

[SEE RULE 102(1)]**ARMED FORCES TRIBUNAL , KOLKATA BENCH****APPLICATION NO : O. A NO. 16 OF 2015****ON THIS 3RD DAY OF JUNE 2015**

**CORAM : HON'BLE JUSTICE DEVI PRASAD SINGH , MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)**

Amal Kumar Guha, Ex-Sepoy, Army No.14526153,
Son of Late Satya Ranjan Guha, presently residing at
85/9, Sambhu Halder Lane, Salkia, Dist. Howrah,
PIN - 711106

.....Applicant

-VS-

1. Union of India service through
The Secretary, Govt of India, M/o Defence,
Department of Pension and Pensioner, Given Cell for
Information, Seva Bhawan, Defence Headquarters, New Delhi-
110105
2. The Chief of the army Staff,
Integrated HQ of MoD (Army, DHQ,
Under the Ministry of Defence, Govt. of India,
PO New Delhi-110 011
3. The Chief Record Officer, Abhilekh Karyalaya, EME Records,
Secunderabad – 500 021
4. The Asstt. Record Officer, for OIC EME Records, Secunderabad
– 500 021
5. Principal Controller of Defence Accounts (Pension) Draupadi
Ghat, Allahabad – 211 014
6. Directorate General of EME (EME Pers) Master General of the
Ordnance Branch, Army Headquarters, DHOPO, New Delhi –
110 011
7. Secretary, Department of Ex-Servicemen Welfare and Pension,
Ministry of Defence, South Block, New Delhi – 110 011
8. Army Group Insurance, Directorate Adjutant General's Branch,
Army Headquarters, West Block-III, R.K. Puram, New Delhi-
110066

.... Respondents.

For the Applicant : Ms Manika Roy, Advocate

For the respondents : Mr. Dipak Kumar Mukherjee, Advocate

ORDER**PER Justice Devi Prasad Singh, MEMBER (Judicial)**

The instant application under Section 14 of the Armed Forces Tribunal Act, 2007 (in short, Act) has been preferred by the applicant to set aside the impugned orders and to grant disability pension with effect from 5th October, 1984. The applicant had moved before the Tribunal at a later stage after approaching the High Court of Calcutta. The relevant fact and legal proposition are discussed hereinafter.

2. It appears that being aggrieved with the impugned orders, whereby the respondents have declined to grant disability pension, applicant preferred a Writ Petition bearing No. W.P. 10581 (W) of 1991 before the High Court, Calcutta. The High Court while entertaining the Writ Petition on 27-8-1991, permitted the respondent to file reply within 4 weeks and rejoinder thereon within 2 weeks.

3. On 2-1-2003 the Writ Petition was dismissed by the High Court since none appeared on behalf of the applicant even on the second call. The dismissal order was for non-prosecution of the petition. It appears that again during the course of proceeding before the High Court on 8-11-2014 the Writ Petition being CO 10581 (W) of 2014 was restored to its original file and number. Again, during the course of proceeding on 28-11-2014 none appeared on behalf of the applicant. Hence the petition was dismissed for non-prosecution. A copy of the order of the High Court has been filed with the Original Application.

4. Admittedly, on 28-11-2014 the Writ Petition No.C.O. 10581 (W) of 1991 was dismissed for default. Instead of approaching the High Court for the restoration of the writ petition, the applicant has approached the Tribunal under Section 14 of the Act. While

pressing for grant of relief as prayed in the OA, Miss Manika Roy, learned counsel submits that in High Court the Writ Petition was dismissed for non-prosecution. The present O.A. has been filed before the Tribunal. Admittedly, no application was moved for recall of the order before the High Court. Relying upon the judgement of the Hon'ble Apex Court in **AIR 1961 1457 (DARYAO and Others Vs State of UP and Others)** that the principles of res judicata shall not be applicable if the petition is dismissed in limine without a speaking order or as withdrawn. On the other hand, the learned counsel for the respondents raised a preliminary objection that until and unless the order dated 28-11-2014 passed by the Calcutta High Court is restored to its original position, the present petition shall not be maintainable and only under section 34 of the Act, a petition pending before the High Court may be transferred to the Tribunal.

