
(1997) 09 AHC CK 0205

In the Allahabad High Court

Case No : Spl. Appeal No's. 132 and 154 of 1997

Daya Shankar Tewari

APPELLANT

Vs

Chief of Army Staff and Others

RESPONDENT

Date of Decision : 01-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 3 LLJ 566

Hon'ble Judges : D.P. Mohapatra, C.J;S.R. Singh, J

Bench : Division Bench

Advocate : Ajit Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Singh, J.—Special Appeal No. 132 of 1997, as initially filed, was directed against the judgment and order dated November 27, 1996, disposing of Civil Misc. Writ Petition No. 13885 of 1995 studded with certain observations and the order dated February 5, 1997, dismissing Civil Misc. Review Application No. 655 of 1996 seeking review of the Judgment dated November 27, 1996. When Special Appeal No. 132 of 1997 came up before the Court on March 18, 1997, it was felt that these two orders could not be lumped together for being challenged in one single appeal and hence, to clear the road-block about the maintainability of a single appeal against two orders, the petitioner prayed for and was granted time to file separate appeal impugning the judgment/order dated November 27, 1997 attended with an application for condonation of delay. The appellant, thereafter, filed Special Appeal No. 154 of 1997 against the judgment dated November 27, 1996. Both these appeals as they were intertwined, were admitted for hearing vide Court's order dated April 17, 1997 and heard finally on August 1, 1997.

2. Facts that emerge from the materials on record of the writ petition and events leading the appellant to land up in this Court are that the appellant joined the Army Service as a Sepoy on August 28, 1977 and while posted at Panagarh, he

chanced to meet with an accident as a result of the Motor Cycle going into a skid in which the petitioner "sustained severe injury" while he was "on bonafide Government duty". The injury was attributed to "Military Service in peace". The petitioner was placed in Medical Category "B" (Permanent) w.e.f. November 12, 1982 as a case of fracture mid-shaft femur (Lt). "The disability was estimated less than 20%. Upon his submitting a willingness certificate to continue in service and on the recommendation by the O.C. Unit that the individual could be suitably employed in his own trade, the appellant was retained in service in the same trade but harnessed to an alternative job in the public interest, owing to his disability. It appears that the appellant had staked his claim for being remustered or retained as J.C.O. (Religious teacher) called "Pandit" but the same was concededly rejected vide order dated November 22, 1992 which reads as under ;

1. Refer to your letter No.563/47/ST-12 dated Nov. 4, 1982.
2. Since No. 13832478 Sep/DVR (MT) D.S. Tiwari of your Unit has been down-graded to medical category (B) (Permanent), he is not eligible for re-mustering as a JCO Religious teacher (Pandit).

Sd/- (K.V.K. Rao) Capt. Ro For Offg. Officer Incharge ."

After completion of 10 years of service, a duly constituted Medical Board held on July 12, 1987 at Military Hospital, Dehradun found the appellant medically unfit to be continued in service and accordingly, commended his being relieved of the Army Service. The recommendation met the approbation of A.D.M.S., U. P., area Bareilly on July 30, 1987 and thereafter, the appellant was discharged from Army with effect from September 1, 1987, pursuant to Discharge Order 1,03/87 dated March 1987 which was served to appellant on August 31, 1987. The appellant, then, filed Civil Misc. Writ Petition No. 21823 of 1987 praying for following amongst other reliefs :

"(1) Call for the records of the case, issue writ, direction or order in the nature of certiorari quashing the order dated March 20, 1987 passed by opposite party No.4 annexed as Annexure 3 to the writ petition which was served to the petitioner on August 31, 1987.

(2) Issue mandamus commanding the opposite parties to send the petitioner to be examined by the Medical Board constituted for the said purpose under the Army Act and Rules and take the petitioner in service forthwith."

3. The said writ petition came to be heard and disposed of vide judgment and order dated January 28, 1992. The relevant portion of the judgment reads as below :

"It is contended that on account of fracture in the left leg the petitioner, became disabled for discharging his normal functions, therefore, he was discharged. However, his services can be retained as per the provisions contained in Annexure C.A. 1 to the counter-affidavit. The grievance of the petitioner is that despite his several representations and applications for being appointed, nothing

has been done.

