

**Tapas Kumar Dey Vs. The Union of India and Ors.**

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**Court :** Kolkata

**Decided On :** Jan-30-2015

**Judge :** Tapabrata Chakraborty

**Appellant :** Tapas Kumar Dey

**Respondent :** The Union of India and Ors.

**Judgement :**

IN THE HIGH COURT AT CALCUTTA Constitutional Writ Jurisdiction ORIGINAL  
SIDE Present: The Honble Justice Tapabrata Chakraborty W.P.No.713 of 2010  
Tapas Kumar Dey Versus The Union of India & ORS.For Petitioner : Ms.Somali  
Mukhopadhyay.

For Respondents : Mr.D.N.

Chatterjee.

Judgment On : 30th January, 2015.

**Tapabrata Chakraborty, J.**

This writ application has been preferred challenging a show- cause notice dated 24th June, 2008 and a memorandum dated 27th June, 2009 issued by the respondent no.4.

A brief review of the relevant facts would suffice.

Upon emerging to be successful in a selection process, the petitioner was appointed to the post of Constable under the Border Security Force (hereinafter referred to as BSF) and upon successful completion of training for 9 months, the petitioner was posted at Manipur from 1989 till 1991.

Subsequent thereto, while discharging his duty in F-Co.of 30 BN at Kashmir and on the intervening night of 26/27th March, 1992, the petitioner sustained a bullet injury at his lower abdomen due to militant fire.

Such injury was ascertained to be attributable to government bonafide duty in a Court of Enquiry by an order dated 15th April, 1992.

On and from the year 1994 till 2006 the petitioner was placed under different battalions and thereafter in the month of November 2007 the petitioner was placed under 191-BN BSF at Kalyani and was allotted light unarmed duties.

Thereafter, the petitioner was referred to the Institute of Psychiatry, Kolkata by the BSF authorities for the purpose of ascertainment of the petitioners health status and pursuant thereto an examination was conducted and a report was issued on 23rd November, 2007 and again thereafter on 1st February, 2008 the petitioner was examined by the Department of Health and Family Welfare and it was inter alia opined that the petitioner is fit to continue his normal duties.

Subsequent thereto, on 24th June, 2008, the petitioner was issued a show-cause notice by the respondent no.4 communicating a tentative proposal of retirement on grounds of unfitness under Rule 25 of the Border Security Force Rules, 1969 (hereinafter referred to as the said Rules).By the said memorandum, the petitioner was also intimated that he would be at liberty to apply for Review Medical Board.

Pursuant thereto the petitioner sought for a Review Medical Board and by a memorandum dated 1st May, 2009 issued by the respondent no.4 the petitioner was again directed to report before a Medical Board on 4th May, 2009.

On the said date no examination was held by the authorities.

Thereafter by a memorandum dated 16th June, 2009 issued by the respondent no.4 the petitioner was advised to submit his unconditional notice for voluntary retirement within 24th June, 2009.

The petitioner responded to the same by a representation dated 17th June, 2009 but without considering the same the respondent no.4 by a memorandum dated 26th June, 2009 issued the order of retirement from service on ground of physical unfitness.

The date of effect of such retirement was stipulated to be 26th June, 2009 by a further memorandum dated 27th June, 2009 issued by the respondent no.4.

Aggrieved by the said decision the petitioner made representations dated 2nd July, 2009 and 29th November, 2009 and in response thereto a memorandum dated 9th January, 2010 was issued by the respondent no.4 intimating inter alia that the petitioners application dated 29th November, 2009 addressed to the Director General, BSF is under consideration of FHQ-BSF, New Delhi and the decision of the same will be communicated to the petitioner in due course of time.

In the said representations, the petitioner indicated that he was examined by Dr.

Kaustav Chakraborty, Md.Psychiatry attached to the Institute of Neuroscience Kolkata on 6th May, 2010 and it was inter alia recommended that the petitioner is fit to carry out normal responsibilities.

Ms.Somali Mukhopadhyay, learned advocate appearing for the petitioner submits that the petitioner suffered bullet injury while discharging his duty at Kashmir and such injury was ascertained to be in discharge of government bonafide duty by the competent authority.

Such trauma and stress of bullet injury affected the petitioners health and the petitioner prayed for light duties and accordingly the BSF authorities referred the petitioner to the Institute of Psychiatry and the doctors opined that the petitioners behavioral pattern was not violent and he was otherwise fit to continue his normal duties as would be explicit from the reports dated 17th November, 2007, 23rd November, 2007 and 1st February, 2008 at pages 60 to 62 of the writ application.

