

Kamlesh Devi Vs. Union of India and ors

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Court : Delhi

Decided On : Jul-31-2013

Judge : Gita Mittal

Appellant : Kamlesh Devi

Respondent : Union of India and ors

Advocate for Def. : Dr. Ashwani Bhardwaj

Advocate for Pet/Ap. : Mr. S.M. Hooda, Mr. S.S. Pandey

Judgement :

\$~12 * IN THE HIGH COURT OF DELHI AT NEW DELHI + W.P.(C)
No.4774/2012 Date of decision:

31. t July, 2013 % KAMLESH DEVI Through : Petitioner Mr. S.M. Hooda and Mr. S.S. Pandey, Advs. versus UNION OF INDIA AND ORS Respondents Through : Dr. Ashwani Bhardwaj, Adv. CORAM: HONBLE MS. JUSTICE GITA MITTAL HON'BLE MS. JUSTICE DEEPA SHARMA GITA MITTAL, J.

(Oral) 1. The petitioner before this court has assailed the order dated 21st October, 1997 passed by the Armed Forces Tribunal rejecting the petitioners prayer for grant of disability pension and special family pension with regard to unfortunate death of her husband late Sepoy Bijender Singh.

2. The facts giving rise to the present petitioner to the extent necessary are set down hereafter. Sepoy Bijender Singh was enrolled with the Indian Army on 8th August, 1990 after completing medical examination without any disease at the time of enrolment. Sepoy Bijender Singh was posted in Jammu and Kashmir area where he was detected as suffering from Cancer. WP(C) No.4774/2012 page 1 of 11 Treatment for this disease was administered by the army medical authorities. The Cancer kept on spreading and, in the year 1995 his right leg had to be amputated. It is noteworthy that the jawan continued to serve the Indian Army over this entire period even after his amputation. The family of late Sepoy Bijender Singh was finally called to Jammu and Kashmir in September, 1995 to take the jawan home with them.

3. Our attention has been drawn to the Summary and Opinion of the Classified Specialist in Medicine, Medical Oncology dated 16th July, 1995 who has made the following observations with regard to the medical condition of the jawan: Last review in May 95 did not reveal any abnormality. Presently admitted with h/o a mass in the left clevicular region. FNAC confirmed the recurrence clinically the individual is a cachectic and was recurrence. Further therapy is unlikely to be of any benefit as recurrence has occurred after extensive therapy all modalities have been exhausted. Recommended to be invalidated in MED Cat EEE out of service.

4. Based on this opinion, the petitioner was brought before the Release Medical Board which conducted its proceedings on 2nd September, 1995. Pursuant to these Medical Board proceedings, the petitioners husband was invalidated out of service in medical category EEE. He unfortunately succumbed to the disease on the WP(C) No.4774/2012 page 2 o

28. h of September, 1995. We may note that the Release Medical Board of the jawan assessed the percentage of disability at 90%. The record of the Medical Board proceedings has been placed before this court. The medical board returned the following findings: The board is agree with the opinion of specialist and fit to be Invalidated out from military service in low medical category EEE.

5. The petitioner has contended that the claim of disability pension of the jawan was sanctioned by his commanding officer and forwarded to the Pension

Controller of Defence Account (PCDA) (Pension), Allahabad for making payment in terms of Regular 12 of the Pension Regulation for the Army 1961 (Part II). The PCDA, Allahabad rejected the disability pension claim made by the petitioner vide their letter dated 29th January, 1997 for the reason that jawan had expired about 5 days after the date of his invalidation from the service.

6. The petitioner, as the widow of the deceased jawan, submitted an appeal against the rejection of her husbands disability pension. This appeal was rejected by order dated 9th December, 1999 by the Ministry of Defence, Government of India. The petitioners second appeal for grant of disability pension of her husband and consequently family pension to her was rejected by an order dated 29th October, 2001, again by the Government of India, Ministry of Defence. WP(C) No.4774/2012 page 3 o

7. of The petitioner challenged all these orders rejecting the claim the deceased jawan for disability pension vide WP(C)No.2647/2003 before this court which was transferred to Armed Forces Tribunal (Principal Bench) and registered as T.A.No.47/2010. This petition was rejected by the Armed Forces Tribunal by a judgment dated 13th January, 2012 holding that the petitioner could not be granted the prayer under any applicable existing rules and regulations.

8. As noted above, the petitioner has challenged the judgment dated 13th January, 2012 of the Armed Forces Tribunal; the orders of the PCDA(P) Allahabad as well as the Government of India rejecting her appeals denying disability pension of her deceased husband and the family pension to her by way of the present writ petition. The challenge rests primarily on the ground that the PCDA(P) Allahabad had no jurisdiction whatsoever to reject the claim of the petitioner in the given circumstances. It is contended that there is no record with regard to any ailment or disease which affected the petitioner at the time of his initial recruitment. He was healthy and able bodied when he joined the Army, served in hard areas. The deceased husband of the petitioner was diagnosed as suffering from Cancer which he acquired only after he joined services. It is contended in any case, given the nature of duties which the petitioners husband was required to perform in the area of Jammu and Kashmir, the condition of the deceased would have been

9. The respondents in their several communications as well as medical examination of the husband of the petitioner have held that the ailment of late Sepoy Bijender Singh was neither attributable nor aggravated by the exigency of service. It has been endorsed that the same was not connected with the exigencies of service.

