

(2002) 05 AHC CK 0041

Allahabad High Court

Case No: C.M.W.P. No. 37942 of 1994

Dharam Vir Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: May 6, 2002

Acts Referred:

- Pension Regulations for Army, 1961 - Regulation 173
- Pension Regulations for Army, 1961 - Regulation 173
- Pension Regulations for Army, 1961 - Regulation 173

Citation: (2002) 3 AWC 1818 : (2002) 2 UPLBEC 1734

Hon'ble Judges: R.R. Yadav, J

Bench: Single Bench

Advocate: Colonel Ashok Kumar Retd., S.K. Tyagi, Dheeraj Singh and P.R. Maurya, for the Appellant; S.K. Rai and S.C., for the Respondent

Judgement

R.R. Yadav, J.

The core question involved in the instant writ petition is whether petitioner is entitled to receive disability pension for the injury "Sensory Neural Deafness" (both ears) sustained by him on 22nd August, 1984, while taking part in navigation competition organised by Headquarter 23, Inf. Division.

2. I have heard the learned counsel on both sides at length and after hearing following order was dictated in Court today, which reads thus :

"The instant writ petition succeeds and is allowed with special cost of Rs. 10,000 to the petitioner for insensitivity of the respondents refusing disability pension to the petitioner for such a long time which he was entitled to receive even on the basis of the counter-affidavit filed by the respondents. The order impugned dated 19.9.1986 (Annexure-6 to the writ petition) and appellate communication order dated 30.4.1987 (Annexure-7 to the writ petition) are hereby quashed. The petitioner is entitled to receive arrears of disability pension after computing it in accordance with

law for the injuries sustained by him attributable to Military Service from the date of his discharge, i.e., from 27.6.1986 with 12% interest per annum thereon from the date of his entitlement till actual payment is made to him and the respondents are mandated to pay disability pension to the petitioner month by month. The respondents are directed to make compliance of the order passed today within three months from the date of receipt of a certified copy of this order.

The detailed reasons will follow later on."

3. Now I propose to give detailed reasons for the aforesaid conclusions in the backdrop of factual matrix of the case on hand as averred in the writ petition by the petitioner and in return filed by respondents.

4. The brief facts necessary for just decision of this case are that the petitioner was selected and enlisted in the Indian Army on 2nd March, 1982 and thereafter he was posted in 65 Mountain Regiment and served the Regiment till 1984. In the year 1984, the Mountain Regiment was deployed in Hillock Features around Ramgarh Valley. The petitioner had sustained an Injury "Sensory Neural Deafness" (both ears) on 22nd August, 1984, while taking part in navigation competition organised by Headquarter 23, Inf. Division. The petitioner was treated in Army Regiment Medical Unit and later on in the Military Hospital. The treatment of the petitioner went on and at later stage, he was confined in Military Hospital at Namkum for Intensive treatment running into eight weeks. Ultimately, he was medically boarded out on 27th June, 1986, with 80% disability. Consequent thereof, he was discharged on the same day, a copy of discharge order dated 27th June, 1986, is filed and marked as Annexure-1 to the writ petition.

5. It is evident from perusal of discharge order (Annexure-1 to the writ petition) that while discharging the petitioner from military service, it was recorded that he is unfit for re-employment in Defence Security Corps. (D.S.C.). The character of the petitioner was recorded in Discharge document (Annexure-1 to the writ petition) as very good.

6. After service of notices on respondents, they have filed a Joint return admitting that the petitioner was employed in the Regiment of Artillery and he was invalided out of service with effect from 27th June, 1986, due to a disease "Sensory Neural Deafness" (both ears) under Rule 13, Item III (iii) of Army Rules, 1954. The duly constituted Invaliding Medical Board arranged on the petitioner at Military Hospital, Namkum on 1st April, 1986 to assess the cause, nature and degree of disablement had viewed the disability as neither attributable to nor aggravated by military, service and assessed the degree of disablement at 80%. It is averred in the counter-affidavit filed by respondents that disability pension is sanctioned under Regulation 173 of Pension Regulations for the Army Part-I, 1961, which is a statutory provision. The grant of disability pension is considered by the Chief Controller of Defence Accounts (Pension), Allahabad in consultation with Medical Advisors on