In the counter affidavit, refuting the submission of the petitioner; it is contended that at no point of time, the petitioner made any application for being appointed in accordance with the rules.

The relevant rule referred to above finds place in Annexure C.A. I to the counter affidavit wherein in Clause (2) a general principle has been enumerated for retention in service in alternative employment. According to it, ordinarily permanent low medical category personnel will be retained in service till completion of 15 years service in the case of J.C.Os and 10 years in the case of O.R.

In the circumstances of the case, if the petitioner is still entitled to get benefits of the above provision and he makes appropriate application for it within a month from today, his application shall be considered and decided according to the Rules within a period of three months from the date of its receipt and the decision taken thereon will be intimated to him.

With the above observations, this petition is finally disposed off at the admission stage."

4. Thereafter, it is alleged, the appellant moved an application on February 22, 1992 to the Record Officer, A.S.C. (M.T.) for appointment on the post of J.C.O. (R.T.) stating therein that the application dated February 22, 1992, be treated in continuation of the earlier application made for the purpose on November 4, 1982, which, as stated above, had already been rejected vide order dated November 22, 1982. The A.S.C. (M.T.) also appears to have sent certain communication to the Army Headquarter, New Delhi, in respect of this Court's judgment dated January 28, 1992 rendered in Writ Petition No. 21823 of 1987. The Army Headquarter by its communication dated September 8, 1992, addressed to A.S.C. Record (M.T.) Bangalore, opined that individual could be re-enrolled in terms of Para 143 of the Regulation for the Army (Vol. I) - Revised Edition 1987 and A.S.C. Record (M.T.) Bangalore, was advised to take necessary action accordingly under intimation to the Headquarter. Acting on the aforesaid directions contained in the letter dated September 8, 1992 of the Army Headquarter, necessary medical examination of the appellant was again carried out on Oct. 17, 1992 at Military Hospital, Varanasi and by a communication letter dated February 23, 1993, the appellant was bidden to report for necessary re-enrolment in the office of B.R.O. Varanasi as Sepoy-Driver (MT) in view of paragraph 143 of the Regulations. Pursuant to the said communication the appellant reported and was re-enrolled as Sepoy (Driver) MT where he performed his duties regularly till his discharge with effect from July 31, 1996 vide order dated August 14, 1995, on attaining the prescribed age of 40 years. The writ petition No. 13885 of 1995 from which stem, the Special Appeals on hand, was presented in the Registry on May 19, 1995 i.e. while the petitioner was still serving as Sepoy (Driver) M.T. upon his being re-enrolled pursuant to

the orders aforestated, praying for the following specific amongst other reliefs.

(i) Issue a writ order or direction in the nature of certiorari quashing the order dated March 20, 1987 passed by opposite party No.2 annexed as annexure No.4 to the writ petition, which was served to the petitioner on August 31, 1987.

(ii) Issue a writ order or direction in the nature of mandamus directing the respondents to pay the arrears of salary from the date of discharged period.

(iii) Issue a writ order or direction in the nature of mandamus directing the respondents to treat the petitioner as a continuation in service.

(iv) Issue a writ, order or direction in the nature of mandamus directing the respondents to give all the consequential service benefits to the petitioner.

(v) Issue a writ, order of direction in the nature of mandamus to direct the respondents to consider the application dated November 4, 1982 the petition to Religious teacher."

The writ petition culminated in a judgment and order of dismissal dated November 27, 1996. The dismissal spurred the petitioner into filing a review of the said judgment, but the application for review was also recipient of the fate of dismissal vide judgment and order dated February 5, 1997 passed by the learned single Judge. After his failure before the learned single Judge, the petitioner appellant has filed the two appeals as aforestated.

5. We have heard the appellant Daya Shankar Tiwari, who appeared in person, at considerable length and also Sri. R.P. Goyal, Senior Advocate, who on our request, led the argument as Amicus Curiae, Sri Ajit Kumar Singh, learned Addl. Standing Counsel for Union of India was heard in opposition.

