
(2016) 3 JKJ 114

Jammu & Kashmir High Court

Case No: LPAOW No. 444 of 2001 and MP No. 481 of 2001

Union of India

APPELLANT

Vs

Ex. Naik. Ranjit Singh

RESPONDENT

Date of Decision: March 16, 2016

Acts Referred:

- Constitution of India, 1950 - Article 21
- Pension Regulations for Army, 1961 - Rule 173
- Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 - Section 47

Citation: (2016) 3 JKJ 114

Hon'ble Judges: Mr. N. Paul Vasanthakumar, C.J. and Mr. Tashi Rabstan, J.

Bench: Division Bench

Advocate: Mr. R.S. Jamwal, Sr. Panel Counsel, for the Appellant; Mr. Amarvir Manhas, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

N. Paul Vasanthakumar, C.J. - This appeal is filed against the order of the learned Writ Court made in OWP No. 100/1997 dated 06.07.2000

giving directions to the appellants to re-determine the disability of the respondent and to give him an alternate job within a period of four months.

The said order was not stayed during the pendency of this appeal.

2. The case of the respondent before the Writ Court was that he was recruited in JAK Rifles of the Indian Army as a Sepoy on 20.03.1979 and

allotted No. 13742342 F and was thereafter promoted as Naik in the year 1992. He discharged his duties to the best of his ability and while

discharging his duties at Saichen Glacier in May, 1993, he has Frost bite of toe (Right foot) and he was hospitalized on 22.05.1993 and was

discharged after giving treatment on 04.06.1993 with a medical advice to place him in medical category C.E.E (Temporary). As the wound of the

respondent did not heal, he was again admitted in the hospital on 26.11.1993 and was discharged on the next day with the recommendation that

he will continue in medical category CEE (temporary). On 03.06.1994 the respondent was again hospitalized and discharged on 06.06.1994 with

an observation by placing him in medical category CEE (permanent). Again on 12.10.1994 the respondent was taken to Military Hospital and was

discharged on 18.10.1994 with remarks that he shall stay in Unit line and has not to be sent on A/L, C/L, T/D till the approval of the Medical

Board by the higher authority. Finally without following any of the procedure, he was summarily discharged from the force on 31.03.1995.

3. The respondent applied for disability pension, which was rejected on 26.10.1995 on the ground that the disability assessed was less than 20%.

In the said order the respondent was given the option to file an appeal. Accordingly he filed an appeal on 19.03.1996. Even though the same was

acknowledged, no order was passed till the writ petition was filed. The respondent having improved in his health was physically fit and willing to

serve in the Army and he was discharged without his consent, which is in violation of the rules governing the service conditions of the Army

personnel. In the writ petition the respondent has prayed for grant of disability pension or in the alternative he be taken back in Army service with

back wages.

4. The writ petition was opposed by the appellants by contending that respondent was downgraded to medical category CEE (T) by a Medical

Board held in 166 MH with effect from 20.05.1993 and on further revision the respondent was placed in medical category CEE (P) with effect

from 17.10.1994 by a Medical Board at 185 MH. As per the policy mentioned in the Army Headquarter letter dated 24.03.1992 and Army

Order 44/80, a low medical category personnel are either required to be dispensed with within six months of their down gradation to permanent

lower category or alternate shelter appointment is required to be given based on the extent of disablement. It is mentioned in the counter affidavit

that no shelter appointment was available in the Unit hence the respondent was discharged from service on 31.03.1995 and he was paid several

benefits, namely, service pension of Rs. 420/- per month, Death-cum-retirement gratuity Rs. 14,805/-, Capitalized value of commuted pension Rs.

37,921/- and Army Group Insurance Fund of Rs. 22,915/-. Insofar as the disability pension claim of the respondent was concerned, the primary

condition for grant of disability pension as per Rule 173 of the Army Pension Regulations is that disability pension be granted to an individual who

is invalidated from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20% or over. It is

further stated in the counter affidavit that though the disability of the respondent is attributable to the military service, the same was assessed at 1 to

5 %, which is far below as fixed under Rules, hence the disability pension claim of the respondent was rejected.

5. The learned Single having noticed the fact that the disability assessed being between 1 to 5%, there may be improvement in the year 2000 and

ordered to re-determine the disability and giving the respondent an alternate job within four months.

6. The appellants instead of re-assessing the disability for providing alternate job to the respondent have chosen to file this appeal with delay of

132 days and the delay was condoned by this Court on 16.11.2001. When the appeal was listed for admission on 27.11.2001, the appeal was

admitted and notice was issued, however, the order of the learned Single Judge was not stayed. Thus the order of the Writ Court is in operation as

on today.

