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EX-HAV ASHOK KUMAR

v.

UNION OF INDIA & ORS.

(Civil Appeal No.6126 of 2019)

B

JULY 24, 2019

**[DR. DHANANJAYA Y CHANDRACHUD
AND INDIRA BANERJEE, JJ.]**

C *Pension Regulations for the Army, 1961 – Regulations 173, 173-A – On completing original tenure of 24 years of service on 27 Dec. 2010, the appellant, Havildar in the Army was granted extension of service for two years until 26 Dec. 2012 – During the course of extended tenure, he suffered stroke and was re-categorised into the category described as SHAPE-3 (Permanent) with an 80% disability – Appellant was discharged from service – Appellant's*
D *claim seeking the grant of disability pension was allowed by the Armed Forces Tribunal (AFT) – Appellant moved the AFT seeking payment of ex-gratia compensation of Rs.9,00,000/- based on policy circular dtd. 26 Dec.2011 – Rejected – On appeal, held: On merits, the appellant was granted disability pension under the 1961*
E *Regulations– Regulation 173 provides for the grant of disability pension to a person who is invalidated out of service on account of a disability which is attributable to or aggravated by military service in a non-battle casualty where the disability is assessed at 20% or more –Regulation 173-A extends the provision for disability pension by a deeming fiction under which a person who is placed in low*
F *medical category while on extended service and is consequently discharged will also stand covered by the grant of disability pension – Deeming fiction is confined to the grant of a benefit to the extent specified in Regulation 173-A – Initially by policy decision of the Government of India datd. 4 June 2010, ex-gratia compensation was provided to the next of kin in cases of death – This was extended*
G *on 26 Dec. 2011 to personnel who are disabled or incapacitated on account of causes attributable to or aggravated by military service – Appellant evidently did not meet that requirement of the policy circular since he was not boarded out of service on account of disability/war injury attributable to or aggravated by military*
H *service – He was entitled to disability pension in view of Regulation*

173-A – Significantly, under Regulation 173-A, he is deemed to have been invalidated from service for the purpose of the entitlement rules laid down in Appendix 2 to the Regulations – Fiction under Regulation 173-A cannot be extended to the policy document dtd. 26 Dec. 2011 – If the intent of the Policy was to grant ex-gratia compensation to every person who is granted a disability pension, it would have provided so – Claim for ex-gratia compensation could not have been entertained – Armed Forces – Service Law – Code of Civil Procedure, 1908 – Or. II, r.2.

Appellant, a Havildar in the Army completed his original tenure of 24 years of service on 27 Dec.2010. He was granted extension of service for two years until 26 Dec. 2012. During the course of extended tenure, the appellant suffered a stroke and was re-categorised into the category described as SHAPE-3 (Permanent) with an 80% disability. The appellant was discharged from service. In 2013, the Appellant moved the Armed Forces Tribunal (AFT) at its Principal Bench seeking the grant of disability pension. The claim was allowed by the AFT. However, the claim of rounding off of the disability pension was kept open on the hypothesis that the issue was pending decision before Supreme Court. The appellant filed Review Application before the AFT, which was allowed. The AFT held that as a matter of fact, it was mistaken in its finding that the issue of rounding off was pending before Supreme Court and that the appellant was entitled to the benefit of rounding off from 80% to 100%. In 2016, the appellant moved the AFT seeking the payment of ex-gratia compensation of Rs.9,00,000/- based on policy circular dtd. 26 Dec. 2011. The claim was rejected by the AFT. Hence, the present appeal.

Dismissing the appeal, the Court

HELD: 1.1 Regulation 173, Pension Regulations for the Army, 1961 provides for the grant of disability pension to a person who is invalidated out of service on account of a disability which is attributable to or aggravated by military service in a non-battle casualty where the disability is assessed at 20 per cent or more. Regulation 173-A extends the provision for disability pension by a deeming fiction under which a person who is placed in a low medical category while on extended service and is consequently

A discharged will also stand covered by the grant of disability pension. A person, who is placed in a low medical category and is discharged, is also deemed to have been invalidated out of service for the purpose of the entitlement rules laid down in Appendix 2 to the Regulations. The deeming fiction is confined to the grant of a benefit to the extent specified in Regulation 173-A. Initially
B by policy decision of the Government of India in the Ministry of Defence dated 4 June 2010, ex-gratia compensation was provided to the next of kin in cases of death. This was extended on 26 December 2011 to personnel who are disabled or incapacitated on account of causes attributable to or aggravated by military service.
C [Paras 9-11] [37-C-F]