According to her as the petitioner protested against an illegal imposition of punishment on 27th November, 2007 by the Commandant and the denial of the authorities to allow the petitioner to ventilate his grievance before the Director General through a notice dated 11th January, 2008, the authorities, upon rejection of the petitioners claim by a memorandum dated 15th May, 2008, vindictively issued the show-cause notice dated 24th June, 2008.

She further submits that the Medical Reports dated 28th February, 2009, 3rd March, 2009, 24th March, 2009 would reveal that the petitioner was found fit to discharge his normal duties but the respondents did not grant any weightage to such opinion of the doctors and abruptly issued the memorandum dated 27th June, 2009, directing retirement of the petitioner from service with effect from 26th June, 2009, on ground of physical unfitness.

The said memorandum reveals that for arriving at such decision the opinion of the Review Medical Board dated 4th May, 2009 was taken into consideration.

She further submits that on 16th June, 2009 (Annexure P-16 at page 90 of the writ petition) the respondent authority served a letter to the petitioner and pressurized him to submit unconditional notice for voluntary retirement from service which the petitioner did not accept.

Drawing the attention of this Court to a Medical Report dated 6th May, 2010 she asserts that the petitioner is capable of discharging normal duties but without considering such report, the respondents have abruptly issued the order of retirement under Rule 25 of the said Rules.

She further submits that the issue as regards continuance of the petitioners service is yet to be decided and determined by the competent authority since the Commandant himself in the memorandum dated 9th January, 2010 has observed that the petitioners application dated 29th November, 2009 is yet to be disposed of by FHQ-BSF, New Delhi.

But prior to communication of any such decision, the respondents issued the order of retirement on the ground of physical unfitness and such action is ex facie

violative of the statutory provisions.

She further argues that in the Medical Boards constituted by the authorities there were no specialist doctors in Psychiatry and that as such the petitioner was not appropriately examined and the opinion of the Medical Boards to the effect that the petitioner was suffering from Bipolar Mood Disorder and Manic Depressive Psychosis, are not acceptable.

In support of her arguments, Ms.Mukhopadhyay has placed reliance upon an unreported judgment delivered by the High Court of Jharkhand at Ranchi in the case of Union of India and others - versus Ram Chander Pandey.

Placing reliance upon the averments made in the affidavit-in- opposition, Mr.D.N.Chatterjee, learned advocate appearing for the respondents submits that the petitioner was initially examined on 9th March, 2005 and the Medical Board observed that the petitioner was suffering from Bipolar Mood Disorder and recommended for his placement under Low Medical Category(Temporary).i.e., S3 (T-

48) H1A1P3(P-48)E1.

Subsequent thereto, the petitioner was again examined on 15th March, 2008 and the Medical Board opined that the petitioner was suffering from Bipolar Mood Disorder and was unfit for further retention in service and the percentage of the petitioners disability was stipulated to be 50%.

According to Mr.Chatterjee, upon consideration of the opinion of the Medical Board dated 15th March, 2008, the respondent no.4 issued the show-cause notice on 24th June, 2008 and the order of retirement on ground of physical unfitness was issued against the petitioner on the basis of the opinion of the Review Medical Board dated 4th May, 2009.

He further submits that the petitioner has already received a total amount of Rs.52,700/- on account of GPF, F.A., and adhoc bonus and has accordingly accepted the order of retirement under Rule 25 of the BSF Rules and that as such he cannot turn back and challenge the said order of retirement.

He has also drawn the attention of this Court to a Medical Board Report dated 4th March, 2009 wherein the Board was of the opinion that the petitioners case is of Manic Depressive Psychosis and the petitioner is unfit to remain in category SHAPE-I.

He further submits that the petitioner suffered from operational injury in the year 1992 from which he duly recovered but he started having strange dreams which was followed by sleep disturbance and gradually it became serious, necessitating treatment from the Institute of Psychiatry, Calcutta since November, 2000.

Thereafter, the petitioner was sent to the said Hospital for regular follow up treatment but there was no improvement.

The petitioner had distinct adjustment problem with people around him and he even went to the extent of having sexual perversion.

Mr.Chatterjee further submits that the respondents have acted in strict consonance with the statutory provisions and the decision towards retirement was taken on the basis of the opinion of a validly constituted Review Medical Board and that there is absolutely no error in the decision making process warranting interference of the Honble Court.

I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

For the purpose of resolution of the dispute the following dates are vital : a) 26/27th March, 1992 - Petitioner suffered bullet injury due to militant fire.

b) 15th April, 1992 - Enquiry proceeding concluded with a finding to the effect that the injuries sustained by the petitioner was attributable to government bonafide duty.

c) 9th March, 2005 - Medical Board opined that the petitioners case is of BIPOLAR MOOD DIS

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and was unfit to remain in medical category SHAPE-ONE.

