Ex. Const. Badan Singh vs Union Of India (Uoi) And Anr. on 22

March, 2002

Equivalent citations: 2002 VIIIAD Delhi 553, 97 (2002) DLT 986

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Bench: V Sen

JUDGMENT

Vikramajit Sen, J.

1. Despite the passage of a quarter-century since the AIDS/HIV infection was diagnosed, the stigma that surrounds it has not subsided. The number of persons who have become victims of this affliction has swelled to such staggering sums, that its pestilential proportions have accused a global effort to be made to combat it. However, the prejudice against the victim of AIDS is easily discernible form the indurate stand that is most often taken by the Authority concerned, in terms of its lack of alacrity to grant relief, as also in the extent or amount of relief allowed to the sufferer. The present petition is an example of this apathy, which is the result of a belief that HIV is the consequence of an immoral act. In this case it is admitted that the petitioner's wife is HIV; and that the parties have a child. Innocence, therefore, loses all relevance.

2. The facts in this unfortunate case are that the petitioner was enrolled in the Border Security Force on 12.6.1990. In March 1997 it was discovered by the Respondents that the petitioner was suffering form HIV Infection (Tuberculosis of Lungs and Abdomen with Infective Hepatitis). The petitioner had undergone medical examination, inter alia, at the AIIMS, New Delhi, and at the National Institute of Communicable Diseases, New Delhi. He appeared before a Medical Board on 16.4.1998 and was considered unfit for further service. A Review Medical Board was also convened on his request on 24.9.1998 which also arrived at the conclusion that the petitioner was unfit for further service. It will be relevant to record that by letter dated 16.6.1998 the Commandant of the Battalion had issued a notice for medical board out to the petitioner with 40 per cent disability. The petitioner was medically boarded out from service with effect from 15.2.1999 with seventy per cent (70%) disability, on the recommendations of the Review Medical Board

and the approval of the Competent Authority under Rule 25 of the BSF Rules. Although it has been averred by the petitioner that he was not suffering form any medical problems at the time of the termination of his services, which would impede him in the performance of his duties, this issue has not been pressed. It is also mentioned in the petition that "the petitioner vouchsafes that he has not been possibly given HIV Infection by any other woman, because no opportunity had occurred in which he could have contracted HIV Infection from some other woman. The BSF Authorities, who had carried out the investigations against the petitioner have never made any allegation of attributing any blame on the petitioner for alleged HIV Infection suffered by him". There appears to be an oblique accusation in the writ petitioner that the HIV Infection has been contracted by the petitioner as a consequence of any of his personal acts, but this plea has also rightly not been pressed during the course of arguments. It is, however, asserted by him that on the date of the termination of his services, although he was placed in category 'EEC', he was capable of performing the duties assigned to him. No effort was made by the Respondents to consider this aspect. Unquestionably, the Respondents have also not made nay effort to even investigate whether he could be allotted alternate duties. It is the petitioner's contention that by virtue of his having been placed in category 'EEE', the BSF has declared him hundred per cent (100%) invalid, and it is thus illogical that his disability was assessed at the lower figure of 70% Indubitably, the existence of some bias cannot be ruled out completely. The impugned Order dated 9.2.1999 reads as follows:

"Whereas review medical board of Border Security Force convened by HQ Raj & Guj. Ftr BSF on 25 Sept' 1998 to examine No. 90254763 Constable Badan Singh of 163 Battalion BSF, who is suffering form after effects of HIV Infection (Tuberculosis of longs and abdomen with (Infective Hepatitis). Constable Badan Singh has been graded medical category 'EEE' and declared "UNFIT" for retention in BSF.

2. The review medical board proceedings have been perused by Director (Medical) FHQ, New Delhi and approved by IG BSF P&G, FTR Jodhpur on 12/11/1998 vide SHQ BSF Gujarat letter No. Med/SHQ/BSF/Guj/98/1228 dated 20 Nov'98.