7. The contention of the appellants in this appeal is that while the respondent was serving with 20 JAK Rifles, he was admitted in the Army

Hospital due to Frost bite of toe (right) (OPTD) and he was downgraded to medical category CEE (Temporary) and on further revision he was

placed in medical category CEE (Permanent) and for giving alternate employment no post was available in the Unit, hence he was discharged from

service on 31.03.1995. It is also one of the contention raised in the appeal that when no appointment is available or when the retention of the

respondent was considered not necessary, he was discharged. It is stated that ordinarily permanent low medical category personnel will be

retained in service till completion of 15 years in case of JCOs and 10 years in case of OR (including NCOs) and such persons may continue to be

retained in service beyond the above period until such person becomes due for discharge in normal manner subject to his willingness and fulfilment

of the stipulations. The appellants are heavily relying on the guidelines/policy which states that employment of permanent low category personnel at

all times is subject to availability of suitable appointment commensurate with their medical category provided the same is justified in public interest

and retention of such person will not exceed the sanctioned strength of the regiment/corps. It is also stated in the grounds that respondent had given

in writing that he has no objection if he is discharged from service which he has given in response to the show cause notice served on him and the

said aspect was not considered by the Writ Court the learned Single Judge has wrongly relied on the decision of Hon'ble the Supreme Court

reported in AIR 1995 SC 519 (Narendra Kumar Chandla v. State of Haryana). The learned counsel appearing for the appellants argued that

as there was no vacancy available to accommodate the respondent after he was found medically unfit, he was discharged from service which was

also accepted by the respondent.

8. learned counsel appearing for the respondent, on the other hand, submitted that the disability assessed by the medical Board being between 1 to

5 %, the respondent was very much fit to continue in service and even assuming that he was not fit to continue in army service, he ought to have

been given an alternate job as admittedly the disability has occurred during the course of employment i.e. while serving at Saichen Glacier, which

fact is admitted in the objections filed by the appellants themselves. Hence the respondent was entitled to get shelter appointment till his normal age

of retirement particularly when he was denied the disability pension on the ground that his disability was assessed between 1 to 5% alone. Learned

counsel also submitted that discharging the respondent after 16 years of his unblemished record of service only on the ground of low medical

category, without giving alternate employment was found fault with by the learned Single Judge and the learned Single Judge directed the appellants

to re-determine the disability of the respondent and to provide employment and there is no illegality in the order of the Writ Court and the

respondent is now aged 57 years and, therefore, alternate employment at this juncture is not possible and the respondent may be treated as in

service in alternate employment with pay protection and the appellants may be directed to calculate the salary and other benefits payable to the

date of superannuation and whatever amount already paid to the respondent be adjusted and the balance may be directed to be paid to him.

9. We have considered the rival submissions with reference to the specific admitted facts in this case.

10. The respondent was enrolled on 20.03.1979, admittedly while discharging his duties at Saichen Glacier suffered with Frost Toe and was

treated in Army Hospital and was kept in lower medical category CEE (temporary) and thereafter permanent. He was discharged from service on

the ground of medical disability. The disability of the respondent was admittedly between 1 to 5% and for that reason the disability pension was

denied to the respondent, which is specifically mentioned in the counter affidavit filed by the appellants before the Writ Court. The contention that

the respondent accepted the discharge/ expressed his willingness for his discharge, cannot be countenanced as the scheme contemplated giving

alternate employment which is also stated in the counter affidavit. No effort was made to give alternate employment to the respondent till his normal

age of retirement as per the scheme which clearly states that ordinarily permanent low medical category personnel will be retained in service till

completion of 15 years in case of JCOs and 10 years in case of OR (including NCOs) and such persons may continue to be retained in service

beyond the above period until such person becomes due for discharge in normal manner subject to his willingness and fulfilment of the stipulations.

Without ascertaining the said facts, a summary order of discharge was issued to the respondents and only in the counter affidavit reasons are

mentioned. The Hon'ble Supreme Court in the decision reported in AIR 1995 SC 519 (Narinder Kumar Chandla v. State of Haryana)

considered a similarly placed disabled person who was denied alternate employment and held that the denial of alternate appointment to a person

who has suffered disability during the course of his employment, is in violation of the Article 21 of the Constitution of India. In para 7, it is held thus:

Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which,

when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which the

employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since he is a

matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of

15/30 words per minute is necessary. For a Clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the

respondent Board to relax his passing of typing test and to appoint him as an LDC. Admittedly on the date when he had unfortunate operation, he

was drawing the salary in the pay scale of Rs 1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been

rehabilitated in the post of LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs 1400- 2300 and

direct to pay all the arrears of salary"".