(Page 27 of the affidavit-in-opposition) d) 17th November, 2007 - Medical Report from Institute of Psychiatry, Calcutta (Page 60 of writ application) e) 23rd November, 2007 - Medical Report from Bangur Institute.

(page 61 of writ application) f) 1st February, 2008 - Medical Report from Department of Family Welfare and Health.

(page 62 of the writ application) g) 15th March, 2008 - Medical Board which opined that petitioners case is of BIPOLAR MOOD DIS

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and as such unfit for further retention in service.

(page 32 of the affidavit-in-opposition) h) 24th June, 2008 - Show-cause notice issued by the respondent no.2.

(page 79 of the writ application) i) 4th March, 2009 - The Medical Board opined that the petitioners case is of Manic Depressive Psychosis and that he was unfit to remain in category SHAPE -I.(page 42 of the affidavit-in-opposition) j) 4th May, 2009 - The Medical Board opined that the petitioner was suffering from Manic Depressive Psychosis and that he is unfit for further service.

(page 41 of the affidavit-in-opposition) The undisputed facts are that the petitioner suffered a bullet injury in course of his duty and that subsequent thereto he developed a sleep disturbance and by the Medical Board Report dated 9th March, 2005 the petitioner was found to be suffering from Bipolar Mood Disorder and was considered to be unfit to remain in Medical Category SHAPE-I.

Subsequent thereto, the petitioner was referred by the BSF authorities to the Institute of Psychiatry and the said department declared the petitioner to be fit to continue in service.

(Pages 60 to 62 of the writ application) On 28th February, 2009 the BSF Hospital authorities opined that the petitioner should be sent to the Department of Psychiatry and pursuant thereto the petitioner was tested at Bangur Institute and on 24th March, 2009 (page 88 of the writ application) the doctor recommended for

placement of the petitioner in light duties without arMs. In the midst thereof, upon considering the petitioners medical category, at the time of joining at 191Bn-BSF, he was asked to perform duties without arms/ammunition like line office runner, watering of plant in unit area and line sentry duty.

No material was brought on record by the respondents to the effect that the disability of the petitioner while joining the said 191Bn- BSF stood enhanced, till 15th March, 2008 and that in fact even on 4th March, 2009, a Medical Board found the petitioner unfit to remain in category SHAPE-I but not totally unfit for continuance in service and that the said report dated 4th March, 2009 is similar to the report dated 9th March, 2005.

Records reveal that the show-cause notice was on the basis of Medical Board Report dated 15th March, 2008 and the petitioner was considered to be unfit for further retention in service as he was suffering from a Bipolar Mood Disorder but the final order under Rule 25 of the said Rules was passed by the respondent no.4 placing reliance upon the Review Medical Board opinion dated 4th May, 2009 wherein it was opined that the petitioner is suffering from Manic Depressive Psychosis and was unfit for further service.

In view of such admitted contradictions, this Court referred the matter to the Director, Bangur Institute of Neuroscience and Psychiatry, Department of Health and Family Welfare, Government of West Bengal, to constitute a Medical Board and to examine the petitioner and pursuant to the said order dated 22nd August, 2014 a Medical Board was constituted and the petitioner was examined and a report was forwarded vide memorandum dated 27th September, 2014.

In the said report the Board members have unanimously concluded that the petitioner is currently stable without any active mood, thought or perceptual disorder.

The evidence of the past history of depressive episodes has been provided by the patient himself.

It is not possible to comment or concluded about the past history of Bipolar mood disorder based on current examination.

There is no explanation as to how the petitioner, who was found to be suffering from Manic Depressive Psychosis and considered unfit to remain in Medical Category SHAPE-I by a Medical Board on 4th March, 2009, could have incurred total unfitness within a period of 2 months as explicit from the Medical Report dated 4th May, 2009.

A perusal of the said order dated 27th June, 2009 also does not reveal any independent application of mind on the part of the respondent no.4.

Protesting against such decision, the petitioner made a representation on 29th November, 2009 to which a reply was issued on behalf of the respondent no.4 intimating, inter alia, that the petitioners representation dated 29th November, 2009 addressed to the respondent no.2 is still awaiting a decision from the Superior Officer and that such decision would be communicated to the petitioner in due couRs.of time.

However, till date no such decision has been communicated to the petitioner but in the midst of hearing Mr.Chatterjee placed reliance upon a document dated 18th March, 2010 issued by Deputy Commandant (ESTT) wherein it has, inter alia, been observed that the petitioners application dated 29th November, 2009 has been duly examined by the HQ but could not be acceded to.