1.2 In order to be entitled to the grant of ex-gratia compensation, it is necessary that the applicant must fulfill the following conditions: (i) The applicant should have been disabled or incapacitated in the performance bona fide official duties; and
D (ii) the applicant should have been boarded out of service on account of disability/war injury attributable to or aggravated by military service. If the intent of the Policy was to grant an ex-gratia compensation to every person who is granted a disability pension, it would have provided so. On 21 September 1998, the
E Army Headquarters provided the procedure and criteria for screening of personnel below the officer rank for extension in service. All PBOR are to be screened for extension of two years by the Screening Board. Annexure B to the Policy Instruction contains specific provisions in regard to retention during the extended tenure. [Paras 12-14] [38-B-E]
F

1.3 This indicates that a person who is placed in a permanent low medical category, except a battle casualty or a person wounded in action, and consequently placed in a permanent low medical category during the extended service will be discharged under the existing rules. Such a person who is discharged undoubtedly
G would be entitled to the benefit of the disability pension by virtue of the deeming fiction in Regulation 173-A of the Pension Regulations. However, it does not *ipso facto* entitle the individual to the grant of ex-gratia compensation. The case for ex-gratia compensation has to fall within the purview of the governing
H conditions which are contained in the policy circular dated 26

December 2011. The appellant evidently did not meet that requirement of the policy circular since he was not boarded out of service on account of disability/war injury attributable to or aggravated by military service. He was entitled to disability pension in view of the provisions contained in Regulation 173-A. Significantly, under Regulation 173-A, he is deemed to have been invalidated from service for the purpose of the entitlement rules laid down in Appendix 2 to the Regulations. The fiction under Regulation 173-A cannot be extended to the policy document dated 26 December 2011. The claim for ex-gratia compensation could not have been entertained. [Paras 15-17] [39-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6126 of 2019

From the Judgment and Order dated 12.10.2018 of the Armed Forces Tribunal, Principal Bench, New Delhi in O.A. No. 1232 of 2016

V. S. Tomar, Ambreesh Kumar Aggarwal, Advs. for the Appellant.

K. M. Nataraj, ASG, Amit Verma, Shailesh Madiyal, Debashis R., Sharath Narayan Nambiar, Sudhanshu Prakash, Vinayak Sharma, Arvind Kumar Sharma, Advs. for the Respondents.

The Judgment of the Court was delivered by

DR DHANANAJAYA Y CHANDRACHUD, J.

1. Delay condoned.

2. The appellant was a Havildar in the Indian Army. He completed his original tenure of twenty four years of service on 27 December 2010. He was granted an extension of service for two years until 26 December 2012. This extension was granted to the appellant in accordance with the procedure set out in a policy letter of the Army Headquarters dated 21 September 1998 which is titled:

“PROCEDURE AND CRITERIA FOR SCREENING OF PERSONNEL BELOW OFFICER RANK (PBOR)”

3. During the course of his extended tenure, the appellant suffered a stroke and was re-categorised into the category described as SHAPE-3 (Permanent) with an 80% disability. The Release Medical Board found that the disability was not attributable to or aggravated by military service. The appellant was discharged from service.

A 4. Seeking the grant of disability pension, the appellant moved¹ the Armed Forces Tribunal at its Principal Bench². On 2 July 2014, the AFT allowed the O A by holding that the appellant was entitled to disability pension. However, the claim of rounding off of the disability pension was kept open on the hypothesis that the issue was pending decision before this Court.

B 5. The appellant filed a Review Application before the AFT which was allowed on 30 October 2014. The AFT held that as a matter of fact, it was mistaken in its finding that the issue of rounding off was pending before this Court. Hence, the AFT held that the appellant was entitled to the benefit of rounding off from 80% to 100%.

C 6. The appellant moved the AFT in 2016 seeking the payment of ex-gratia compensation of Rs 9,00,000 based on a policy circular dated 26 December 2011. The AFT rejected the claim on the following counts:

D (i) Such a claim should have been made before the AFT in the earlier round of proceedings and not having been addressed either in the OA or in the review, such a relief was barred by Order II Rule 2 of the Code of Civil Procedure, 1908³;

E (ii) The claim was barred by limitation since the appellant was discharged from service in 2012 and it was only in 2016 that the AFT was moved for such relief; and

F (iii) On merits, the essential requirement for claiming ex-gratia compensation was that the applicant should have been invalidated from service on the ground of disability. In the present case, the appellant, upon completing twenty four years of service, was granted an extension of two years and it was during the extended period that he was discharged upon being downgraded to a low medical category.