11. It is also to be noted at this juncture that recognizing the said plight of the disabled persons and their rights guaranteed under Article 21 of the

Constitution of India the Parliament enacted the Act called "" the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full

Participation) Act, 1995. In the said Act, Section 47 mandates giving of alternate employment to disabled persons who sustain disability during

service. Section 47 reads thus:-

Sec.47. Non-Discrimination of Government employment.- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires

a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the

same pay scale and service benefits.

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is

available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to

such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

12. On perusal of the above statutory provision, it is clear that there is a statutory injunction not to dispense with or reduce in rank of such an

employee who suffers disability during his service. The object of the Act was to give effect to the right to live guaranteed under Article 21 of the

Constitution of India and as on date of discharge of the respondent there was a scheme available to the appellants to adjust the disabled persons in

an alternate post. The Hon'ble Supreme Court of India in the decision reported in (2003) 4 SCC 524 (Kunal Singh v. Union of India and anr),

in paragraph 9 held thus:-

9.An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such

employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very

frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads ""no establishment shall dispense

with, or reduce in rank, an employee who acquires a disability during his service"". The Section further provides that if an employee after acquiring

disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not

possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of

superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident

from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee

who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended

to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must

be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting

statutory obligation on the employer to protect an employee acquiring disability during service.

13. Even though the respondent was discharged before the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights &

Full Participation) Act, 1995, the said Act having been enacted bearing in mind the judgment of Hon'ble the Supreme Court in Narendra Kumar

Chandla's case rendered on 04.02.1994 (cited supra) in recognition of the fundamental rights guaranteed under Article 21 of the Constitution of

India, one cannot say that the said Act or the reason behind the said Act cannot be applied to the facts of this case.

14. It is not the case of the appellants that there was no scheme to give alternative employment to military personnel prior to the said Act and such

being the position and having regard to the fact that the percentage of disability of the respondent, even according to the appellants as assessed by

the Medical Board was between 1-5%, it was all the more necessary to the appellants to give alternate employment to the respondent without

discharging him. Thus the fundamental right guaranteed to the respondent under Article 21 of the Constitution of India for getting alternate

employment due to disability sustained by him while discharging his duties at Siachen Glacier is illegal. Thus, learned Single Judge was perfectly

right in allowing the writ petition with a direction to redetermine the disability and give alternate employment by judgment dated 06.07.2000.

15. The respondent is now aged 57 years, he having crossed the age of retirement as of now the appellants are bound to treat the respondent as

having served in the army as if he was not discharged from service and give him all benefits including seniority, promotion, which were given to his

juniors. The appellants are also not justified in contending that the respondent has accepted the discharge order and he is not entitled to seek

alternate employment. The said contention cannot be countenanced as it is well accepted principle of law that there cannot be any estoppels

against statute. The same is made clear in judgment of Hon'ble the Supreme Court reported in 1999(4) SCC 458 (Electronics Corporation of

India Ltd. v. Secretary, Revenue Department) and 2009 (6) SCC 194 (Sneh Gupta v. Devi Sarup). The beneficial orders/legislation

cannot be narrowly interpreted to deny relief to the person, who deserves to get it. The purpose of the policy framed by Army being to give

alternate employment to the physically disabled persons, who sustained disability during the course of employment, the same should be given due

weight-age and merely because the respondent applied for disability pension, which also was rejected as the disability was found to be between 1-

5%, the appellants are not justified in denying alternate employment to the respondent as the disability was lesser i.e. between 1-5%.

16. Hon'ble the Supreme Court in the decision reported in 2008 (1) SCC 579 (Bhagwan Dass and anr. v. Punjab State Electricity Board)

held that the officers dealing with the disabled persons must change their mind set and they are duty bound to follow the law. In paragraph 19 it is

held thus:-

We understand that the concerned officers were acting in what they believed to be the best interests of the Board. Still under the old mind-set it

would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite

wrong, seen from any angle.

From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful

rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and

have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but

would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal

citizens of the country.

17. On the basis of the above findings the appeal is dismissed with a direction to the appellants to treat the respondent as in service of the military

from the date of his discharge till his actual date of superannuation with all benefits including promotional benefits. The appellants are directed to

calculate the benefits payable to the respondents and pay the same after adjusting whatever payments the respondent had received either by way

of pension, gratuity, computation of pension etc. The order is directed to be implemented within a period of three months from the date of receipt

of copy of this order. No costs.