

(2010) 04 UK CK 0130

In the Uttarakhand High Court

Case No : Writ Petition (S/S) No. 2976 of 2001

Gokaran Singh

APPELLANT

Vs

The Union of India (UOI) and Another

RESPONDENT

Date of Decision : 02-04-2010

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 38, 38(4), 38(4)
Central Reserve Police Force Act, 1949 — Section 16, 4
Central Reserve Police Force Rules, 1955 — Rule 16
Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2011) 2 UC 991

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : D.S. Mehta, for the Appellant; Ajay Singh Bisht, for the Respondent

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—This writ petition has been filed by the Petitioner challenging the order dated 19.8.1996 (Annexure-10 to the writ petition), whereby the representation/claim of the Petitioner for grant of invalid pension has been rejected. He has, inter alia, prayed that the Respondents be directed to give invalid pension to the Petitioner.

2. The brief facts of the present case are as follows:

The Petitioner was enrolled as a Constable in the Indo Tibetan Border Police (hereinafter referred to as I.T.B.P.) on 2.2.1988, and he joined his post on 24.2.1988. Vide order dated 18.10.1989, his services were earlier terminated. All the same, vide order dated 5.7.1990, he was reinstated in service. The same year i.e. in 1990, the Petitioner complained of pain in his body and was examined by a Medical Board and the said Medical Board in its opinion dated 22.8.1990 stated that though the Petitioner is permanently incapacitated for further service of the kind he has been doing in I.T.B.P., yet he is fit for further services in I.T.B.P, which are of less laborious nature. The Petitioner, subsequently, preferred

an appeal, which was rejected vide order dated 2.9.1991 in which it was stated that the Petitioner has been discharged from service as a disease known as "Poly Arthritis" has been diagnosed on the Petitioner while in service, and there is no lower post of less laborious character with ITBP, where he can be absorbed. Consequently, the Petitioner filed a writ petition being Writ Petition No. 34913 of 1991 in the High Court of Judicature at Allahabad. The said writ petition was dismissed and consequently, the Petitioner filed a Special Appeal being Special Appeal No. 632 of 1992 before the High Court of Judicature at Allahabad, which was disposed of with the observation that although the Petitioner cannot be taken back in service but the claim of the Petitioner for medical/invalid pension under Sub-rule (4) of Rule 38 of Civil Services Pension Rules, 1972 (from hereinafter referred to as the CCS Rules, 1972) can be considered by the Authorities, if he files a representation before the Respondents. The Petitioner consequently filed a representation before the Respondents, which was decided on 19.8.1996 (Annexure-10 to the writ petition) stating that under CCS Rules, 1972 the medical pension can only be given to a person, who has put in ten years of service and since the Petitioner has admittedly put in only three and half years of service, he is not qualified for medical/invalid pension. Therefore, the claim of the Petitioner for medical pension was rejected by the order dated 19.8.1996. The Petitioner challenged the order dated 19.8.1996 before the High Court of Judicature at Allahabad by filing Writ Petition No. 10846 of 1997 and after creation of the State of Uttarakhand the said case has been transferred to this Court u/s 35 of the Uttar Pradesh Reorganisation Act, 2000 and has been renumbered as Writ Petition (S/S) No. 2976 of 2001.

3. Counter and rejoinder affidavits have been perused and the counsels for both the parties have been heard at length.

4. It is an admitted fact that the Petitioner had put in only three and half years of service as a constable. It was during the period of service, when the disease known as "Poly Arthritis" was diagnosed on the Petitioner and the services of the Petitioner were subsequently terminated vide order dated 2.9.1991. Termination order of the Petitioner states that the services of the Petitioner were terminated u/s 16 of the Central Reserve Police Force Rules, 1955, which are applicable in the present case. As per the said Section, a constable is first inducted in service only for a period of three years as a temporary employee. It is after a period of three years, that he may be given a substantive status. In case, he is not given a substantive status, then the constable can either be considered for declaration as a "quasi permanent employee", in case he is not declared as such, then this status would remain that of a temporary government servant. This is clear from Section 16 of the CRPF Act. Rule 16 of the CRPF Rules reads as under:

16. Period of Service.-[(a) All members of the Force shall be enrolled for a period of three years. During this period of engagement, they shall be liable to discharge at any time on one month's notice by the appointing authority. At the end of this those not given substantive status shall be considered for quasi-

permanency under the provision of the [Central Civil Service (Temporary Service) Rules, 1965]. Those not declared quasi-permanent under the said rules shall be continued as temporary Government employees unless they claim discharge as per Schedule to the Act. Those who are temporary shall be liable to discharge on one month's notice and those who are quasi-permanent shall be liable to discharge on three months' notice in accordance with the said rules, as amended from time to time.]

(b) Should the Central Government decide at any time to disband the Force or any part of it [either before termination of the period for which a member of the Force is enrolled or at anytime thereafter] he shall be liable to be discharged, without compensation, from the date of disbandment.

(c) No member of the Force shall withdraw from the duties of his office without the express permission of the Commandant or an accredited gazetted officer.

