

(2010) 03 KL CK 0098
In the High Court Of Kerala
Case No : W.A. No's. 774 and 1105 of 2009

Chief of Air Staff	Vs	APPELLANT
Augustian		RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Air Force Act, 1950 — Section 16
Air Force Pension Regulations, 1961 — Regulation 153
Air Force Rules, 1969 — Rule 13, 15, 15(2)
Pension Regulations for Army, 1961 — Regulation 158, 173, 173A

Citation : (2010) 2 ILR (Ker) 613 : (2010) 2 KLT 514

Hon'ble Judges : P.N.Ravindran, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : P. Parameswaran Nair, Asst. Solicitor General and T. Sanjay, A.C.G.C. and S. Krishnamoorthy, C.G.C, for the Appellant; V.K. Sathyanathan and S. Sanal Kumar, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Ravindran, J.—A common question arises in these Writ Appeals. They were therefore heard together and are being disposed of by this common judgment.

W.A. No. 774 of 2009

2. The appellants are the respondents in O.P. No. 39594 of 2002. The sole respondent is the petitioner therein. The respondent joined the Indian Air Force as Airman on 15.5.1985. As per the rules then in force, an Airman below 29 years of age who acquires a degree was eligible for being considered for regular commission in the Indian Air Force. After entry in service, the respondent acquired the LL.B. degree on 7.10.1996, but he was over-aged and was not eligible to be considered for regular commission. Later, on 9.12.1997, the upper age limit to be considered for regular commission was raised to 39 years. Though on 25.7.1998, the respondent applied for being considered for regular commission, his request was turned down on medical grounds, on 27.7.1998. He

again applied for regular commission and was considered for regular commission on 7.6.1999, 1.11.1999 and 1.5.2000, but he was not successful in getting regular commission.

3. In the meanwhile, the Air Headquarters took a policy decision on 9.12.1997 for discharge of Airmen on educational grounds. This was to enable them to settle in the civil stream on their failure to get regular commission in the Indian Air Force. As per the said policy, an Airman who has acquired the requisite qualification for being considered for regular commission but fails to qualify for regular commission even in the third attempt, can seek immediate discharge from service within six months of availing the third chance. It was also stipulated that an incumbent who acquires the qualification for being considered for regular commission should make the first attempt for regular commission within one year of acquisition of the qualification. Since the respondent did not get regular commission, taking advantage of the new policy, he applied for discharge from the Indian Air Force on educational grounds. That request was rejected by order dated 19.9.2000 on the ground that he did not apply for regular commission within a period of one year from the date of acquisition of the qualification, but, only after two years and eight months. The respondent thereupon filed C.W.P. No. 14634 of 2000 in the High Court of Punjab and Haryana. By Ext.P2 judgment delivered on 25.1.2001, a learned Single Judge of the Punjab and Haryana High Court allowed the said Writ Petition, quashed the order rejecting the respondent's claim for discharge on educational grounds and directed the respondents therein to consider his case for discharge within two months. Pursuant to Ext.P2 judgment, the respondent's request for discharge on educational grounds was reconsidered and granted. He was thereupon discharged from the Indian Air Force on 15.5.2001.

4. About seven months later, the respondent submitted a representation dated 7.2.2002 seeking grant of disability pension. He contended that he was not selected for permanent commission on medical grounds, that at the time of discharge his disability was assessed by the Medical Board at 20% and therefore, he is entitled to disability pension. By Ext.P3 letter dated 20.2.2002, the second appellant informed him that as he was discharged from service at his own request, he is not entitled to disability pension. Reference was made to para. 158 of the Pension Regulations for the Air Force, 1961.-The respondent thereupon filed O.P. No. 39594 of 2002 in this Court challenging Ext.P3 and seeking payment of disability pension. He contended that as he has rendered sufficient service to earn service pension and at the time of discharge his disability was assessed by the Medical Board at 20%, he is entitled to disability pension. He also contended that Regulation 158 referred to and relied on in Ext.P3 applies only to those who suffer disability within seven years after discharge. It was further contended that as he had suffered disability while in service and the disability was attributable to such service, he is entitled for payment of disability pension.

5. The appellants resisted the Writ Petition by filing a counter affidavit. Inter alia, it was contended that though the respondent had applied for regular commission, he was not selected for regular commission as he did not make the grade, that he thereafter submitted an application for discharge on educational grounds and was discharged at his own request under Rule 15(2) of the Air Force Rules, 1969 by the competent authority. The appellants also contended that as per the rules, the respondent who was discharged at his own request and was not invalided from service on account of disability is not entitled for disability pension.