6. The learned single Judge, in his judgment dated November 27, 1996 has dwelt upon and replied the appellant's gravamen as against his discharge from service vide Discharge order No. 03 of 1987, (which was sought to be quashed vide prayer No. 1 of the writ petition) in the following words :

"In view of the decision in the earlier writ petition, the petitioner could not maintain the said prayer being prayer No. 1 and, prayer No. 5 which are hit by the principle of res judicata in view of the decision contained in Annexure 6 to the writ petition aforesaid. Moreover, the petitioner has accepted the said position and had acted upon the same. Now, he cannot turn round and question the same once again. There is no scope for reopening the closed chapter by recalling the order passed in earlier writ petition."

7. Sri R.P. Goyal learned Senior Advocate submitted that the principle of res judicata had no application to the facts of the case on hand in that, urged the counsel, entire issue was left wide open to be decided by the respondents in accordance with law and in the light of the observation made in the judgment dated January 28, 1992 disposing of earlier writ petition which contains no expression of opinion on merits of the appellant's gravamen as against his

discharge from service. The learned Counsel urged that the learned single Judge erred in invoking the principle of *res judicata*, Be that as it may, we are of the considered view that no ground is made out for interference under Article 226 of the Constitution with the order of discharge/release from service. The cause of discharge as shown in the discharge order dated March 20, 1987 reads thus :

"Discharged being placed in medical category lower than "AYE" and not upto the prescribed Military Physical Standard.

On the material on record, it is crystal clear that the discharge was ordered under Item No. III (V) Rule 13 of the Table annexed to the Army Rules on the basis of medical reports which indicate that the appellant was categorised as permanent medical category "B". The discharge order dated March 20, 1987 followed on the basis of medical opinion available as on date of the said order and the Approving Authority had for its basis the opinion of the Medical Board held at Military Hospital, Dehradun on July 12, 1987 and the recommendation dated July 15, 1987 as well. The opinion of the Medical Board and the decision reached by the authorities being not marred by malice or blemish of perversity ,cannot be supplanted by this Court by its own opinion while exercising supervisory power under Art. 226 of the Constitution as distinguished from appellate power. We are of the considered view that on the material on record, no exception can be taken by this Court of the Discharge Order 03 of 1987 which was given effect to from September 1, 1987.

8. Coming now to grips with the appellant's grievance hinged on non-consideration of his application dated November 4, 1992 in respect of which the relief sought for vide prayer No.5 of the writ petition is to issue writ, order or direction in the nature of mandamus directing the respondents to consider the application dated November 4, 1982 of the appellant for appointment to the post of Religious Teacher, suffice it to say that the prayer has already met the fate of rejection, vide order dated November 22, 1982 of the appropriate authority, a copy of which has been annexed as Annexure C.A. 2 to the Counter affidavit filed in Special Appeal No. 132 of 1997 and Annexure 3 to the petitioner's affidavit filed in support of the Stay application moved in Special Appeal No. 132 of 1997 which order has seemingly yielded asset to attain finality without any demur by the appellant. It may be observed that copy of the alleged application dated November 4, 1992 has not been brought on record and what has been annexed as Annexure 2 to the affidavit filed in support of the stay application, is a letter ostensibly written by Major Gaje Singh, Officer Commanding, A.S.C. Records, M.T. Aurangabad, to higher authority in respect of remustering the appellant as Religious Teacher and it was in response to the said letter that the order dated November 22, 1982 (Annexure 3 to the appellant's affidavit) was issued by Capt. K.V.K, Rao, R.O. for officiating Officer Incharge, A.S.C. (Records) M.T. Aurangabad, holding that the appellant was not eligible for re-mustering as J.C.G. Religious Teacher (Pandit) since he had been down graded to medical category "B" (Permanent).

