
(1996) 08 MP CK 0091
In the Madhya Pradesh High Court
Case No : L.P.A. No. 142 of 1995 (J)

Captain Mohan Singh

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 13-08-1996

Acts Referred:

Army Rules, 1954 — Rule 15A(2)

Pension Regulations for Army, 1961 — Regulation 48

Citation : (1997) 1 MPJR 358

Hon'ble Judges : Usha Shukla, J;S.K. Dubey, J;Miss, J

Bench : Full Bench

Advocate : Party in Person, for the Appellant; Indira Nair, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

Appellant who was the writ petitioner has filed this appeal under clause 10 of the Letters Patent against the order dated 3.7.1995 passed in M.P. No. 3837/88 by Shri A.K. Mathur, J. as he then was.

The appellant was recruited as sepoy in the Army in the Corps of Electrical and Mechanical Engineers on 20th February 1960, and was allotted army No. 7041368. Due to his meritorious service, he reached to the rank of Captain. On a day of November, 1977, during lunch, he became unconscious. On Medical examination he was found a case of Sinus Bready Cardia for which he was treated and was discharged in the year 1979 as found fit a discharge all type of duties, but, was recommended for advice of Army Consultant MH (CTC) Pune. There, he was declared a case of Pulmonary Tuberculosis and ATT (Anti-Tuberculosis treatment) was started. After treatment and discharge, he was placed in low medical category. He was then admitted to MH Jabalpur on 5th July, 1981 for medical re-categorization, where he was opined a relapse case of Pul. T.B. Hence was transferred to MH (CTC) Pune for further treatment in July

1981, where sputum was found positive and ESR High, The appellant was declared as "Relapse case of Pul T.B., hence, was brought before the Final Invalid Medical Board of Officers, where the appellant was declared permanently unfit for any form of military service. On the report, a notice dated 5.8.1981 was issued by Officer Commanding under sub-rule (2) of Rule 15-A of the Army Rules 1954 (for short the Rules"), which was acknowledged by the appellant. The appellant did not prefer any petition within 15 days, the time prescribed under sub-rule (2) of Rule 15-A against the finding of the Medical Board and at the bottom gave a note that he did not wish to prefer any petition against the finding of the Medical Board. Therefore a communication, was sent vide Annexure-I dated 30.10.1981 by the officer commanding invalidating the appellant from military service w.e.f. 30.10.81 (AN). The appellant on that was granted 100% disablement pension in accordance with regulation 48 of Pension Regulations for the Army 1961 Part-I (for short the "Regulations"). Thereafter, the appellant was asked after two years to appear for re-examination under regulation 60 (b). The appellants' disability was found to be reduced from 100% to 80% vide order dt. 19.9.1984 Annexure - N to the petition. Again after period of two years, the appellant was re-examined in view of Regulation 60 (b) and on re-examination the appellant's invalidity was found to be 60% vide order dated 5.11.1986 - Annexure-P to the petition. Thereafter, on 17.5.1988, Accounts Officer (Pension) issued a memo dated 17.8.1988 to appear before the Medical Board at Military Hospital, Jabalpur for his re-examination and re-fixation of pension according to disability, but, the appellant did not appear.

In between, in view of the decision of Rajasthan High Court in case of Major Vijay Bhatnagar v. Union of India C.A. No. 55/85, decided on 22.3.1985, wherein it was held that an order releasing an officer on medical ground has to be passed by the Chief of Army staff, in case no petition is preferred by the officer concerned in the time specified in sub-rule (3) of Rule 15-A. This order was challenged before the Supreme Court, but, SLP against the same was dismissed, therefore, as the order of release of the appellant on medical ground was passed by the staff officer which was placed before the Chief of the Army staff, who, then approved the release of the appellant on medical ground and passed the order dated 3.5.1995 stating that the appellant shall be deemed to have been retired from service on medical grounds, w.e.f. 25.11.1986 instead of 30.10.1981.

The appellant challenged the order of retirement with retrospective effect and also the order of Medical Board of suspending the disability pension by the writ petition. The writ Court after considering the contentions documents and the Rule 15-A, observed that first of all, the order was passed by the Central Government and subsequently, it appears that in view of the Bhatnagar's case (supra) it was realised that the order for discharge has to be passed in terms of Rule 15-A of the Rules therefore, the papers were resubmitted for the approval of the Chief of Army staff and after his approval the order discharging the appellant from service was issued on 25.11.1986. In view of this, the writ Court

observed that the appellant will get pension from 25.11.1986 and will be treated notionally continued in service till 25.11.1986 instead of his discharge from service from 30.10.1981.