6. The learned single Judge overruled the contentions of the appellants and held that the respondent is entitled to grant of disability pension as provided in Regulation 153 of the Pension Regulations for the Air Force, 1961. It was held that as at the time of discharge the respondent was placed in a lower medical category than that in which he was placed at the time of his entry in service, he is entitled to grant of disability pension as provided in Regulation 153. The Writ Petition was accordingly disposed of with a direction to the appellants to recalculate his pension taking into account the disability element also. The appellants were however permitted to call upon the respondent to undergo examination by a Medical Board to ascertain whether he continues to suffer from the same degree of disability as assessed by the Medical Board at the time of his discharge. Aggrieved thereby, the appellants have preferred this Writ Appeal.

W.A. No. 1105 of 2009

7. The appellants are the respondents in O.P. No. 4482 of 2002 and the sole respondent is the petitioner therein. The respondent entered service in the Indian Army as a Vehicle Mechanic on 9.9.1983. He was discharged from the Indian Army on 31.7.1999 after he was placed in a low medical category on extreme compassionate grounds. While in service, the respondent suffered dislocation of a disc. He was under treatment for quite some time. It was for that reason that he sought discharge on compassionate grounds. After discharge from the Indian Army, he submitted Ext.P7 representation dated 27.7.2001 to the appellants seeking payment of disability pension. When no reply was received, he sent Ext.P8 reminder dated 11.9.2001. As no reply was received to the said letter also, the Writ Petition was filed seeking a direction to the appellants to grant disability pension to him. It was contended that as he was placed in a low medical category at the time of discharge, he is entitled to disability pension under Regulation 173 of the Pension Regulations for the Indian Army, 1961.

8. The appellants resisted the Writ Petition by filing a counter affidavit. They conceded that at the time of discharge, the respondent was placed in a low medical category "CEE (Temporary)", that at the time of discharge the release Medical Board considered the disability of the respondent and came to the conclusion that his disability is not attributable to military service, but was aggravated due to the stress and strain of military service and that the Medical Board had assessed his disability at 30% for two years. It was contended that the respondent was not invalided from service on account of any disability, but,

was discharged at his own request, on extreme compassionate grounds. It was contended that the respondent, who was discharged at his own request and was not invalided from service cannot therefore claim disability pension under Regulation 173 of the Pension Regulations for the Army, 1961.

9. O.P. No. 4482 of 2002 was heard on 6.1.2009. Following the decision in O.P. No. 39594 of 2002 from which Writ Appeal No. 774 of 2009 arises, the learned Single Judge held that as the respondent was admittedly placed in a lower medical category at the time of discharge than that in which he was placed when he entered service, disability pension cannot be denied to him on the ground that he was discharged from the Army at his own request. The Writ Petition was accordingly allowed and the appellants were directed to revise his pension by including the disability element also therein. Aggrieved thereby, the appellants have preferred this appeal.

10. We heard Sri. T. Sanjay and Sri. S. Krishnamoorthy, the learned Additional Central Government Standing Counsel appearing for the appellants in W.A. Nos. 774 of 2009 and 1105 of 2009 respectively, Sri. V.K. Sathianathan, the learned Counsel appearing for the respondent in W. A. No. 774 of 2009 and Sri. S. Sanal, the learned Counsel appearing for the respondent in W.A. No. 1105 of 2009. We have also gone through the pleadings and the materials on record. We shall first deal with the claim of the respondent in W. A. No. 774 of 2009 for payment of disability pension. It is not in dispute that the respondent in W. A. No. 774 of 2009 was not invalided from service on medical grounds after being found unfit to discharge duties as an Airman in the Indian Air Force. He was admittedly discharged at his own request on educational grounds. These facts are evident from Ext.P2 judgment of the Punjab and Haryana High Court in C.W.P. No. 14634 of 2000 filed by him. He however claims payment of disability pension relying on Regulation 153 of the Pension Regulations for the Air Force, 1961 and Appendix II to the said Regulations.

11. Rule 15 of the Air Force Rules, 1961 sets out the authorities competent to order discharge of personnel for the causes specified therein. As per Rule 15, persons enrolled under the Air Force Act, 1950 who are attested in terms of Section 16 of the Act may be discharged at their own request by the Commanding Officer subject to the stipulation that this has to be carried out in accordance with the conditions of enrolment. In the case of those who are discharged upon being found medically unfit for further service, the discharge has to be carried out only on recommendation of an Invaliding Board. It is common ground that the respondent in W.A. No. 774 of 2009 was not discharged after having been found medically unfit for further service based on the recommendations of an Invaliding Board. He was admittedly discharged at his own request on educational grounds.

12. The rules in Chapter III of the Pension Regulations for the Air Force, 1961 apply to Airmen who were serving on regular terms/engagement on 1.6.1953 as well as those who either joined or join service on or after that date. Section IV in

Chapter III of the said Regulations deals with disability pensionary awards. The primary conditions for the grant of disability pension are set out in Regulation 153 of the Pension Regulations for the Air Force, 1961 which reads as follows:

153. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by air force service and is assessed at 20 per cent or over.