Pension, who are appointed by the Director General Armed Forces Medical Services. New Delhi. Since the disability of the petitioner was considered as neither attributable to nor aggravated by the Military Service, the grant of disability pension was denied with an opportunity to appeal against the decision of the Chief Controller of Defence Accounts (Pension), Allahabad within a period of six months from the date of rejection of his disability pension claim by the Chief C.D.A. (P.), Allahabad on 19th September, 1986. It is averred in the counter-affidavit that the appeal submitted by the petitioner was considered by Government of India Ministry of Defence, but the same was dismissed, a true copy of the communication order dated 30th April, 1987, is filed and marked as C.A.-1 to the writ petition.

7. For deeper and better understanding of the controversy involved in the instant writ petition, the averments made in paragraph 5 of the counter-affidavit filed by respondents are quoted herein below in verbatim :

"That in reply to the contents of para 3 of the writ petition, it is stated that the petitioner had sustained an injury "Sensory Neural Deafness" (both ear) on 22nd August, 1984, while taking part in navigation competition organised by Headquarter 23, Inf. Division and not in the wake of en-mass desertion of Sikh Troops from Sikh Regimental Centre Ramgarh as alleged in the para under reply."

8. In view of the aforesaid admission made in paragraph 5 of the counter-affidavit filed by respondents, it would be expedient at this juncture to have a look at the relevant Entitlement Rules for grant of disability pension to the Armed Forces. The provisions which are not relevant for just decision of the case on hand are omitted.

9. Under Regulation 173 of Disability Pensionary Awards, it is provided that unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of disability which is attributable to or aggravated by military service and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix-II. Relevant provisions of Appendix-II of Paragraph 5 provide that approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions :

Rule 5:

"(a) 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,"

10. Paragraph 6 of Appendix-II lays down that disablement or death shall be accepted as due to military service provided it is certified by appropriate medical authority that disablement is due to a wound, injury or disease which is attributable

to military service or existed before or arose during military service and has been and remains aggravated thereby. It will also include the precipitating/ hastening of the onset of a disability.

11. Paragraph 9 of Appendix-II postulates onus of proof. It clearly provides that the claimant shall not be called upon to prove the conditions of entitlement. 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. The military duty is defined under Paragraph 12 of Appendix-II which contemplates that a person subject to the disciplinary Code of the Armed Forces is on "duty" :

(a)

(b)

.....

(c) During the period of participation in recreation and other unit activities organised or permitted by Service Authorities and during the period of travelling in a body or singly by a prescribed or organised route.

Note 1.--appended to paragraph 12 of Appendix-II reads thus :

Note J.--(a) Personnel of the Armed Forces participating in :

(i) local/ national/ international, sports tournaments as member of service teams, or

(ii)

.....

(iii) injuries sustained by personnel of the Armed Forces in impromptu games and sports outside parade hours, which are organised by, or with the approval of, the local service authority, and death or disability arising from such injuries, will continue to be regarded as having occurred while "on duty" for purposes of these rules.

12. In paragraph 22 of Appendix-II, it is contemplated that assessment of degree of disability is entirely a matter of medical judgment and is the responsibility of the medical authorities. The degree of disablement due to service/duty of a member of the military forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of same age and sex, without taking into account the earning capacity of the member in his disabled condition in his own or any other specific trade or occupation, and without taking into account the effects of any individual factor or extraneous circumstances, where disablement is due to more than one disability a composite assessment of the degree of disablement shall also be made by reference to the combined effect of all such disabilities in addition to separate assessment for each disability.

13. Paragraph 23 of Appendix-II postulates that where entitlement is denied by the Pension Sanctioning Authority on initial consideration of the claim, the claimant has a right of appeal against decision on entitlement and assessment.