3. Now therefore, in exercise of the powers under BSF Act 1968, Rule-25 No. 90254763 Constable Badan Singh of 163 Bn BSF is hereby ordered to retire form service with effect from 15th Feb' 1999(AN).

4. No. 90254763 Constable Badan Singh has been struck off strength of this

unit w.e.f. 15 Feb' 1999 (AN).

Sd/-

(N G Ganguly)

COMMANDANT

163 Bn BSF"

3. It has been prayed in the writ petition that (i) the petitioner be reinstated with continuity of service, or (ii) that he be provided alternative employment to enable him to earn his livelihood and pension on attaining the age of superannuation and or (iii) alternatively that he be granted all pensionary benefits as admissible to persons with 100% medical disability attributable to service.

4. The Respondent, Border Security Force, has strenuously resisted the petition on the ground that the petitioner cannot be granted pensionary benefit as he has not completed the requisite ten years of qualifying service, as per Rule 49(ii) of the C.C.S. Pension Rules. It has also been submitted that the petition is barred by delay and laches having been filed in January 2000; which ground is wholly untenable and is summarily rejected. It has also been contended that the petitioner can neither be allowed to stay in service as per the Rules nor can his disability be enhanced to 100 per cent. Mr. Gaurav Duggal learned counsel appearing on behalf of Respondents, has argued that no weightage ought to be given to the initial assessment of the petitioner's 40 per cent disability since this assessment was made by the Unit where the petitioner was then posted and not by a competent authority; the decisions as to the extent of disability can rightly and properly be taken only by the Medical Authorities as has been done in the letter dated 9.2.1999, extracted above. Reliance has been placed on Rule 25 of the Border Security Force Rules (hereinafter referred to as 'the Rules') which specify that where a Commandant is satisfied that a Subedar, a Sub-Inspector or an enrolled person is unable to perform his duties by reason of any physical disability, he may direct that the said Subedar, Sub-Inspector or the enrolled person, as the case may be, be brought before a Medical Board, If the Medical Board is of the opinion that such person is unfit for further service, with which opinion the Commandant agrees, he may order the retirement of such person. With this Rule we are not immediately concerned since there is no challenge as to the correctness

of the procedure followed by the Respondents. Reliance has also been placed on Rule 49 of Central Civil Services (pension) Rules (hereinafter referred to as 'the pension Rules' which reads as follows:

"49. Amount of pension.

(1) In the case of a Government servant retiring in accordance with the provision of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

(2)(a) In the case of a Government servant retiring in accordance with the provisions of these rules after competing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at fifty per cent of average emoluments, subject to a maximum of four thousand and five hundred rupees per mensem.

(b) in the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under Clause (a) and in no case the amount of pension shall be less than Rupees three hundred and seventy-five per mensem;

(c) notwithstanding anything contained in Clause (a) and Clause (b) the amount of invalid pension shall not be less than the amount of family pension admissible under Sub-rule (2) of Rule 54.

3. In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half-year and reckoned as qualifying service.

(4) The amount of pension finally determined under Clause (a) or Clause (b) of Sub-rule (2), shall be expressed in whole rupees and where the pension contains a fraction of a rupee it shall be rounded off to the next higher rupee."

5. Mr. Gaurav Duggal sought to buttress his contentions on the strength of a decision of the Hon'ble Supreme Court in Union of India & Ors. v. Rakesh Kumar, Civil Appeal No. 6166 of 1999, decided on March 30, 2001, in which the above Rule came to be

considered. In those batch of appeals, the question before the Hon'ble Supreme Court was as to whether persons who had voluntarily retired after completing ten (10) years service but before completing qualifying service of twenty (20) years, were nonetheless entitled to get pensionary benefits. It appears that a favorable Government Order was relied upon and even implemented in some measure. The Court observed that the Government cannot amend or substitute statutory Rules by administrative instructions; only if the Rules are silent on any particular point can the Government fill up the gaps and supplement the Rules by issuing instructions not inconsistent with the Rules. The Apex Court held that the persons how had sought voluntary retirement before having completed 20 years of service were accordingly not entitled to the payment of pension under Rule 49 of the Pension Rules. This judgment has no relevance to the issued raised in this writ petition. The Apex Court did not opine that in every case where the concerned employee's services are brought to an end, whether on his volition or at the instance of his employer, he is not entitled to pension. Those situations are not contemplated by Rule 49 of the Pension Rules.