The question whether a disability is attributable to or aggravated by air force service shall be determined under the regulations in Appendix II.

(emphasis supplied)

Rule 1 in Appendix II to the above Regulations, referred to in Regulation 153 reads as follows:

1. With effect from 1st April, 1948, in supersession of all previous orders on the subject, the entitlement of disability and family pension, children's allowance and death gratuities will be governed by the following rules. Invaliding from service is a necessary condition for the grant of a disability pension. An individual who at the time of his release under the Release Regulations is in a lower medical category than that in which he was recruited will be treated as invalided from service. Air men who are placed permanently in a medical category other than "A" and are discharged because no alternative employment suitable to their low medical category can be provided as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalided out of service.

(emphasis supplied)

13. The learned single Judge has relied on Rule 1 of Appendix II to hold that as the respondent was in a lower medical category at the time of his discharge than that in which he was placed when he was recruited, it has to be deemed that he was invalided from service. It is on that short ground that the learned single Judge has held that the respondent is entitled to disability pension under Regulation 153 of the Pension Regulations for the Air Force, 1961. Rule 13 of the Air Force Rules, 1969 stipulates that a person subject to the Act (Air Force Act, 1950) may be released from the Air Force in accordance with the Air Force Rules, 1969 or in accordance with the orders or instructions made in that behalf by or under the authority of the Central Government. The respondent in W.A. No. 774 of 2009 was released in accordance with Rule 15 of the Air Force Rules, 1969 by discharging him at his own request. He was not released after being found medically unfit for further service based on the recommendations of an Invaliding Board. Regulation 153 quoted above states in categorical terms that unless otherwise specifically provided, disability pension may be "granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by Air Force service and is assessed at 20% or

over". The second limb of Regulation 153 states that the question whether a disability is attributable to or aggravated by Air Force service shall be determined under the Regulations in Appendix II. On the terms of Regulation 153, disability pension can be granted only to an individual who was invalided from service on account of a disability which is attributable to or aggravated by Air Force service. The rules in Appendix II can be applied only for the purpose of deciding whether the disability of an individual who is invalided from service on account of a disability is attributable to or aggravated by Air Force service. In our opinion, Rule 1 of Appendix II to the Pension Regulations for the Air Force, 1961 cannot be relied to hold that even in cases of discharge on grounds other than disability, merely because the person discharged was in a lower medical category than that in which he was at the time of recruitment, he has to be treated as invalided from service. Rule 1 of Appendix II can be applied only to decide whether the disability of an individual who is invalided from service on account of a disability is attributable to or aggravated by the Air Force service. If any other interpretation is placed on Rule 1 of Appendix II, it will have the effect of enabling every person released from the Air Force to claim disability pension. A young man of robust health who is recruited to the Air Force in his teens or twenties and is discharged from service at the age of 45 or 50 will certainly be in a lower medical category than that in which he was placed at the time of his recruitment. By passage of time, his health would have deteriorated. His eye sight would have become poorer. It happens not only in the case of personnel employed in the Armed Forces but to every human being. In our opinion, it is only in cases where an individual is invalided from service on account of a disability after he is found medically unfit by a duly constituted invaliding Board, that Rule 1 of Appendix II to the Pension Regulations for the Air Force, 1961 can be referred to and relied on to determine whether the disability incurred by him is attributable to or aggravated by Air Force service.

14. In the instant case, the respondent was admittedly discharged on educational grounds under a new policy framed and issued by the Air Headquarters. He had to move the High Court of Punjab and Haryana to get such discharge. Though at the time of discharge, he was examined by a Medical Board, that was not for the purpose of ascertaining whether he is liable to be invalided from service on account of a disability. In other words, no disability or disease led to the petitioner's discharge from service and therefore, Rule 1 of Appendix II cannot be pressed into service to hold that as he was in a lower medical category at the time of discharge than that in which he was placed at the time of entry in service, he should be deemed to have been invalided from service. Rule 1 of Appendix II cannot in our opinion enlarge the scope of Regulation 153 of the Pension Regulations for the Air Force, 1961. It can be applied only to determine whether the disability which led to the employee's discharge is attributable to or aggravated by Air Force service.