G 7. The AFT relied on the note appended to Rule 2 of the Pension Regulations for the Army and came to the conclusion that for the purpose of disability pension, a person who is discharged from service during the extended tenure is deemed to have been invalidated for the purpose only of the Entitlement Rules laid down in Appendix 2 to the Regulations. Aggrieved by the decision of the AFT, this appeal has been filed.

¹ O A No 321 of 2013

² “AFT”

³ “CPC”

8. Mr V S Tomar, learned counsel appearing on behalf of the appellant submitted that in **Union of India vs Ram Avtar**⁴ a three judge Bench of this Court concluded on the issue as to whether an individual who has retired on attaining the age of superannuation or on completion of the tenure of engagement is entitled to the benefit of rounding off of disability pension upon being found to suffer from a disability which is attributable to or aggravated by military service. The Union Ministry of Defence contended that this benefit of rounding off is available only to Armed Forces personnel who are invalidated out of service and not to any other category. This submission was rejected while dismissing the appeal filed by the Union of India against the decision of the AFT. Hence, it was urged that in the present case, for all intents and purposes, the appellant, who was on an extended tenure of service, was prematurely discontinued and it must be treated an invalidation out of service. On this basis, it was submitted that the appellant would be entitled to ex gratia compensation in terms of the policy circular dated 26 December 2011.

9. Opposing the submissions which were urged on behalf of the appellant, Mr. K.M. Nataraj, learned Additional Solicitor General submitted that in essence, the argument of the appellant is that every person who is granted disability pension must necessarily get an ex-gratia payment. This, it was urged, is neither the intent nor the purpose of the Policy Circular. According to the submission, the grant of ex-gratia compensation to Army personnel who die in the course of duties while in service as stipulated in the original policy dated 4 June 2010 was subsequently extended on 26 December 2011. The essential requirement of the Policy dated 26 December 2011 is that it applies to defence service personnel who are disabled or incapacitated in the performance of their official duties and are boarded out of service on account of disability/ war injury attributable to or aggravated by military service. It was urged that this condition is not fulfilled in the case of the appellant. The appellant, it was urged, was granted an extended tenure of two years of service in terms of the Army Headquarters' Policy Instruction dated 21 September 1998 under which retention during the extended tenure is subject to certain conditions. One of those conditions is that a person who is placed in the permanent low medical category (except those who are battle casualties or wounded in action), would be discharged under the existing Rules.

⁴ Civil Appeal No 418 of 2012 decided on 10 December 2014

- A Hence, it was submitted that as the appellant was discharged in accordance with the conditions subject to which he was granted an extended tenure, he would not be entitled to the benefit of ex-gratia compensation. It has been urged that if the policy circular were to indicate that every person who is entitled to a disability pension would also be entitled to ex-gratia, a specific provision to that effect would have been made.
- B

C 10. Though the AFT has rejected the claim of the appellant on the ground that the claim for ex-gratia compensation was not made in the earlier round and is therefore, barred by both Order II Rule 2 of the CPC and by limitation, we propose to decide the issues in this appeal on merits. Hence, we have not gone into these technicalities. We addressed ourselves to the merits of the claim since in all fairness that is the basis on which the claim has been opposed by the learned Additional Solicitor General.

- D 11. At the outset, it would be necessary to appreciate the circumstances in which the appellant was granted disability pension under the Pension Regulations for the Army, 1961. Regulations 173 and 173-A have a bearing on the matter. They provide as follows:

“Primary conditions for the grant of disability pension

- E 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 at 20 per cent or over.

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

Individuals discharged on account of their being permanently in low medical category.