6. The relevant provision can be found in Rule 38 of the Pension Rules which is reproduced for ready reference:

"38. Invalid pension

(1) Invalid pension may be granted if a Government servant retires form the service on account of any bodily or mental infirmity which permanently incapacitates him for the service.

(2) A Government servant applying for an invalid pension shall submit a medical certificate of incapacity from the following medical authority, namely :-

(a) A medical Board in the case of a Gazetted Government servant and of a non-gazetted Government servant whose pay, as defined in Rule 9(21) of the Fundamental Rules, exceeds (Two thousand and two hundred rupees) per mensem;

(b) Civil Surgeon or a District Medical Officer or Medical Officer of equivalent status in other cases.

NOTE 1.- No medical certificate of incapacity for service may be granted unless the applicant produced a letter to show that the Head of his Office or Department is aware of

the intention of the applicant to appear before the medical authority. The medical authority shall also be supplied by the Head of the Office or Department in which the applicant is employed with a statement of what appears form official records to be the age of the applicant. If a service book is being maintained for the applicant, the age recorded therein should be reported.

NOTE 2.- A lady doctor shall be included as a member of the Medical Board when a woman candidate is to be examined.

(3) The form of the Medical Certificate to be granted by the medical authority specified in Sub-rule (2) shall be as in Form 23.

(4) Where the medical authority referred to in sub-rule (2) has declared a Government servant fit for further service of less laborious character than that which he had been doing, he should, provided he is willing to be so employed, be employed on lower post and if there be no means of employing him even on a lower post, he may be admitted to invalid pension."

7. No specific traverse and denial has been made to the petition's averment that in placing him under medical category 'EEE' and declaring him unfit for retention in BSF and invalidating him out of service due to medical condition it must be concluded that he has 100 per cent disability. In the absence of a specific denial to this statement, it must be assumed that the Respondents have admitted that the petitioner suffered form 100 per cent disability. The present case is not one where the petitioner has applied for grant of invalid pension. His plea before the Respondents was that he should be permitted to complete 10 years qualifying service, and that he was fit to do so. Sub-rule (1) of Rule 38 of the pension Rules will, therefore, apply. It is the Respondent who had graded the petitioner in the medical category 'EEE' and declared him unfit for retention in the BSF. No minimum service can or has been prescribed to cover. such an eventuality.

8. Unfortunately there still remains a severe social stigma against persons suffering form HIV. It is difficult to conceive of a situation where nay person would consciously or wittingly run the risk of contracting AIDS. It is ludicrous to contend that anyone would contract HIV so as to earn a disability pension. The fact is that this disease is spreading like wildfire in the developing countries, and in India it has assumed alarmingly epidemic proportions. This indicates that it may be the consequence Governmental failure, albeit

for paucity of adequate funds, to bring about social awareness on the risks and dangers endemic in careless conjugation. It is now also sufficiently documented that AIDS is communicable not only through sexual contact but also through blood transfusion. For this reason I had specifically recorded that it had not been pressed by the petitioner that he had contracted AIDS for no fault of his own, or for reasons attributable to service. A reading of Rule 38 of the pension Rules, however, significantly discloses that grant of invalid pension is not dependent on whether the bodily or mental infirmity which permanently incapacitates the concerned person was contracted or suffered in the course of service. All that the Rule envisages is that the person should be incapacitated for service. In this vital aspect, these Rules are not similar to Rule 48 of the defense Services Regulations which stipulates that disability pension is admissible when an officer is retired form military service on account of a disability which is attributable to or aggravated by such service. It is quite clear that in the case in hand no 1effort was made by the BSF to investigate whether the petitioner, inspite of his medical affliction, could be given some other duties to perform, atleast so as to enable him to fulfill the minimum 10 years service and become eligible for pension. It is quite possible that the absence of a sympathetic if not a compassionate handling of the case was because the disease in question is AIDS. I find it necessary to emphasise that no person would willingly contract AIDS. Keeping in view the highly communicable instance and nature of this affliction, patients must be treated with sufficient sympathy.