[(d)(1) The appointing authority may, during the period of initial appointment of a member of the Force, appointed u/s 4 of the Act, permit him, for good and sufficient reason, to resign from the Force with effect from such date as may be specified in the order accepting his resignation:

Provided that on the acceptance of his resignation any such member of the Force shall be required to refund to the Government all the cost of training imparted to him in the Force or a sum equal to three month's pay and allowances, received by him prior to the date of his resignation, whichever is less.

Explanation.-(1) For the purpose of this sub-clause "during the period of initial appointment" shall mean the period before a member of the Force is declared quasi-permanent.

(2) The appointing authority may refuse to permit a member of the Force to resign if the emergency has been declared in the country either due to internal disturbances or external aggression.]

(e) The appointing authority may give substantive status to such members of the Force as are found suitable in all respects.

5. It is admitted fact that the status of the Petitioner, when he was discharged from service was of a temporary employee, therefore, one month's notice was enough for terminating the services of the Petitioner. All the same, the case of the Petitioner is that it is not a termination simpliciter, but it is a case where the Petitioner was diagnosed with a disease while he was in service and had faced a Medical Board and this Medical Board had given an opinion that the Petitioner is fit to remain in the force, if he is assigned a job of less laborious nature. Relevant paragraphs in this regard are paragraphs 21, 22 and 26 of the counter affidavit.

6. Rule 38 of the CCS Rules reads as under:

38. Invalid pension-(1) Invalid pension may be granted if a Government servant retires from the service on account of any bodily or medical infirmity which

permanently incapacitates him for the service.

(2) A Government servant applying for an invalid pension shall submit a medical certificate of incapacity from the following medical authority, namely:

(a) A Medical Board in the case of a Gazetted Government servant and of a non-Gazetted Government servant whose pay, as defined in Rule 9 (21) of the Fundamental Rules, exceeds [Two thousand and two hundred rupees]* per mensem;

(b) Civil Surgeon or a District Medical Officer as Medical Officer of equivalent status in other cases.

Note 1.-No medical certificate of incapacity for service may be granted unless the Applicant produces a letter to show that the Head of his Office or Department is aware of the intention of the Applicant to appear before the Medical Authority. The medical authority shall also be supplied by the Head of the Office or Department in which the Applicant is employed with a statement of what appears from official records to be the age of the Applicant. If a Service Book is being maintained for the Applicant, the age recorded therein should be reported.

Note 2.-A lady doctor shall be included as a member of the Medical Board when a woman candidate is to be examined.

(3) The form of the Medical Certificate is to be granted by the Medical Authority specified in Sub-rule (2) shall be as in Form 23.

(4) Where the Medical Authority referred to in Sub-rule (2) has declared a Government servant fit for further service of less laborious character than that which he had been doing, he should, provided he is willing to be so employed, be employed on lower post and if there be no means of employing him even on a lower post, he may be admitted to invalid pension.

(5) Deleted.

7. What is relevant for the purposes here is Sub-rule (4) of the above Rule which states that where the Medical Authority, referred to in Sub-rule (2), has declared a Government servant fit for further service of less laborious character than that he had been doing earlier then in case the incumbent is desiring to do such a service he shall be employed on a lower post. However, the Department has taken a stand that the Petitioner cannot be absorbed on a less laborious post as a less laborious "post" does not exist.

8. The reasons assigned by the Department for not absorbing the Petitioner on less laborious post are that the Petitioner is a constable, which is the lowest post in the Department and there is no post lower than that of a constable, and therefore, the Petitioner cannot be absorbed on a lower post. This defence has been taken by the Department in paragraph 22 of the counter affidavit, as well. Paragraph 22 of the Counter affidavit is being extracted below:

22. That the contents of para 21 of the writ petition are not admitted. The Petitioner was declared permanently incapacitated for service by the Medical Board due to case of POLY ARTHRITIS. The Petitioner after enlistment in this department fell ill due to multiple joint pain and remained admitted w.e.f. 24.12.1988 to 10.1.1989. On 22.12.1988 he was referred to Medical specialist western command Hospital Chandigarh, where he was diagnosed to be a case of POLYARTHRITIS and advised treatment. Due to recurrence of pain and swelling of his joints he was again admitted in Hospital and remained admitted from 7.2.89 to 21.2.89. On 21.2.89 he was again reviewed by the Medical specialist Lt. Col. Dr. P.K. Upadhyya of Western Command Chandimandir Chandigarh and recommended him to be placed under category "BEE" for 6/12 years w.e.f. 29.8.89. While examining the Petitioner by the Medical authority the Petitioner gave the past history of joints pain and swelling from 1979, which has been recorded in the history sheet. The Petitioner concealed this fact when he had given undertaking at the time of his recruitment on 24.2.1988. The Medical Board specifically opined him fit for further service of less laborious character than that which he had been doing. The competent authority while issuing the order of his termination from service had clearly mentioned that, there had been no means of employing him in lower post or less laborious character job. Constable being the lowest sanctioned post in the force. There had not been an option with the Commandant, but to terminate the service being a temporary government servant after giving him one month notice under the rules.