The said memorandum dated 18th March, 2010 contains no reason and depicts no independent application of mind and the same has also not been issued by the respondent no.2.

Such sequence of facts reveals that pending appropriate disposal of the petitioners claim by the Superior Officer being the respondent no.2 herein, the respondent no.4 has directed retirement of the petitioner on physical unfitness ground with effect from 26th June, 2009.

The provisions contained in Rule 25 of the said rules, being beneficial to the employee concerned, should be complied with.

Rule 25, sub-rules (6) and (7) read combinedly empowers the Superior Officer to pass an appropriate order as he may deem fit, which in turn means that he may, in a given situation, disagree with the findings of the Medical Board.

Such power of review is in the form of an appellate power.

The words pass such order as he may deem fit, draw no manner of doubt that the Superior Officer has the requisite power not only to agree with the findings of the Medical Board, but also to disagree therewith, and in that view of the matter it was obligatory on the part of the Superior Officer, to pass an appropriate reasoned order and to communicate the same to the writ petitioner.

Such an order passed by the Medical Board or by the Superior Officer entail a civil consequence.

Superior Officer, in terms of the provisions of Rule 25, acts as a quasi judicial authority.

Any order passed by the said authority would entail civil or evil consequence.

Right to continue in service is protected under Article 21 of the Constitution of India (See D.K.Yadav -versus J.M.Industries, reported in 1993 (3) SCC259.

Having regard to the fact that by reason of an order passed under Rule 25, officers mentioned therein may be deprived of their livelihood, an order passed by the said authority would be subject to judicial review of this Court.

While exercising such power of judicial review this Court can enter into the question as to whether the concerned authority had followed the procedures laid down in the said rules while going through the decision making process.

It appears that the petitioners representation against the order of retirement on the ground of physical unfitness was not even considered by the appropriate authority and such action on the part of the respondents tantamounts to violation of principles of natural justice.

Thus, in the instant case a statutory authority has failed to perform his legal duties and such failure warrants interference of this Court.

The petitioner is a battle casualty, i.e., he had suffered physical disability while on duty and as such he has a right to be retained in a sheltered employment, commensurate to the nature of duty to be performed and the disability suffered through conferment of light duties, without arMs. The petitioner is presently aged about 47 years and he is a married person, having a family and the order of retirement issued under Rule 25 of the said rules would adversely affect the livelihood of the petitioner and his family.

Furthermore, the petitioner suffered an injury due to a militant attack and the specialist doctors have opined that he is fit to continue in service and in the backdrop of the said facts and the expert opinion the order of the retirement on the ground on physical unfitness is unsustainable in law.

The measure, magnitude and degree of the ailments suffered by the petitioner does not disentitle him to continue in a post with light duties and in fact the respondents themselves placed the petitioner in a post carrying light duties without arms earlier.

Thus, it would be extremely unfair to bring the petitioners service career at an abrupt end when the Medical Board constituted in terms of the direction of this Court had categorically opined that the petitioner is currently stable without any active mood, thought or perceptual disorder.

For the reasons discussed above, the impugned memoranda dated 24th June, 2008 and 27th June, 2009 issued by the respondent no.4 are set aside and quashed.

There can be no precise formula nor any cast iron rule for grant of back wages.

In the instant case, the petitioner was not allowed to resume his duties for no fault of his own and since the status of being idle was actually imposed upon the petitioner, the principle no work no pay shall not apply in the facts and circumstances of this case.

The order of retirement on ground of physical unfitness, having been set aside not on any technical ground and in the absence of any allegation to the effect that the petitioner was gainfully employed during the period in question, in my opinion, a balance would be maintained and the interest of justice would be subserved through issuance of a direction upon the respondents to disburse 50% of the back wages to the petitioner.

Accordingly, the respondents are directed to reinstate the petitioner in an appropriate post with sedentary, light duties without arrears within a period of 8 weeks from the date of communication of this order.

The respondents are further directed to treat the petitioner in continuous service on and from the date of effect of the impugned order dated 27th June, 2009 till the date of reinstatement in terms of this order.

The respondents are also directed to disburse 50% of the backwages to the petitioner for the period from 26th June, 2009 till the date of reinstatement through four equal monthly instalments, of which should be paid within a period of 10 weeks from the date of communication of this order, upon adjustment of the amount of Rs.52,700/- already paid to the petitioner.

With the above observations and directions, the writ application is disposed of.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Tapabrata Chakraborty, J.)

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