears do not affect third party's right. This was also so observed by the Division Bench in Rattan Singh's case which has been quoted above, on the basis of which the argument was raised by the learned Advocate General, Punjab.
>
> 11. For the foregoing reasons we are of the view that in cases where only fixation of pay according to the relevant rules/instructions or a judgment is prayed for, the writ petition cannot be dismissed at the threshold on the ground of delay and laches but the payment of arrears can be restricted to a reasonable period. Three years and two months would be considered a reasonable period as that is the period for which a person can ask for the payment of arrears before a civil Court."

Learned counsel for the petitioner and the respondents rely upon two judgments i.e. Shiv Dass Vs. Union of India & others (2007) 9 SCC 274 and Union of India & others Vs. Tarsem Singh (2008) 8 SCC 648 in support of their respective pleas. The argument of learned counsel for the petitioner is that in case of pension, the cause of action arises and continues from month-to-month, therefore, delay or limitation cannot be a ground to decline claim of disability pension. Reference was made to the following observations from Shiv Dass's case (supra):

> "9. 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. It would depend upon the fact of each case. 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. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was

no scope for interference, it would have dismissed the writ petition on that score alone."

In Tarsem Singh's case (supra), the Supreme Court held that a belated service related claim would be rejected on the ground of delay and laches. However, 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. The claim for pension was found to be a case of continuing wrong. The Court observed as under:

"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 re-opening 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. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, 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.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have

> restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."

We may notice that the reliance of the learned counsel for the respondents on the judgment of Supreme Court in State of Punjab Vs. Gurdev Singh AIR 1991 SC 2219 is not applicable to the facts of the present case because that was a case of cessation of service on account of an order of dismissal. The order of dismissal gives rise to an actionable cause which is required to be challenged within the period of limitation; else the claim would be barred by time. On the other hand, the claim of pension including disability pension would stand on a different footing. The right to claim pension would arise only on attaining the age of superannuation or discharge but excluding the case of dismissal or removal from service.

However, since a person has approached after delay, the claim of arrears would be restricted to a period of three years prior to initiation of *lis*, as any claim for money could be lodged only within three years from the date right to recovery arises in terms of Article 137 of the Limitation Act, 1963. Therefore, we find that the claim of disability pension cannot be declined for the reason that it was not raised within three years of discharge from the Army, but the payment of arrears would be restricted to a period of three years before the initiation of *lis*.

The other limb of the argument, which needs examination, is that if the record is weeded out by the Army Authorities, whether, the claim of disability pension of the armed forces personnel or their legal heirs can be entertained after the weeding of the records.

Para 592 of the Army Regulations deals with disposal of obsolete documents. The Medical Board proceedings are to be retained for 25 years after an individual becomes non-effective in terms of para 525 of the Regulations. However, Regimental Long Roll is one of the documents, which is required to be preserved. Para 613 pertains to the entries in the Long Rolls. Column (xvi) is in respect of date and cause of becoming non-effective with the Authority.

Mr. Sandhu has referred to a Division Bench judgment of this Court in CWP No.16792 of 2009 titled 'Ex. Naik Chander Singh Vs. Union of India & others' decided on 04.11.2006, wherein the claim of the petitioner was rejected for the reason that service record of the petitioner has been destroyed after retention period of 25 years from the date of discharge. Reference was also made to an order of Delhi High Court in WP(C) No.6141 of 1999 titled 'Shri Deo Prakash Vs. Union of India & others' decided on 15.02.2008, wherein the Court held that if the record was destroyed, it cannot be said that there was any wrong by the respondents. The Court held to the following effect:

> "11. …..In the absence of record, one is not in a position to find out whether those conditions are satisfied namely whether the deceased was absorbed in Central PSU in public interest and what quantum of terminal benefits were received from Defence Accounts Department on his permanent absorption as in the absence of this information his case could not have been finalized."

A perusal of the entries of the Long Rolls, which are required to be preserved permanently, shows that the requirement is to record date and cause of becoming non-effective, but such entries in the Long Rolls is not primary evidence. The primary Medical record is not available after 25 years. The primary evidence of the cause of discharge having been destroyed, the Long Rolls is not conclusive to return a finding that the discharge of Armed

Forces personnel was either attributable or aggravated by military service. It is entry made from another document though made in regular course of working but the same is not primary evidence. It cannot be treated to be secondary evidence as it is only an abstract and cannot lead to conclusive opinion for the reason of discharge. Therefore, the long silence for not lodging a claim of disability pension can be said to bar the remedy.

However, such bar is not absolute. It would be a question of fact in each case. In case, the discharged officer has the opinion of the medical board, from which, it may be possible to find out the cause of discharge from the Armed Forces, the former Armed Forces personnel or their dependents would be entitled to seek consideration for the grant of disability pension, but for a period of not exceeding three years prior to the initiation of the *lis*. But if no record is available in respect of cause of discharge of the Armed Forces, the Armed Forces personnel or their legal heirs cannot draw any adverse inference of the discharge being attributable or aggravated by military service. The delay in lodging of a claim cannot be pre-judicial to the interest of the respondents though at the same time the legitimate right of the Armed Forces personnel or their dependents cannot be defeated. But in case either from the record produced by the legal heirs or the Armed Forces personnel or from the Army Authorities, the cause of discharge is not made out as attributable or aggravated by military service, no adverse inference can be drawn against the Army Authorities. In fact, the inference can be drawn only against the Armed Forces personnel or their legal heirs on account of delay leading to acquience in the process of discharge. Therefore, in case of weeding of the records, the claim of the Armed Forces personnel or their legal heirs would be required to be examined on the basis of available record, if possible, to determine the cause of

discharge from the Army and whether such cause leads to a finding of the discharge being attributable or aggravated by military service.

Though in some of the judgments of this Court including the Full Bench judgment in Saroj Kumar's case (supra), the petitioners have been ordered to be paid for 38 months, but keeping in view the orders of the Supreme Court in Shiv Dass and Tarsem Singh's cases (supra), the arrears would be payable only for a period of 36 months prior to the initiation of *lis*.

In the light of the above discussion, now we proceed to the facts of the present case. In the present case, the petitioner was enrolled on 14.12.1964 and was invalidated from service on 05.08.1993 on account of disability 'Grandmal Epilepsy' after the Medical Board in its meeting held on 11.03.1983 returned a finding that disability is neither attributable nor aggravated to military service and after assessing 20% disability. The claim of the petitioner in respect of disability pension has remained unsuccessful before the Armed Forces Tribunal.

The report of the Invalidating Medical Board is available on record as Annexure A-1. In Part III, the Board has opined that the disability is not connected with service. However, in Column (d), it is mentioned that it is a constitutional disorder not related to military service. To say that it is a constitutional disorder, does not satisfy the parameters contemplated under Clause 14(b) of the Regulations reproduced above. The report does not state that the same could not be detected at the time of enrollment.

Consequently, we find that the order declining the claim of the petitioner in respect of disability pension is not sustainable in law. Therefore, we set aside the order passed by the Tribunal and allow the present writ petition. The respondents are directed to grant disability pension including

arrears for a period from 09.11.2008 i.e. three years prior to filing of the Original Application before the Armed Forces Tribunal on 09.11.2011. The necessary payments be made within a period of three months from the receipt of the certified copy of the order.

(HEMANT GUPTA)
JUDGE

14.05.2014
Vimal

(FATEH DEEP SINGH)
JUDGE