5. We have considered the preliminary objections raised by the learned counsel for the respondents as well as reply given by Miss Roy, learned counsel for the applicant and perused the record. We are proceeding to consider the question of maintainability as a preliminary issue.

6. Section 14 of the Act confers jurisdiction to the Tribunal to entertain an application against the order passed by the authorities relating to service matter. Obviously order passed by the employer shall only be amenable to the jurisdiction of the Tribunal. Any other order passed by other forum not relating to service matter may not be subject matter of dispute before the Tribunal. Further, order passed by a High Court and Hon'ble Supreme Court being higher forum may not be subject matter of dispute or adjudication before the Tribunal.

7. Section 33 of the Act excludes jurisdiction of Civil Courts to the service matter which is amenable to Tribunal. Section 34 further provides that every suit or other proceeding pending before any Court including a High Court or other authority immediately before the date of establishment of the Tribunal under the Act shall stand transferable on that date to such Tribunal. In case any suit or proceeding is transferred to the Tribunal, the Tribunal may on receipt of such record proceed to deal with such suit or other proceeding so far as may be in the same manner, as in the case of the application made under sub section (2) of section 14, from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit.

8. Section 36 of the Act provides that all proceedings before the Tribunal shall be judicial proceedings within the meaning of the Section 193, 219 and 228 of the Indian Penal Code. Section 36 of the Act is reproduced as under :

All proceedings before the Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code (45 of 1860).

9. The provisions contained in Sections 193, 219 and 228 of the Indian Penal Code are also reproduced as under :

Section 193 : “Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years , and shall also be liable to fine”.

Section 219 : “Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a terms which may extend in seven years, or with fine, or with both”.

Section 228 : “Whoever, intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both”.

10. Keeping in view in letter and spirit of Section 34 and 36 of the Act, the proceedings before the Tribunal is a judicial proceeding. Similarly, the proceedings before the High Court is under Art.226 of the Constitution is also a judicial proceeding. Then if in case the writ petition is dismissed for non-prosecution without its restoration and transfer in pursuance of Section 34 of the Act, as to whether a petition may be preferred before the Tribunal? Whether an application may be moved straightway before the Tribunal without restoration of the case by the High Court, which seems to be judicial proceeding?

11. A combined reading of Sections 193, 219 and 228 (supra) at the face of the record shows that the proceedings pending before the Tribunal is a judicial proceeding. Civil Court has inherent power to decide the question whether it has jurisdiction to entertain, deal with and decide the matter which has come before it. The jurisdiction of a tribunal or any other authority stands on a different footing. Parliament has entrusted the tribunal with the power to decide and determine finally the preliminary facts/issue on which its jurisdiction

depends. The findings recorded by the Tribunal on judicial side is subject to appellate jurisdiction of Hon'ble Supreme Court [vide decision of Hon'ble Supreme Court in **CA 7400 of 2013 decided on 11th March, 2015 (Union of India vs Maj Gen Shri Kant Sharma and another)**]. However, the High Court being Constitutional Court possesses power of superintendence under Art. 227 over all authorities, i.e. Tribunal and Subordinate Courts. Hence, Tribunal seems to lack jurisdiction to do anything or pass any order which may amount to review or override the decision of Hon'ble High Court. Dismissal of Writ Petition, even for non-prosecution by the High Court is an order or decision having element of finality. It is the High Court alone which can set aside or recall its order. Hence, Tribunal being subordinate authority seems to lack jurisdiction to pass an order which may undo the decision or order of High Court.

12. There appears no doubt that dismissal of a suit in default cannot be said to be the matter heard and hence dismissal will not operate as res judicata between the parties in subsequent proceedings as laid down by Hon'ble Supreme Court in **1961 AIR 1457 (DARYAO and Others vs. State of UP and Others)**. The learned counsel for the applicant also relied upon other cases like **AIR 1953 SC 16 (Bhatia Coop. Housing Society Ltd vs. D.C. Patel)**, **AIR 1969 SC 823 (Official Trustee vs Sachindra Nath)**, **AIR 1965 SC 338 (Athmanathaswami Devasthanam v K. Gopalswami Ayyangar)**.