14. It was urged by the learned counsel for the petitioner that in the instant case, disablement is caused to the petitioner while participating, in navigation competition organised by Headquarter 23, Inf. Division as admitted in paragraph 5 of the counter-affidavit filed by respondents, hence 80% disability caused to the petitioner is attributable in the present case on duty and the Pension Sanctioning Authority has no legal justification to reject the claim of disability pension benefits to the petitioner. It was submitted by the learned counsel for petitioner that appellate committee has dismissed the appeal of the petitioner with closed mind ignoring the statutory Rules laying down primary conditions for grant of disability pension. In support of his aforesaid contention, the learned counsel for the petitioner placed reliance on a decision rendered in case of Anil Kumar Mishra v. Union of India and Ors. 1996 (1) AWC 248 : 1996 (2) UPLBEC 761. He also placed reliance on a decision rendered in case of Jagdamba Prasad Dubey v. Union of India and others 1999 ALJ 2355.

15. The aforesaid argument advanced by learned counsel for the petitioner was refuted by the learned standing counsel Sri S.K. Rai representing respondents. It was contended by the learned standing counsel Sri Rai that the petitioner was invalided out of service with effect from 27th June, 1986 due to a disease "Sensory Neural Deafness" as defined under Rule 13 Item III (iii) of Army Rules, 1954. According to Sri Rai, the learned standing counsel, the order of discharge from service does not fall within the injury as submitted by the learned counsel for the petitioner. In support of his aforesaid contention, he placed reliance on a decision rendered by learned Judges constituting Division Bench in case of Smt, Kanchan Mala Srivastava and Ors. v. Union of India and Ors. 2000 (4) ESC 2774 , wherein a similar claim for grant of disability pension was rejected by learned Judges constituting Division Bench. In view of the ratio decidendi in the case of Smt. Kanchan Mala Srivastava (supra), the claim of the petitioner deserves to be dismissed. He also invited my attention to another Division Bench decision rendered in case of Lt. Col. (T.S.) Panch Nand Rai v. Union of India and Anr.(2000) 1 UPLBEC 432.

16. I have given my thoughtful consideration to the rival contention raised at the Bar and I am of the view that disablement averred in paragraph 5 of the counter-affidavit is not because of any disease suffered by the petitioner, but it was due to injury received by him while participating in navigation competition organised by Headquarter 23, Inf. Division on 22nd August, 1984. The ratio decidendi referred in case of Smt. Kanchan Mala Sriuastaua (supra) and the decision rendered by Division Bench in case of Lt. Col. (T.S.) Panch Nand Rai (supra) are not attracted in the present case. In case of Smt. Kanchan Mala Sriuastaua (supra) and in

case of Lt. Col (T.S.) Panch Nand, the disputed questions involved were whether petitioner's illness was due to military service or otherwise whereas in the given case the question involved is whether in view of admission made in paragraph 5 of the counter-affidavit filed by respondents quoted hereinabove, the petitioner fulfils the primary conditions for the grant of disability pension and the respondents have illegally, arbitrarily, capriciously with closed mind refused to grant disability pension to him. The decisions rendered in case of Anil Kumar Mishra (supra) and in case of Jagdamba Prasad Dubey (supra), cited by learned counsel for petitioner also deal with disputed questions of illness of army personnel, hence not applicable to the facts of the present case.

17. It is to be noticed that grant of disability pension in Armed Forces is covered by the provisions envisaged under Regulation 173 of the Pension Regulation for the Army 1961. The aforesaid Regulation 173 provides that unless otherwise specifically provided, a disability pension may be granted to an incumbent, who is invalided from service on account of a disability, which is attributable to or aggravated by military service and is assessed 20% or over. The question whether a disability is attributable to or aggravated by military service is to be determined under the Rules in Appendix-11, which are quoted hereinabove.