As to the challenge of suspension of disability pension, the writ Court observed that as the appellant did not appear before the Medical Board for re-survey, therefore, his pension in view of Regulation 56 was suspended from the date he refused to appear before the Medical Board. In case on account of subsequent order dated 5.5.1995 the appellant appears before the Medical Board and if disability is found after the report of re-survey, the appellant will be entitled to get benefit accordingly of the disability pension. As the appellant has been retired from the service with effect from 25.10.1986 all the benefits shall be calculated and given to him within a period of six months from the date of the order. Aggrieved of the order by the writ Court the appellant has filed this inter-court appeal.

Appellant contended that Writ Court did not consider Rule-18, sub-rule (3) which lays down that the retirement, resignation, removal, release, discharge or dismissal of a person subject to the Act shall not be retrospective. Therefore, the appellant could not have been discharged from service retrospectively w.e.f. 25.11.1986. The appellant would be deemed to be retired from service only on the date of passing of the order i.e. on 5.5.1995. It was submitted that by virtue of order dated 5.5.1995 retiring the appellant from service w.e.f. 23.11.1986 all medical survey in respect of disability of invalidating military service of the appellant become infructuous. In any case, when the communication was sent to the appellant vide Annexure-8 the appellant ought to have called for re-survey, without his re-survey his disability pension could not have been stopped under Regulation 48 read with Appendix-II Para 9.

Smt. Indira Nair learned counsel for the respondent supported the order passed by the writ Court and submitted that it was the appellant who himself instead of appearing before Medical Board for his re-survey has chosen to file the writ petition as would be evident from para-34 of the petition, therefore, the appellant's disability pension was rightly suspended under Regulation 56. It was also submitted that because of the order, in case of Vijay Bhatnagar's case (supra) the papers relating the appellant were placed before the Chief of the Army Staff who approved the release of the appellant on medical unfitness and passed with affect from 25.11.1986 vide order dated 5.5.1995 as a consequence of that the appellant was deemed to be in service till 25.11.1986. As a result of the order the appellant was entitled to full pension as he was considered as have served the defence services for eligibility of the full pension for the required number of years and was paid and is being paid accordingly with all increments. If the appellant is aggrieved of the calculation or payment of less payment, the appellant may represent to the CDA (Pension) and on that a decision shall be taken in accordance with law. If the appellant is aggrieved of the decision, he may resort to the remedy which may be available to him in law. As to disability

pension, the appellant has to appear for his re-survey before the Medical Board and if the appellant's disability is found, he shall be paid disability pension accordingly. The contention of the appellant that the Chief of the army staff could not have passed the order retrospectively in view of sub-rule (3) of Rule-18, Rule 18 is not applicable as order was passed under Rule 15-A. Besides, this point was not pressed before the Writ Court.

To appreciate the contentions, it would be appropriate to refer Rule 15-A and Rule 18 of the Rules.

15-A. Release on medical grounds. - (1) An officer who is found by a Medical Board to be permanently unfit for any form of military service may be released from the service in accordance with the procedure laid down in this rule.

(2) The President of the Medical Board shall, immediately after the Medical Board has come to the conclusion that the officer is permanently unfit for any form of military service, issue a notice specifying the nature of the disease or disability he is suffering from and the finding of the Medical Board and also intimating him that in view of the finding he may be released from the service, every such notice shall also specify that the officer may, within fifteen days of the date of receipt of the notice, prefer a petition against the finding of the Medical Board to the Chief of the Army Staff through the President of the Medical Board.

Provided that where in the opinion of the Medical Board the Officer is suffering from a mental disease and it is either unsafe to communicate the nature of the disease or disability to the officer or the officer is unfit to look after his interests, the nature of the disease or disability shall be communicated to the officer's next-of-kin who shall have the like right to petition.

(3) If no petition is preferred within the time specified in sub-rule (2), the officer may be released from the service by an order to that effect by the Chief of the Army Staff.

(4) If a petition is preferred within the time specified in sub-rule (2), it shall be forwarded to the Central Government together with the records thereof and the recommendation of the Chief of the Army Staff. The Central Government may, after considering the petition and the recommendation of the Chief of the Army Staff, pass such order as it deems fit.

Date from which retirement, resignation, removal, release, discharge or dismissal otherwise than by sentence of court-martial takes effect. - (1) The dismissal of an officer u/s 19 or the retirement, resignation, release or removal of such officer shall take effect from the date specified in that behalf in the notification of such dismissal, retirement or removal in the official Gazette.

(2) The dismissal of a person subject to the Act, other than an officer whose dismissal otherwise when by sentence of a Court-martial is duly authorised or the discharge of a person so subject whose discharge is duly authorised, shall be carried out by the commanding officer or such person with all convenient speed.

The authority competent to authorise such dismissal or discharge may, when authorising the dismissal or discharge, specify any future date from which it shall take effect.

Provided that if no such date is specified the dismissal or discharge shall take effect from the date on which it was duly authorised, or from the date on which the person dismissed or discharged, ceased to perform military duty, whichever is the later date.

