

Ex.Constable Ajay Kumar Vs. Union of India and ors.

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Court : Delhi

Decided On : Aug-10-2011

Judge : Pradeep Nandrajog; Sunil Gaur, Jj.

Appeal No. : W.P.(C) 6050/1998

Appellant : Ex.Constable Ajay Kumar

Respondent : Union of India and ors.

Advocate for Def. : Mr.Bhupender Sharma, Adv.

Advocate for Pet/Ap. : Mr.Anil Gautam, Adv.

Judgement :

1. Joining as a Constable under BSF in the year 1989 and serving till February 1994, petitioner proceeded on leave for 2 months to visit his family when misfortune over-took him.
2. Working on the thresher, the little finger of the left hand at distal phalanx level got amputated and the other fingers of the left hand got amputated at MP level.
3. Rushed to BSF Hospital at R.K.Puram and there from to Safdarjung Hospital, petitioner remained under treatment. When wounds healed, he was found to be unfit to perform duties; and relevant would it be to highlight that as a result of the left hand fingers being amputated at various levels as noted above, the grip which

had to exist while holding a fire arm was missing.

4. Rule 25 of the BSF Rules 1969 reads as under:-

25. Retirement of subordinate officer and enrolled persons on grounds of physical unfitness.- (1) Where a Commandant is satisfied that a Subedar, 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, to be brought before a Medical Board.

(2) The Medical Board shall be constituted in such manner as may be determined by the Director-General.

(3) Where the said Subedar, Sub-Inspector or enrolled person is found by the Medical Board to be unfit for further service in the Force, the Inspector General, the Deputy Inspector General or as the case may be, the Commandant may, if he agrees with the finding of the Medical Board order the retirement of the Subedar, the Sub-Inspector, or as the case may be, the enrolled persons:

Provided that before the said Subedar or Sub-Inspector or as the case may be, the enrolled person is so retired the finding of the Medical Board and the decision to retire him shall be communicated to him.

(4) The Subedar, the Sub-Inspector or, as the case may be, the enrolled person may, within a period of fifteen days from the date of receipt of such communication, make a representation to the officer next superior in command to the one who ordered the retirement.

(5) The said superior officer shall have the case referred to a Review Medical Board which shall be constituted in such manner as may be determined by the Director General.

(6) The superior officer may, having regard to the finding of the Review Medical Board, pass such order as he may deem fit.

(7) Where a representation has been made to a superior officer under sub-rule (4), an order passed under sub-rule (3), shall not take effect till it is confirmed by such

superior officer.

5. Suffice would it be to state that the Commandant of the Unit to which the petitioner was attached formed a prima facie opinion that the petitioner was unable to perform duties by reason of a physical disability, and the opinion was based upon the decision of a Medical Board. On 9.8.1995 the Commandant issued a show cause notice to the petitioner as per the requirement of the proviso to Sub-Rule 3 of Rule 25 requiring the petitioner to say what he wanted to say.

6. Not questioning his being invalid the petitioner prayed that he be allowed to serve till he renders 10 years service so that he could earn pension.

7. Ignoring the show cause notice and the reply, for reasons unknown, the Commandant issued another notice dated 27.10.1995, once again communicating to the petitioner, the opinion formed by the Commandant to retire the petitioner from service and called upon the petitioner to submit a response within 15 days.

8. Petitioner responded on 14.11.1995 praying once again that he be allowed to serve up to 10 years.

9. On 30.11.1995, petitioner was intimated that he would stand retired from service with effect from the fore noon of 1.12.1995 and the reason given was the petitioner being declared in the lowest medical category i.e. 'EEE' on account of the left hand fingers being amputated at MP level and the little finger at distal flanks level was unfit for duty.

10. Thereafter, the petitioner started raising an issue of not being brought before a Review Medical Board as contemplated by sub-rule 5 of Rule 25 of the BSF Rules 1969. Petitioner also raised an issue with respect to 12 similarly situated persons being retained in duty in spite of being found to be with much higher level of physical disability.

11. Instant writ petition was filed.

12. 2 points have been urged at the hearing today. First, that the petitioner ought to have been referred to a Review Medical Board as per the requirement of sub-

rule 5 of Rule 25. This not having been done, learned counsel for the petitioner urges that the decision to retire the petitioner from service is contrary to law. Contrary to law in the sense, urges the counsel, of prescribed procedure not being followed. Second contention urged is that the respondents have admitted the averments in para 21 of the writ petition that 12 persons named therein, some of whom had a right or the left leg amputated; some had complete left hand amputated and some were even paraplegic, have been retained in service and thus counsel urges that the petitioner has been discriminated against.

13. As regards the first plea, suffice would it be to state that the requirement to refer an enrolled person to the Review Medical Board, as contemplated by sub-rule 5 of Rule 25 is contingent upon the enrolled person making a representation questioning the opinion prima facie formed by the Commandant that the person concerned, due to reason of a physical disability, is not able to discharge the duties. We highlight that when the show cause notice issued by the Commandant informing the petitioner of prima facie opinion being formed of petitioner being unfit for service due to physical disability was communicated, the petitioner never questioned his disability and his inability to satisfactorily perform duties. The petitioner sought compassion with prayer that he may be permitted to serve 10 years so that he could earn pension.

14. Thus, the question of producing the petitioner before a Review Medical Board does not arise. Indeed it would have been useless to produce the petitioner before a Review Medical Board inasmuch as the nature of the disability and its effect was not disputed.

15. As regards the second plea, we would highlight that the pleadings in the counter affidavit with respect to petitioner's assertions in para 21 of the writ petition are pathetic. In para 21 of the writ petition, the petitioner has given the name of constables with details of the physical disabilities suffered by them and has pleaded that in spite of said persons being much more disabled than the petitioner, they were retained in service and thus petitioner was discriminated against.

16. In the counter affidavit it is simply stated that the petitioner cannot be compared with the said 12 persons.

17. On what reason could the petitioner be not compared with the said persons has not been highlighted. But record produced today before us would show that all said 12 persons were battle casualties i.e. had suffered physical disability while on duty; some when they were clearing mines and other in counter insurgency operations and they were retained in service by giving them sheltered employment commensurate to the nature of duty to be performed and the disability suffered. As regards the petitioner, the disability suffered by him was not while on active duty and this makes position of the petitioner different than the 12 persons whom he has named in the writ petition.

18. It may be an unfortunate situation for the petitioner, but in law he would be entitled to no relief.

19. We are given to understand that BSF as also all other Central Paramilitary Forces have a welfare fund which is generated partly through the contributions by the enrolled members of the Force and partly through Battalion/Regimental funds released by the government. Thus, while dismissing the writ petition we would recommend to BSF Authorities to sympathetically consider disbursing some amount, which would not be a pittance, so that the petitioner could find some comfort in life. We would highlight that the petitioner was barely out of his teens, he was around 20 years of age when he joined service as a constable with BSF in the year 1989 and was hardly 26 years old when he lost the job. The petitioner comes from a rural background and some financial help to him even at this stage would come a long way to help the petitioner who is the victim of an unfortunate accident.

20. The writ petition is dismissed but with the pious hope expressed in the preceding para above.

21. No costs.

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