18. A conjoint reading of paragraphs 5, 6, 9, 12, 13 and 22 of Appendix-II quoted hereinabove leads towards an irresistible conclusion that onus of proof to prove conditions of entitlement is not upon the claimant. The claimant is entitled to receive the benefit of any reasonable doubt. The benefit of grant of disability pension is to be given liberally. Under paragraph 12(c) of Appendix-II, an army personnel during the period of participation in recreation and other unit activities organised or permitted by Service Authorities shall be deemed to be on duty. A bare perusal of paragraph 12(c) of Appendix-II further reveals from Note 1 (a) that personnel of the Armed Forces participating in local/national/international sports tournaments as member of service teams shall be treated to be on duty. It is also clarified under Note 1 (c) of paragraph 12 of Appendix-II that if an incumbent sustained injuries while participating in games, sports tournament or other unit activities organised or permitted by Service Authorities, then such participation shall be treated to be on duty for purposes of grant of disability pension. According to paragraph 22 of Appendix-II, the assessment of degree of disability is entirely a matter of medical judgment and is the responsibility of the medical authority.

19. The aforesaid statutory Rules for the grant of disability pension came up for consideration before Supreme Court in case of Madan Singh Shekhawat v. Union of India, 1993 (3) ESC 1741 (SC), wherein Supreme Court ruled that rules governing disability pension being beneficial provisions are required to be interpreted liberally so as to give them a wider meaning.

20. The interpretation of the aforesaid statutory rules for the grant of disability pension to the personnel of Armed Forces can be viewed from different angle.

Article 41 of the Constitution provides that the State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement. Although Article 41 of the Constitution finds place in Part IV of the Constitution under Directive Principles of State Policy and not enforceable in court of law, yet these Directive Principles have fundamental importance in governance of the State. Thus, Article 41 of the Constitution can be safely used as a key to open the lock of ambiguity of statutory Rules quoted hereinabove relating to grant of disability pension to the personnel of Armed Forces guarding the Nation at the cost of their lives in adverse circumstances thousands of miles away from their families if they are discharged from military service on account of any disability, which is attributable to the military service, such cases deserves sympathetic and compassionate consideration of all including Government of India, Ministry of Defence and Its Authorities. It is true that it cannot be said that sustenance of an injury or wound per se is on account of military service, but while taking decision "on duty" as defined under Entitlement Rules for Grant of Disability Pension, the authorities invested with quasi judicial powers are not to be swayed away on expediency or extraneous considerations leading to manifest error and Injustice to an incumbent as in the given case.

21. It is to be examined in each case that under Rule 173 disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. If these conditions are satisfied, necessarily the incumbent is entitled to the disability pension. Unless these conditions are satisfied, it cannot be said that the sustenance of injury per se is on account of military service. In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service.

22. I am fortified in taking the aforesaid view from a decision rendered by Supreme Court in case of Union of India and Anr. v. Baljit Singh (1996) 11 SCO 315.

23. It is to be noticed that in the case of Union of India and another v. Baljit Singh (supra), the decision of the High Court granting disability pension to a personnel of Armed Forces was upheld and the SLP filed by Union of India and another was dismissed.

24. Let us apply the aforesaid proposition of law to the facts and circumstances of the present case. Indisputably, the petitioner sustained an injury "Sensory Neural Deafness" (both ears) while taking part in navigation competition organised by Headquarter 23, Inf. Division. The first question would be as to whether participation by the petitioner in Navigation competition organised by Headquarter 23, Inf. Division can be said to be within the definition of "on duty" defined under