10. Learned counsel for the parties have drawn our attention to the pronouncement dated 2nd July, 2013 of the Supreme Court of India in Civil Appeal No.4949/2013 (arising out of SLP(C)No.6940/2010) Dharamvir Singh v. Union of India & Ors. wherein also no record was found of the petitioner suffering from any disease at the time of initial enrolment. The Supreme Court has clearly laid down the principles which would apply to a case as the present one for award of disability pension to an army personnel in the following terms:28. A conjoint reading of various provisions, reproduced above, makes it clear that: (i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173). (ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical WP(C) No.4774/2012 page 5 of 11 grounds any deterioration in his health is to be presumed due to service. [Rule 5 r/w Rule 14(b)]. (iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for nonentitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9). (iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [Rule 14(c)]. (v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an

individual's discharge or death will be deemed to have arisen in service. [14(b)]. (vi) If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)]; and (vii) It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the "Guide to Medical (Military Pension), 2002 "Entitlement : General Principles", including paragraph 7,8 and 9 as referred to above. WP(C) No.4774/2012 page 6 o

11. We may note that the facts and circumstances of Dharamvir Singh (Supra) were similar to the present case inasmuch as even in Dharamvirs case no disease recorded in his service record at the time of his acceptance for military service. There was no record of any treatment being administered to Dharamvir Singh or any heredity ailment was found.

12. So far as responsibility of the Medical Board while considering the attributability of the disease or its aggravation to service condition was concerned, in Dharamvir Singh (Supra), the Supreme Court has laid down the following requirements:30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from Clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows: WP(C) No.4774/2012 page 7 of 11

(d) In the case of a disability under C the board should state what exactly in their opinion is the cause thereof.

YES Disability is not related to mil service

31. Paragraph 1 of 'Chapter II' Entitlement : General Principles specifically stipulates that certificate of a constituted medical authority vis--vis invalidating disability, or death, forms the basis of compensation payable by the Government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre-and post-service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and dispute. For the said reasons the Medical Board was required to examine the cases in the light of etiology of the particular disease and after considering all the relevant particulars of a case, it was required to record its conclusion with reasons in support, in clear terms and language which the Pension Sanctioning Authority would be able to appreciate.

32. In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of 'Entitlement Rules for Casualty Pensionary Awards, 1982', the WP(C) No.4774/2012 page 8 of 11 appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Generalised seizure (Epilepsy) at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service. (emphasis by us) The above principle squarely applies to the instant case.

13. The present case also requires a presumption to be drawn with regard to fitness of the jawan at the time of his original enrolment and the consequential benefits to the petitioner upon the presumption in his favour. There is no record at all to show that the petitioner had any kind of medical ailment at the time of

entering into the service.

14. Deterioration of his health and the aggravation of the disease after it was detected while he continued to remain in the field area where he was posted would also weigh in favour of the petitioner and against the respondents. Looked at from any angle, it has to be held that the service conditions would have aggravated his condition and disease, its progression. The Medical Boards do not refer to availability or nature of treatment for the disease at the place of the jawan posting.

15. In this background, the petitioner would be entitled to the relief prayed for in the present petition based on the principles laid down by the Supreme Court in Dharamvir Singhs case (Supra). WP(C) No.4774/2012 page 9 of 11 As a result, we hold that the rejection of claim of the jawan for award of disability pension and the petitioners claim for special family pension by the respondents as well as the orders dated 13th January, 2012 of the AFT are contrary to law and the principles laid down by the Supreme Court and are therefore unsustainable.

16. We accordingly direct as follows:- (i) the impugned order dated 13th January, 2012 of the Armed Forces Tribunal and the orders dated 29th January, 1997 and 29th October, 2001 passed by the respondents are set aside and quashed. (ii) Late Sepoy Bijender Singh shall be entitled to disability pension which has to be computed based on 90% disability with effect from 23rd September, 1995 till 28th September, 1999 in view of the assessment by the concerned medical authorities. (iii) The petitioner shall be entitled to award of special family pension with effect from 29th September, 1995 during her life time in accordance with the applicable rules. (iv) The respondents shall effect computation of the amount admissible to late Sepoy Bijender Singh as well as petitioner in terms of the above directions within three months from today and communicate the same forthwith to the petitioner as well as learned counsel representing the petitioner. WP(C) No.4774/2012 page 10 of 11 (v) The petitioner shall be entitled to interest @ 6% per annum on the amount of arrears for the period of three years prior to today. Dasti to parties. (GITA MITTAL) JUDGE (DEEPA SHARMA) JUDGE JULY 31 2013 mk WP(C) No.4774/2012 page 11 of 11