

**(2012) 01 DEL CK 0025**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 530 of 2012 and CM No.1136 of 2012

Ex. Sepoy Basant Kumar Pandey

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision :** 25-01-2012

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47

**Citation :** (2012) 01 DEL CK 0025

**Hon'ble Judges :** J.R. Midha, J;Anil Kumar, J

**Bench :** Division Bench

**Advocate :** Anilendra Pandey and Mr. D.D. Sharma, for the Appellant; Himanshu Bajaj, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Anil Kumar, J.—The petitioner has sought the quashing of order dated 9th July, 1993 discharging the petitioner from the Territorial Army service and SOS with effect from 10th July, 1993 (FN); order dated 8th December, 1998 declining the claim of the petitioner for disability pension on the grounds that the disability was neither attributable nor aggravated by Military Service and that the disability was assessed at less than 20% and therefore, no disability pension is admissible to the petitioner and finally the order dated 9th April, 2001 in Civil Writ Petition No.1905/2001 titled as "Ex.Sepoy Basant Kumar Pandey v. Union of India & Ors" whereby the writ petition filed by the petitioner against the order dated 8th December, 1998 was dismissed on the ground that the disability of the petitioner was less than 20% and even the Appellate Medical Authority who had examined the petitioner had assessed his disability as less than 20% for five years and thus it was held that the petitioner is not entitled for any disability pension.

2. The petitioner has asserted that he joined the Territorial Army as Sepoy in June, 1987 in the Medical Category of AYE (I).

3. Afterwards, the petitioner was invalided out of the service on medical grounds on 10th July, 1993 as he was downgraded to a Low Medical Category.

4. According to the petitioner he was posted to various places all over India during his tenure of about six years and that he remained healthy throughout his service. However, subsequently the petitioner was invalided out of the service on account of the disease known as "Stomach Disorder Operated" and consequently the petitioner was released from the service with effect from 10th July, 1993 and he was boarded out.

5. The petitioner pleaded that his claim for disability pension was withheld on the records of Rajput Regiment, Fatehgarh despite repeated requests and later on he was informed that the disability pension claimed by him has been rejected by the pension sanctioning authority i.e. the Chief Controller of Defense Accounts (Pensions) on the ground that his disability was neither attributable to or aggravated by military service and in any case, in his case assessment of disability was less than 20%.

6. The petitioner had thereafter, filed an appeal against the order of rejection of his claim for disability pension, which was also declined by order dated 31st August, 2000.

7. The petitioner further disclosed that he had filed a writ petition bearing No.1905/2001 seeking the quashing of orders rejecting his plea for disability pension. However, his writ petition was also dismissed by order dated 9th April, 2001. The Court had passed the following order on 9th April, 2001 on the writ petition of the petitioner being CWP No.1905/2001 titled as "Ex.Sepoy Basant Kumar Pandey v. Union of India & Ors":-

09.04.2001

Present: Mr. H.S.Raghav for the petitioner

Ms. Anamika Aggarwal for the respondents.

C.W.1905/2011

Counsel for the petitioners during the course of this argument has submitted that the petitioners was examined by the Medical Board and according to the opinion of the Medical board, the percentage of disability of the petitioner was 30%. The said submission made during the course of arguments is not supported by any averments in the writ petition.

My attention is drawn to the order dated 8th December, 1998 which clearly indicates that the disability of the petitioner was assessed at less than 20%. Even the Appellate Medical Authority who had examined the petitioner had assessed the disablement of the petitioner at less than 20% for five years as appears from communication at Annexure P-4.

In that view of the matter, there is no merit in the writ petition and the same

stands dismissed.

8. In the writ petition, the petitioner has challenged the order of his discharge dated 9th July, 1993 and the order dated 8th December, 1998 declining his claim of disability pension and the order dated 9th April, 2001 passed by this Court in the writ petition of the petitioner, on the ground that the petitioner could not be discharged u/s 47 of The Persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. According to the petitioner he should have been shifted to some other post with the same pay scale and service benefits and if it was not possible to adjust the petitioner against any post, the respondents should have created a supernumerary post until the availability of a suitable post for the petitioner. The petitioner also relied on Kunal Singh Vs. Union of India (UOI) and Another, to substantiate his pleas.