- G 173-A. Individuals who are placed in a lower medical category (other than ‘E’) permanently and who are discharged because no alternative employment in their own trade/category suitable to their low medical category could be provided or who are unwilling to accept the alternative employment or who having retained in alternative appointment are discharged before completion of their
- H

engagement, shall be deemed to have been invalidated from service for the purpose of the entitlement rules laid down in Appendix II to these Regulations. A

Note. The above provision shall also apply to individuals who are placed in a low medical category while on extended service and are discharged on that account before the completion of the period of their extension.” B

12. Regulation 173 provides for the grant of disability pension to a person who is invalidated out of service on account of a disability which is attributable to or aggravated by military service in a non-battle casualty where the disability is assessed at 20 per cent or more. Regulation 173-A extends the provision for disability pension by a deeming fiction under which a person who is placed in a low medical category while on extended service and is consequently discharged will also stand covered by the grant of disability pension. A person, who is placed in a low medical category and is discharged, is also deemed to have been invalidated out of service for the purpose of the entitlement rules laid down in Appendix 2 to the Regulations. The deeming fiction is confined to the grant of a benefit to the extent specified in Regulation 173-A. C D

13. That leads us to determine the basic issue of whether the appellant fulfilled the requirement for the grant of ex-gratia compensation. Initially by a policy decision of the Government of India in the Ministry of Defence dated 4 June 2010, ex-gratia compensation was provided to the next of kin in cases of death. This was extended on 26 December 2011 to personnel who are disabled or incapacitated on account of causes attributable to or aggravated by military service. However, para 3 of the Policy Circular dated 26 December 2011 contains the following stipulations: E F

“3. The President is pleased to decide that such Defence Service personnel, who are disabled, incapacitated in the performance, of their bonafide official duties under various circumstances and are boarded out from service on account of disability/war injury attributable to or aggravated by military service, shall be paid Ex-gratia lump sum compensation amounting to Rs.9 lakhs for 100% disability. For disability/war injury less than 100% but not less than 20%, the amount of Ex-gratia compensation shall be proportionately reduced. No Ex-gratia compensation shall be payable for disability/war injury less than 20%. The proportionate G H

A compensation would be based on actual Percentage of disability as certified by the invaliding Medical Board, without applying - board banding provisions as contained in Para 7.2 of this Ministry's above mentioned letter dated 31.01.2001."

B 14. In order to be entitled to the grant of ex-gratia compensation, it is necessary that the applicant must fulfill the following conditions:

- (i) The applicant should have been disabled or incapacitated in the performance bona fide official duties; and
- (ii) The applicant should have been boarded out of service on account of disability/war injury attributable to or aggravated by military service.

C 15. If the intent of the Policy was to grant an ex-gratia compensation to every person who is granted a disability pension, it would have provided so.

D 16. On 21 September 1998, the Army Headquarters provided the procedure and criteria for screening of personnel below the officer rank for extension in service. All PBOR⁵ are to be screened for extension of two years by the Screening Board. Para 5 of the letter provides:

E "5. Retention of a PBOR during extended tenure. The retention of a PBOR during the extended tenure will be governed by the considerations as per Annexure 'B' to this letter."

17. Annexure B to the Policy Instruction contains specific provisions in regard to retention during the extended tenure and includes the following stipulations:

F "1. Retention of PBOR during the extended tenure will be governed by the followings consideration:-

- (i) Medical Standard The individual must continue to remain medical category 'AYE' PBOR who are temporary low medical category at the time of Screening Board as well as during the currency of extension of service will continue to be in service. If this temporary low medical category is made into permanent low medical category is made into permanent low medical category except those who are battle casualties wounded in action and consequently placed in LMC (pt)

⁵ "Persons below officer's Rank

during enhanced service, the individual will be discharged under the existing rules.” A

18. This indicates that a person who is placed in a permanent low medical category, except a battle casualty or a person wounded in action, and consequently placed in a permanent low medical category during the extended service will be discharged under the existing rules. Such a person who is discharged undoubtedly would be entitled to the benefit of the disability pension by virtue of the deeming fiction in Regulation 173-A of the Pension Regulations. However, it does not ipso facto entitle the individual to the grant of ex-gratia compensation. The case for ex-gratia compensation has to fall within the purview of the governing conditions which are contained in the policy circular dated 26 December 2011. B C

19. The appellant evidently did not meet that requirement of the policy circular since he was not boarded out of service on account of disability/war injury attributable to or aggravated by military service. He was entitled to disability pension in view of the provisions contained in Regulation 173-A. Significantly, under Regulation 173-A, he is deemed to have been invalidated from service for the purpose of the entitlement rules laid down in Appendix 2 to the Regulations. The fiction under Regulation 173-A cannot be extended to the policy document dated 26 December 2011. D

20. Consequently, we are of the view, for the reasons we have indicated, that the claim for ex-gratia compensation could not have been entertained. E

21. The appeal is accordingly dismissed.

22. Pending application(s), if any, shall stand disposed of. F