9. Concededly, the Cadre of Religious Teachers/padres consists of Jamadars and Subedars/Rasildars in the ratio of 3 : 1 and constitutes a Special List of J.C.Os. who are not eligible for promotion to the rank of sub-Major/ Ris. Major and an individual, in order to be eligible for appointment to this Special list must be in medical category "A" and must not be below 25 years or above 35 years of age on the date of appointment and must also be possessed of the minimum educational qualifications prescribed by A.J. 204 of 1958 as amended from time to time. The appellant who attained the age of 40 years during the pendency of the Special Appeals on hand, was placed in medical category "B" (Permanent) on November 12, 1982 which is a medical category lower than "A" and therefore, his claim for appointment as Religious Teacher was rightly rejected vide order November 22, 1982 he being not eligible for appointment. It is borne out from the record that medical category "B" (Permanent) in which the appellant was placed in 1982, endured even in 1987 when he was discharged after completing the qualifying service of 10 years.

10. The appellant, therefore, cannot be given indulgence of resuscitating a claim which stood rejected way-back in 1982 as aforesaid. If he was aggrieved by the said order dated November 22, 1982, he ought to have invoked the procedure of challenging the same at the appropriate forum. The observations made in the judgment dated January 28, 1992 passed in the earlier writ petition filed by the appellant that "if the petitioner is still entitled to get benefits of the above provisions and he makes appropriate application for it within a month from today, his application shall be considered and decided according to rules "cannot be exploited to reopen a closed chapter. The claim made in the application filed by the appellant in 1992 for remustering as Religious Teacher by riding piggyback on the aforesaid observations made in the judgment dated January 28, 1992, has been in our considered view, rightly rejected by the authorities and, in the circumstances of the case, it was rightly "opined that the individual is required to be re-enrolled in terms of para 143 of the Army; Regulations" by means of communication contained in letter dated September 8, 1992 (Annexure C.A. 1) to the counter-affidavit filed in Spl. Appeal No. 132 of 1987. The Court is also of the view that "Retention in service in alternative employment" as comprehended in paragraph 2 of the Appendix "A" to AO 46 of 1980, having already been availed of by the petitioner, after he was declared medical category "B" (Permanent) in 1982, by giving his willingness in 1982, to be retained in service by re-mustering him in the public interest in the same trade though on a different post, cannot be re-invoked by the appellant twice over after discharge from service on fruition of qualifying service of 10 years which he was allowed to complete by giving the benefit of retention in service till August 31, 1987 albeit being a case of low medical Category "B" (Permanent), the appellant could well have been discharged from service on November 12, 1982 when he was declared as Medical category "B" (Permanent). In the circumstances, therefore, there is no question of issuing any writ, order or direction commanding the respondents to consider the appellant's application dated November 4, 1982, which as stated

herein above, has already been rejected vide order dated November 22, 1982. That apart, having acquiesced to his being re-enrolled as Driver (MT) in consideration of his application moved pursuant to the judgment of the Court dated January 28, 1992, the appellant cannot be afforded unmerited indulgence to lay any claim now in respect of the post of J.C.O. Religious Teacher (Pandit). It has come in the counter affidavit filed in the Special Appeal that the appellant has since been discharged on attaining the prescribed age of 40 years during the pendency of the special appeal and being aged about 40 years, he has ceased to be eligible for appointment to the post of Religious Teacher by reason of his having become over-aged. In the totality of the circumstances, the Court converges to the considered view that the respondents have acted reasonably and fairly and not illegally, arbitrarily or capriciously in dealing with the case of the appellant with regard to his claim for appointment on the post of Religious Teacher and no interference is warranted in the matter by the Court.

11. As a result of foregoing discussion, we do not consider it necessary to dwell upon other prayers of consequential nature made in the writ petition some of which have already been dwelt upon at length and taken care of in the judgment dated November 27, 1996 passed by the learned single Judge. Both the appeals are liable to be dismissed.

12. It may however, be observed that this judgment shall not impinge upon the decision on the question as to how should the interim period from the date of discharge to the date of re-enrolment be treated which is pending consideration before the appropriate authority, to be decided in accordance with law.

13. In the result, both the appeals fail and are dismissed. We however, make no orders as to costs.