15. We shall now deal with the claim of the respondent in W.A. No. 1105 of 2009. In the said case also, the respondent was not invalided from service on account

of a disability. True, he was in a lower medical category at the time of discharge. But, he was not placed in a lower medical category (other than "E") permanently. The Medical Board assessed his disability at 30% for two years only. He had applied for discharge on extreme compassionate grounds as can be seen from Ext.P2. His discharge was not after a duly constituted Invaliding Board recommended his discharge from service on account of disability. He was also not discharged from service in terms of Regulation 173-A of the Pension Regulations for the Army, 1961 for the reason that after being placed in a lower medical category permanently, no alternative employment suitable to his low medical category could be provided to him. Regulation 173 of the Pension Regulations for the Army, 1961 which is pari materia with Regulation 153 of the Pension Regulations for the Air Force, 1961 and Regulation 173-A of the Pension Regulations for the Army, 1961 read as follows:

173. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 per cent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II.

(emphasis supplied)

173-A. Individuals who are placed in a lower medical category (other than "E") permanently and who are discharged because no alternative employment suitable to their low medical category could be provided, shall be deemed to have been invalided from service for the purpose of the entitlement rules laid down in Appendix II to these Regulations.

Note: The above provision shall also apply to individuals who are placed in a low medical category while on extended service and are discharged on that account before the completion of the period of their extension.

Rule 1 of Appendix II to the said Regulations is also similar to the rule governing personnel of the Indian Air Force and it reads as follows:

1. With effect from 1st April, 1948, in supersession of all previous orders on the subject, the entitlement to disability and family pension, children's allowances and death gratuities will be governed by the following rules. Invaliding from service is a necessary condition for the grant of a disability pension. An individual who at the time of his release under the Release Regulations is in a lower medical category than that in which he was recruited will be treated as invalided from service. JCOs/ORs/NCs(E) who are placed permanently in a medical category other than "A" and are discharged because no alternative employment suitable to their low medical category can be provided as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have invalided out of service.

(emphasis supplied)

The learned Single Judge allowed the Writ Petition following the view taken by him in O.P. No. 34594 of 2002. The interpretation placed by us on Regulation 153 and the Rules in Appendix II of the Pension Regulations for Air Force, 1961, governs this case also. Therefore, as in the said case, we hold that Rule 1 of Appendix II cannot be relied on to hold that the respondent who was not invalided from service on account of a disability, based on the recommendations of an Invaliding Board, but was discharged on compassionate grounds at his own request has to be treated as invalided from service. The respondent has not pleaded or proved that he was discharged after being placed in a lower medical category (other than "E") permanently for the reason that no alternative employment suitable to his low medical category could be provided to him. He was admittedly discharged at his own request and not for the reason that no alternative employment suitable to his low medical category could be provided. Therefore, he cannot rely on Regulation 173-A of the Pension Regulations for the Army, 1961 to contend that he should be deemed to have been invalided from service. We accordingly hold that the respondent cannot be deemed to be an individual who was invalided from service.

16. The learned Counsel for the respondent in W.A. No. 774 of 2009 relied on the decision of a Division Bench of the Delhi High Court in Mahavir Singh Narwar v. Union of India and Anr. 2005 (1) All ISLJ 133 in support of his contention that a person who was placed in a lower medical category at the time of his discharge than that in which he was recruited is liable to be treated as a person invalided from service. It was submitted that SLP (Civil) No. 2417 of 2004 filed by the Union of India from the said judgment was dismissed by the Apex Court on 4.1.2008. A copy of the aforesaid decision of the Division Bench of the Delhi High Court is produced as Ext.P5 in W.P.(C) No. 39594 of 2002 from which W.A. No. 774 of 2009 arises. In that case, the Division Bench of the Delhi High Court held that the petitioner who had applied for discharge from the Indian Army on compassionate grounds will not lose his right to claim disability pension. Rule 1 of Appendix II to the Pension Regulations for Army, 1961 was relied on to hold that as the petitioner was in a lower medical category at the time of his discharge than that in which he was placed when he entered service, he is to be treated as invalided from service. For the reasons which we have set out above, we are not persuaded to agree with the decision of the Division Bench of the Delhi High Court that Rule 1 of Appendix II can be applied even to cases where a person was not invalided out of service due to disability but was discharged at his own request or on compassionate grounds. We have also gone through the order passed by the Apex Court in SLP (Civil) No. 24171 of 2004 which arose from the said decision. The Apex Court dismissed the SLP at the stage of admission after condoning the delay and did not decide the issue raised on the merits.

17. It is evident from the pleadings and the materials on record that the petitioners in the Writ Petitions from which these Writ Appeals arise were not

invalided out of service on account of a disability. They were discharged at their own request. The concept of invaliding applies only to cases where the tenure of service is cut short on account of disability. The concept of invaliding does not apply to cases where the employee chooses to retire from service after completing his tenure of service or on compassionate grounds. We are therefore of the considered opinion that the direction issued by the learned single Judge to the appellants to pay disability pension to the petitioners in the respective cases cannot be sustained.

We accordingly allow the Writ Appeals, reverse the judgments of the learned Single Judge and dismiss the Writ Petitions, The parties shall bear their respective costs.