13. It means the arguments advanced by the learned counsel for the applicant, Miss Roy seems to be correct to the extent that subsequent writ petition and such dismissal would not attract the bar of the principle of res judicata to a subsequent writ petition on the same cause of action. However, the question involved is entirely different. High Court under Art. 226 of the Constitution exercised extra ordinary jurisdiction and a decision or

order passed by High Court cannot be reviewed by a statutory authority like Tribunal. Moreover, under Art.227 of the Constitution High Court shall have the power of superintendence over all courts and tribunals . The Art.227 of the Constitution is reproduced as under :

“227. Power of superintendence over all courts by the High Court –

- (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction;
- (2) Without prejudice to the generality of the foregoing provision, the High Court may –
 - (a) Call for returns from such courts;
 - (b) Make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
 - (c) Prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.
- (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practicing therein;

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces”.

14. In view of above, it does not appear that a lower forum, like Tribunal shall be entitled to entertain an application/petition in the event when for the same cause of action a petition has been dismissed by the High Court being higher and constitutional forum. Whether High Court wants to restore the Writ Petition is a matter which may be a subject matter liable to be considered by High Court itself.

15. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in Bay Berry Apartments (P) Ltd. v. Shobha (2006) 13 SCC 737 and U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey (2006) 1 SCC 479. Entertaining of a petition for the same cause of action amounts to deciding a dispute with regard to which High Court has dismissed a petition, may be for non-prosecution, which seems to be not permissible as it will amount to nullify the order passed by the High Court.

16. Their Lordships of the Privy Council in a case reported in (1887-88) 15 IA 156 (PC); ILR (1889) 16 Cal 98 at p 102 held that dismissal of a suit for plaintiff's default of appearance was plainly not intended to operate as res judicata, but it imposed certain disability upon the plaintiff and he is thereby precluded from bringing a fresh suit in respect of the same

cause of action. Section 98 of CPC permits the Civil Courts to entertain for any matter whatsoever unless barred by law. But, Armed Forces Tribunal Act does not permit to entertain a petition of any matter. It has been conferred jurisdiction only to entertain petition with regard to the service matter of armed forces personnel.

17. Apart from above, Rule 8 and Rule 9 of Order IX of the Code of Civil Procedure, 1908 deals with the matter where a suit is dismissed for non prosecution and its restoration. Rule 9 of Order IX of the Code of Civil Procedure, 1908 provides that in case a suit is dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. For convenience, Rules 8 and 9 of Order IX are reproduced as under :

- “ 8. **Procedure where defendant only appears** – Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.
9. **Decree against plaintiff by default bars fresh suit** – (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

18. It is the settled position of law that the principles of Code of Civil Procedure to be followed with regard to Writ Petitions filed in the High Court and in case the petition is dismissed, it shall be necessary for the petitioner to move application for its restoration. Unless a petition is restored to its original Number, it shall not be open to file another Writ Petition for the same cause of action as provided in Rule 9 of Order IX of Code of Civil

Procedure, 1908. However, Art.226 confers extra ordinary jurisdiction to High Court already to pass appropriate order for substantial justice. A decision or order passed by High Court may not be reviewed by a statutory authority like Tribunal.

19. In that view of above, it appears that in case the present petition is entertained and decided on merit it shall indirectly amount to nullify the order passed by High Court and High Court being higher and Constitutional forum it is not permissible. Only a pending petition in High Court may be transferred to AFT. Petition dismissed even for default shall not deemed to be pending before High Court. Accordingly, no application may be entertained by the Tribunal for the same cause of action, in case a petition for the same cause of action has been dismissed for default or by non-speaking order passed by High Court.

20. In view of above, option is open to the applicant to move appropriate application before the High Court for recall and restoration of application for the order of 2014 and in case the order is recalled and restored to its original No. and position, then application may be moved for transfer of the petition to this Tribunal as provided in Section 34 of the Act.

21. Subject to above, since the application is not maintainable, OA is dismissed accordingly. No Order as to costs.

(LT GEN GAUTAM MOORTHY)
MEMBER(ADMINISTRATIVE)

(JUSTICE DEVI PRASAD SINGH)
MEMBER (JUDICIAL)