9. The decision in Madan Singh Shekhawat v. Union of India and Ors., can be pressed to the fore as it contains sufficient guidelines for arriving at a just and fair decision in this petition. In that case the petitioner was Sawar in military service. While alighting from a train he suffered an accident which necessitated the amputated of his right arm. At the time of this unfortunate occurrence he was traveling to his home station on authorised causal leave. He was, however, not undergoing the journey on a travel warrant i.e. at Government expense. Shri Shekhawat claimed special disability pension which was recommended by the high Authorities but rejected by the Controller of defense Accounts (Pension), Allahabad. Rule 10 of the defense Service Regulations (hereinafter referred to as 'the Regulations') specify that casual leave counts as duty. Rule 48 of the Regulations reads as follows:

"Disability pension when admissible - An officer who is retired form military service on account of a disability which is attributable to or aggravated by such service and is

assessed at 20 per cent or over may, on retirement, be awarded a disability pension consisting of a service element and a disability element in accordance with the regulations in this section;"

In respect of accidents the following rules will be observed:-

(a) .....

(b) .....

(c) A person is also deemed to be 'on duty' during the period of participation in recreation, organized or permitted by Service Authorities and of traveling in a body or singly under organized arraignments. A person is also considered to be 'on duty' when proceeding to his leave station or returning to duty from his leave station at public expense."

His Lordship Santosh Hedge, J. did not perceive the use of the words 'returning to duty form his leave station at public expense' has an obstacle to the grant of relief under provisions which are avowedly beneficial in character. The Court opined that the rule makers did not intend to deprive Army personnel of the benefit of disability pension solely on the ground that the cost of the journey was not borne by the public exchequer. Instead it construed the words "at public expense" to mean "traveling which is undertaken authorisedly".

10. The present case also calls for some judicial engineering of the Rules and Regulations which are inherently and intrinsically beneficial in nature and content, thus calling for a wide interpretation and application. Rule 38 of the pension Rules does not prohibit the grant of invalid pension if the bodily or mental infinity which permanently incapacitates the person concerned results form the nature of duties officially performed. It is contended by Mr. Duggal that in granting such pension the petitioner would in fact be bestowed a premium for his sexual deviation or recklessness. Assuming that the petitioner acquired AIDS through extra marital sexual intercourse, it could hardly be presumed that he intended to contract this fatal and stigmatic health disorder, leading immediately to ostracism, so as to become eligible for premature pension. He must surely be regretting his action even if he is responsible for his infection. I am unable to subscribe to the view that he would be happy to reap the benefit of an invalid pension.

Given the choice, the petitioner, or any other person in his place, would prefer to work rather than suffer from AIDS. One of the essential functions and duties of the Government and any other Authority directly sourced from Government funds, is to extend medical benefits and support to the suffering. The grant of invalid pension is not a paisa more than this basic obligation. In the present case we can steer clear form the controversy as to whether the infirmity or incapacity was attributable to or aggravated by service since Rule 38 of the pension Rules unlike Rule 48 of the Regulations does not contemplate this causation.

11. In this analysis the writ petition succeeds. The Respondents are directed to pay to the petitioner invalid pension with effect from 15.2.1999 together with interest at the rate of six per cent (6%) per annum, within sixty days form today. In view of the callous and unsympathetic stand adopted by the Respondents I am also of the view that the petition is entitled to be reimbursed the costs of his petition, which are quantified at Rs. 5,000/-.