9. After hearing the rival submissions of the parties, this Court is of a considered view that in matters where "invalid pension" or "disability pension" is an issue even where two views are possible, the one giving benefit to the disabled should be applied for the simple reasoning of equity and good conscience. The admitted case here is that the Petitioner had put in three and half years of service. It was during his service in I.T.B.P. that he was diagnosed with a disease known as "Poly Arthritis" and the Medical Board he faced was of the opinion that though he cannot perform the job he had been doing earlier, but can perform work of less laborious character. The Rules, which are applicable in the present case, also provide in such a contingency, as referred above, primarily Sub-rule (4) of Rule 38 of the CCS Rules, 1972, in the first instance such a person can be assigned a less laborious job. Nevertheless I.T.B.P. has simply discharged the Petitioner from service and has neither assigned him a job of less laborious character, nor has given him invalid pension, when the Petitioner was always willing to work on a lower post of a less laborious character. The only defence taken by I.T.B.P. is that there was no lower post for absorbing the Petitioner in the Department, as the post of constable is the lowest post and Sub-rule (4) of Rule 38 of the CCS Rules, 1972 state that in such a contingency, a person can be employed on a lower post of less laborious character only if there are means of employing him on a lower post. The Respondents, however, state that there were no means available to employ him, as such he was not given appointment. This position taken by ITBP is unacceptable, for the reasons that once there was an opinion of the Medical

Board that the Petitioner is fit for less laborious work and is willing to perform duties as such, there should have been a clear finding that no such posts of a less laborious character are available in I.T.B.P. The defence taken by I.T.B.P. is that the lower post than that of constable does not exist in the Department. What the provision actually implies is a lower post of less laborious character. It does not mean, the lower post in status or in monetary terms or in any other way. All it means is that a different nature of job be assigned to him, which is of a less laborious character. The Respondents, however, have taken a recourse to a patently legalistic position and have defended their stand by stating that the Petitioner who is a constable cannot be given a lower post as the constable is the lowest post in the department. What will be seen here is the actual intent of the provision and not a hair splitting technical interpretation. Lower post would only mean a post of less laborious nature. In other words, the person had to be simply assigned to a less laborious work. Nothing more. As has already been stated above, this stand taken by the Respondents is incorrect. Moreover, in case, they were not willing to assign the Petitioner a job of less laborious character as contemplated under Sub-rule (4) of Rule 38 of the CCS rules, then it was necessary for the authorities to have admitted the Petitioner for the invalid pension. This Court is also conscious of the fact that the language of Sub-rule (4) says "may be admitted". All the same, under the facts and circumstances of the case, "may" here will be read as "shall". In this given contingency, where there are no plausible reasons assigned by the Respondents for not assigning less laborious work to the Petitioner, they were bound to admit the Petitioner for the invalid pension. It is true that normally "may" has to read as may only and not as "shall", but then there are exceptions. In a given context "may" has to read as "shall". In the present context may has to be read as shall because any other interpretation would frustrate the very intent and purpose for which a disability pension is granted. This position of law is now well settled, as it was stated by SC in State of Uttar Pradesh Vs. Jogendra Singh, as under:

... There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command.

10. Learned Counsel for the Respondents has relied upon a SC's judgment in Union of India v. Bashirbhai R. Khiliji, AIR 2007 SC 1935 . In the said judgment, one Bashirbhai Khiliji was completely invalidated from the service and his prayer for invalid pension was also denied by the authorities. However, a Division Bench of the Gujarat High Court had set aside the order of the authorities and had also awarded the invalid pension to the Petitioner. Union of India, however, went in Appeal. The grounds taken by the Union of India were that the concerned person had not completed the qualifying service, necessary for the pension. The Apex Court although held the action of the authorities against the Petitioner quite harsh, but denied the invalid pension to Bashirbhai R. Khiliji and allowed the

appeal of the Union of India and had held that the person was not entitled for an invalid pension, as he had not completed a stipulated period of service which is required in order to get entitled for pension.

11. The facts of the present case, however, are clearly distinct from the one cited above by the counsel for the Respondents. In the present case, the Petitioner was not completely invalidated. There was a medical opinion in his favour, which stated that the Petitioner is fit for further service provided he is given less laborious work. Under these circumstances, unless the Respondents had stated valid reasons, he was liable to be absorbed in a less laborious work. This was denied to him and even the claim for invalid pension was rejected. It is under these circumstances that the present case becomes different. It is a case, where the Petitioner was denied absorption to a less laborious work which was liable to be given to him. The defence taken by the department in not absorbing the Petitioner to a less laborious job is not tenable. It is under these circumstances that the present case becomes different from the case cited above by the Respondents.

12. This Court, therefore, holds that the Petitioner was liable to be given a job of a less laborious character in the given contingency, as contemplated under Sub-rule (4) of Rule 38 of the CCS Rules, 1972. Since this was denied to the Petitioner, under these special and unique circumstances, it becomes necessary to award the Petitioner the invalid pension. The Respondents are hereby directed to admit the Petitioner for an invalid pension, which he was entitled to get after being discharged from service i.e. from 2.9.1991 onwards, along with all consequential benefits within a period of four months from the production of a certified copy of this order.

13. The writ petition hence stands allowed on the aforesaid terms. No order as to costs.