(3) The retirement, removal, resignation, release, discharge or dismissal of a person subject to the Act shall not be retrospective.

A bare look Rule 15-A shows that it lays down the procedure of release on medical unfitness on physical disability. If Rule 15-A is invoked in the case of an officer, a Medical Board has to examine the officer. If no petition is filed within the time specified under sub-rule (2) on notice against the finding of Medical Board, to Chief of Army staff through the President of the Medical Board then is sub-rule (3) the officer may be released from the service by an order to that effect by the Chief of Army staff. If petition is preferred within the time specified in sub-rule (2) then procedure has to be followed as prescribed in sub-rule (4) of Rule-15 A. If the procedure prescribed in Rule 15-A is not adhered to the order of release would be invalid. See Capt. Virendra Kumar Vs. Union of India (UOI), .

Rule 18 deals with the date from which retirement, resignation, removal, release, discharge or dismissal otherwise than by sentence of court martial takes effect. It speaks of the date of effectiveness of the orders of release, retirement, resignation, removal, discharge, or dismissal otherwise than by sentence of court-martial. The nature of the orders specified in Rule-18 does not cover the release of an officer on medical grounds which is independent and is dealt with in Rule 15-A., Rule 15-A is self contained in itself, which prescribes the procedure of release of an officer on medical grounds. If the procedure prescribed is adhered in Rule - 15A, the Chief of the Army Staff will have full power to act and release an officer independent of Rule-18.

In case of appellant, the order was not passed discharging the appellant on account of medical unfitness from 30.10.1981 by the Chief of the Army Staff, as required by sub-rule (3) of Rule 15-A, in view of the law laid down in Capt. Virendra Kumar's case (supra), the case of the appellant was placed before the Chief of the Army Staff, who, on satisfying, a case of release or discharge under Rule-15 A passed the orders. That is why the order passed on 5.5.1995 discharging the appellant from 25.11.1986, treating the appellant in service, giving all retrial service benefits which otherwise he would not have got. In the circumstances the order passed is in conformity with Rule-15-A, and cannot be said to be invalid.

As to entitlement of the disability pension, the contention what it was not necessary for him to appear before the Medical Board for re-survey nor the appellant could have been asked to appear for re-survey in view of

Regulation-48, Appendix-II, Para-9 (b).

Regulation-48 lays down that (a) An officer who is retired from military service on account of a disability which is attributable to or aggravated by such service and is assessed at 20 percent 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; (b) The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II.

Appendix II under Regulation 48, 173 and 153 deals with Entitlement Rules, Para-9 of which deals with Assessment, Para 9 (a) lays down that the assessment of a disability is the estimate of the degree of disablement it causes, which can properly be ascribed to service as defined below i.e. in clause (b). Para 9 (b) lays down that the disablement properly referable to service will be assessed as under;

(i) At the time of discharge from the forces :-

Normally the whole of the disablement then caused by the disability.

(ii) On resurvey of disability after discharge from the service ;

The whole of the disablement then caused by the disability less the followings -

(1) The part due to non-service factors, such as individual habits, occupation in civil life, accident after discharge, climatic environment after discharges.

(2) Any worsening due to the natural progress of the disability since discharge apart from the effects of service.

Deduction (1) will be made in all cases; while deduction (2) above will apply only in cases where the disability is accepted as aggravated by, but not attributable to service.

Regulation 56 of the Regulations as amended reads as under :-

56. In case a pensioner who has been asked under any rule or order, to appear before a re-survey medical board, for re-assessment of his disability, refuses to do so, the disability element of his pension shall be suspended from the date of such refusal. If, however, the pensioner has rendered less than five years qualifying service, the disability pension as a whole shall be suspended.

Therefore, it is clear from Regulation 56 that if an incumbent refuses to appear before the re-survey Medical Board, then the disability pension shall be suspended from such date on his refusal. In the present case the appellant was asked to appear before the Medical Board but he declined to appear as per Regulation 56, hence, the appellant's disability pension was suspended. The contention that the appellant could not have been called for re-survey prior to five years period in compliance of the memo, has no substance as the last order to the appellant for appearing before the Medical Board of re-survey was passed

in the year 1988. The appellant did not challenge earlier orders for re-survey and reduction of pension of the medical survey which the appellant accepted the benefits of reduced disability pension, now he is estopped and cannot make a grievance of reduction from 100% to 80% and then 80% to 60% vide orders dated 19.9.1984 and 5.11.1986 respectively, when asked again vide memo dated 17.5.1988 to appear before the Medical Board for re-survey.

It is stated at the bar that the appellant now has appeared before the Medical Board for-re-survey, but, decision has not been communicated to the appellant, if so, that shall be communicated to the appellant and if the appellant is aggrieved of that, he shall be at liberty to challenge the same in accordance with law.

In the result, the appeal fails and is dismissed with no order as to costs.