9. The petition is contested by the respondents. Mr. Himanshu Bajaj who has appeared on advance notice contended inter-alia that the claim of the petitioner for disability pension has already been adjudicated and rejected by this Court by order dated 9th April, 2001 and that the said order cannot be challenged by the petitioner by filing the present writ petition as no Letters Patent Appeal was filed against the said order nor was it challenged by filing a Special Leave Petition. The respondents have contended that though the order dated 9th April, 2001 has been passed by a Single Judge of this Court in a writ petition, the same cannot be challenged by filing another writ petition before a Division Bench. Regarding the plea that the petitioner could not have been discharged and should have been adjusted to some other post with the same pay scale and service benefits or if the post was not available then he should have been kept on the supernumerary post until a suitable post would have been available to the petitioner by invoking Section 47 of The Persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, it has been contended on behalf of the respondents that this cannot be a ground as the plea would be barred on account of the constructive res-judicata, since the said plea was available to the petitioner when the earlier writ petition was filed and the petitioner ought to have taken this plea in his petition being CWP No.1905/2001 which was filed by him.

10. The learned counsel has also contended that in any case under the proviso to Section 47, there has been a notification exempting the applicability of the provisions of the said Act and consequently the petitioner is not entitled for any relief by invoking any provision of the said Act.

11. This Court has heard the learned counsel for the parties in detail. The petitioner had filed the writ petition bearing CWP No. 1905/2001 for challenging his discharge from the service and also for claiming the disability pension. However, the Single Judge of this Court on perusing the record pertaining to the petitioner had held that since the disability of the petitioner was assessed as less than 20% and the petitioner had been unsuccessful in producing any document that proved otherwise, the petitioner was not entitled to receive the disability

pension. Aggrieved by the order of the Single Judge of the High Court, the only remedy available to the petitioner was to move a Letters Patent Appeal in order to address his grievances before the proper forum, rather than filing another writ petition before this Court. The present writ petition in the circumstances is barred under law since it is based on the same cause of action already adjudicated upon by the Single Judge in CWP No. 1905/2001. Therefore on this ground alone the writ petition is liable to be dismissed.

12. In any case even if the plea of the petitioner, that he should not have been discharged but instead ought to have been adjusted to some other post with the same pay scale and service benefits or in the very least should have been kept on a supernumerary post until a suitable post would have been available to the petitioner, by placing reliance on Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is to be taken into consideration, the same cannot to be accepted in view of the notification dated 28th March, 2002 exempting the applicability of the provision of the Act to the petitioner. The said notification categorically stipulates that in exercise of the powers conferred by the proviso to Section 47 of the Persons with Disabilities Act, 1995, the Central Government having regard to the type of work carried on hereby exempts all categories of posts of combatant personnel of the Armed Forces from the provisions of the said section. The power prescribed under the proviso to Section 47 clearly enumerates that the appropriate Government may having regard to the type of work carried on in any establishment by notification and subject to such conditions if any as may be specified in such notification exempt any establishment from the provisions of this section. Therefore, in any case the petitioner who was a Sepoy in the Armed Forces is exempt from the benefits inscribed u/s 47 of the Persons with Disabilities Act, 1995.

13. In the totality of the facts and circumstances and for the foregoing reasons there are no grounds to hold that the petitioner is entitled for any disability pension. The writ petition in the facts and circumstances is without any merit and the decision of the respondents to deny the disability pension since the assessment of the petitioner's disability was less than 20%, cannot be faulted. The petitioner has failed to make out any such illegality, irregularity or perversity in the case of the respondents or the decision of this Court in CWP No. 1905/2001 dated 9th April, 2001 which will require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit and it is, therefore, dismissed.