paragraph 12 of Appendix-II. For argument sake, as suggested by the learned counsel, participation in Navigation competition organised by Headquarter 23, Inf. Division is taken to be recreation sport tournament, then it will fall within the definition of "on duty" and admittedly injury sustained by the petitioner while participating in the aforesaid Navigation competition organised by Headquarter 23, Inf. Division would fall within the definition of "on duty". Even if for argument sake the Navigation competition organised by Headquarter 23, Inf. Division is not treated to be recreation game or tournament organised by Headquarter 23, Inf. Division, then it would positively fall within the definition of "other unit activities" organised or permitted by the Service Authorities as envisaged under paragraph 12(c) of Appendix-II, wherein it is clearly provided that during the period of, participation in. recreation and other unit activities organised or permitted by Service Authorities and during the period of travelling in a body or singly by a prescribed or organised route shall be taken to be a personnel of the Armed Forces "on duty". A reference can also be made about Note 1(c) of paragraph 12 of Appendix-II wherein it is stated that if any personnel of Armed Forces participating in local/international tournament as a member of service teams, then in case any Injury is sustained by such personnel of the Armed Forces outside parade hours which are organised by or with the approval of the local service authority and death or disability arising from such injuries, will continue to be regarded as having occurred while "on duty". Thus, it is established in the instant case that the petitioner received injuries leading to his 80% disablement while he was in military service, i.e., "on duty" and an argument contrary to it is not acceptable to me. The respondents deliberately and wilfully Ignored the aforesaid statutory provisions in the present case while arriving on the conclusion that the injury sustained by the petitioner while participating in Navigation competition on 22nd August, 1984, organised by Headquarter 23, Inf. Division is not attributable to military service, therefore, petitioner is not entitled to get the benefit of disability pension. In view of clear admission in paragraph 5 of the counter-affidavit quoted hereinabove, the aforesaid conclusion arrived at by respondents and medical authorities held to be perverse as no reasonable and prudent man can arrive on such conclusion as arrived by them denying disability pension to the petitioner for such a long time in casual manner.

25. It is borne out from perusal of paragraph 9 of the Appendix-II that the claimant is not required to prove the conditions of entitlement and under the aforesaid statutory paragraph, an armed forces personnel is entitled to receive the benefit of reasonable doubt. Here in the present case in view of the clear admission made by respondents in paragraph 5 of the counter-affidavit quoted hereinabove, there is no doubt, whatsoever, that the petitioner received injuries while he was participating in Navigation competition organised by Headquarter 23, Inf. Division. It is admitted by respondents in paragraph 6 of their counter-affidavit that after receiving injury on 22nd August, 1984, the petitioner was hospitalized for the disability "Sensory Neural Deafness" (both ears) in Military Hospital, Namkum with effect from 26.3.1985 to

24.4.1985 and thereafter he was boarded out from service with effect from 27th June, 1986 by a duly Constituted Invaliding Medical Board arranged by Military Hospital Namkum on 1st April, 1986. The Medical Board reported disability of the petitioner to the extent of 80%. It is to be noticed that under paragraph 22 of Appendix-II, it is provided that assessment of degree of "disability is entirely a matter of Medical Judgment and it was the responsibility of the Medical Authorities. Thus, in the present case the injury received by the petitioner while participating in Navigation competition organised by Service Authorities admittedly lead disability to the petitioner to the extent of 80%. The 80% disability of the petitioner admittedly is the reason for his discharge, from service. Under paragraph 22, it is made clear that the degree of disablement due to military service of a member of the Armed Forces shall be assessed by making a comparison between the condition of the member and the condition of a normal healthy person of same age and sex without taking into account the earning capacity of a member in his own or any other specific trade or occupation.

26. From the aforesaid discussion, it is held that in the instant case the petitioner has succeeded to establish disability caused to him during military service. Once aforesaid condition is satisfied, he is entitled for disability pension. It is crystal clear that the injury sustained by the petitioner while participating in Navigation competition organised by Headquarter 23, Inf. Division was due to military service, which is attributable to invalidation and discharge from service of the petitioner.

27. Upshot of the aforesaid discussion is that the instant writ petition succeeds and is allowed with special cost of Rs. 10,000 to the petitioner for insensitivity of the respondents refusing disability pension to him for such a long time which he was entitled to receive even on the basis of the counter-affidavit filed by the respondents. The order impugned dated 19.9.1986 (Annexure-6 to the writ petition) and appellate communication order dated 30.4.1987(Annexure-7 to the writ petition) are hereby quashed. The petitioner is entitled to receive arrears of disability pension after computing it in accordance with law for the injuries sustained by him attributable to Military Service from the date of his discharge, i.e., from 27.6.1986 with 12% interest per annum" thereon from the date of his entitlement till actual payment is made to him and the respondents are mandated to pay disability pension to the petitioner month by month. The respondents are directed to make compliance of the order passed today within three months from the date of receipt of a certified copy of this order.