

(2009) 02 MAD CK 0200
In the Madras High Court
Case No : Writ Appeal No. 335 of 2008

Government of India

APPELLANT

Vs

Pachammal

RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Army Rules, 1954 — Rule 113, 175, 3(3)
Constitution of India, 1950 — Article 21, 226
Pension Regulations for Army, 1961 — Regulation 132
Pensions Act, 1871 — Section 4

Citation : (2009) 4 MLJ 598 : (2009) WritLR 431

Hon'ble Judges : Prabha Sridevan, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : V. Balasubramanian for Central Govt, for the Appellant; S.P. Ilangovan, for the Respondent

Judgement

Prabha Sridevan, J.—This matter was argued in full on the last date of hearing viz., 29.01.2009.

2. The respondent is the wife of Sepoy Munusamy No. 1283657, who died on 11.06.1973. He was enrolled in the Indian Army on 13.12.1965, after duly undergoing all the tests. He was found physically and medically fit until 22.05.1970. On 23.05.1970, he was admitted to Military Hospital, Panagarh and he was diagnosed as Obstructive Jaundice. He was transferred to Command Hospital, Calcutta for re-categorisation. The Command Hospital discharged him on 17.06.1970, placing him in the low medical category CEE temporarily for one year. He was discharged from Army Service with effect from 12.12.1970, vide Disability Certificate No. 134700 dated 25.03.1971. On that date, he had completed 4 years and 364 days service. The claim of the husband of the respondent for disability pension did not yield result. He died on 11.06.1973, leaving behind him surviving the respondent herein, a disabled son and unmarried daughters. He was not paid pension during his life time, after discharge and no family pension was also paid to him. According to the

respondent, as per the procedure available in the Army, he ought to have been reviewed by the Medical Board on completion of one year period and if he had been upgraded, he would have been taken back to the main stream. On the other hand, if he was downgraded, the Medical Board could have been recommended for disability pension based on his disability. Since he was not reviewed, the husband of the respondent was neither recommended for disability pension nor was he observed in the main stream. The respondent's case is that, to cover up the lapses of the authorities, her husband was hastily discharged and the disability pension, to which he was entitled to, was denied to him. During his life time, her husband appealed to various authorities and his application for disability pension was forwarded by Army authorities, vide Memo dated 07.09.1972, but yet pension was not granted. The respondent had been appealing to various authorities and she was only able to get meagre sums of money as financial assistance from Army Welfare Funds, vide Artillery Records, Nasik Road Camp letter No. 1283657/FP/D-iv/NB, dated 09.08.1986. Her last appeal is dated 15.04.1995. Having no other recourse, she filed Writ Petition No. 3767 of 2001, for mandamus to pay a compensation of Rs. 10 lakhs for causing the death of her husband on account of premature discharge and to award disability pension.

3. A counter has been filed. It is stated therein that the service documents of the husband of the respondent viz., Ex Gunner Munuswamy have been destroyed after expiry of retention period i.e. 25 years, in terms of Para 595 of Regulations for the Army 1987. But, from the Long Roll maintained by Air Defence Artillery Records, it is seen that the said Munusamy was enrolled on 13.12.1965 and discharged from service with effect from 12.12.1970 under Army Rule 13(3) item iii(v) since his service was no longer required. According to the appellants, as per Regulation 132 of the Pension Regulations for the Army 1961, minimum 15 years qualifying service is required to earn service pension. Since the late Munusamy had rendered only 4 years 364 days of service, he was not eligible for service pension. It is also stated that after he was discharged from service with effect from 12.12.1970, he had not made any request for service pension or disability pension and after 28 years, the respondent has approached this Court, which must be dismissed for laches. According to Section 4 of the Pension Act, 1871, Civil Courts are also not authorised to entertain any suit. It is also stated that the late Munusamy was dismissed not on medical grounds, but on the ground that his services were no longer required and therefore grant of disability pension or family pension would not arise.

4. The learned single Judge on consideration of the materials on record, directed the appellants herein to pay a disability pension to the deceased from 23.05.1970 till the date of his death i.e. 11.06.1973 and to pay Special Family Pension as per the Pension Rules. Aggrieved by this, the present writ appeal has been filed.

5. The learned Counsel for the Central Government Standing Counsel submitted

that the writ petition must fail on the ground of laches and that the writ petitioner viz., the respondent herein does not satisfy any of the criterion for grant of pension. No records have been produced that the deceased had suffered on account of the army service condition. On the other hand, the records only disclosed that he was discharged as his services were no longer required and not on medical grounds. It was submitted that without any record, the learned single Judge had come to the conclusion that the death of Munusamy was due to medical disability.

6. The learned Counsel appearing for the respondent submitted that this is a pathetic case, the respondent comes from an extremely poor family and she is only a cattle grazer and she had been making tireless efforts to get pension and the records would also show that the matter was under consideration by the authorities and thereafter, suddenly for want of records, for which the respondent is not to blame, her case for pension was rejected. Learned Counsel submitted that the learned Single Judge had rightly allowed the writ petition and the order did not deserve to be interfered with.

7. Learned Senior Counsel for Central Government also produced the Army Regulations applicable to the period when this matter arose. As per the Army Order 146/77 Medical Categorisation of serving JCOs/OR;

1. Serving JCOs/OR of the Army will be medically categorised in accordance with the schedule of physical standards and instructions given in Appendix "A" to this order.

Explanatory notes on low Medical Category Personnel

2. All personnel who are placed in categories B or C, whether temporary or permanent, are fit for employment on suitable duties. However, in deciding the employability of such personnel, any specific restrictions laid down by medical authorities will be kept in view. They should not be required to attend daily sick parades as a routine.

3. Category "C" embraces all personnel who are not fit for active service with units/formations HQ involved in actual fighting, but are fit for such duties which do not involve severe strain.

4. ...

5. ...

6. After categorisation, all individuals in categories "B" and "C" will be returned to their respective units/formations, or Regiment/Corps Centre/Depot, depending upon the employability restrictions recommended by the medical board. Services of low category personnel returned to units will be utilised as best as possible. If it is not found possible to utilise the services of any individual in his unit, he will be returned to his Regt/Corps/Centre/Depot.

7. ...

Special instructions for Medical Boards/RMOs regarding categorisation of JCOs/OR:

11. The medical category of an individual can be downgraded only by a duly constituted medical board. However, in the case of individuals placed in temporary low medical categories, upgradation of category or continuation of award of the existing temporary low medical category, either on a temporary or a permanent basis, can be done by the officer-in-medical-charge of troops.

12. ...

13. Before placing an individual in a temporary category, the medical board should carefully consider whether the individual is likely to show adequate improvement within the maximum permissible period of one year, to warrant his upgradation to the next higher category. If the medical board do not consider it likely, the individual should be awarded a permanent low medical category straightaway.

14. ...

15. Record of medical categorisation of personnel, will be completed on form AFMSF-15, in duplicate, by medical board/officer-in-medical-charge of troops. Approval of ADMS is not necessary. One copy of this form will be sent to the individual's unit and the other copy to his Record Office, by the authority examining/categorising the individual.

16. When a JCO/OR, who is in permanent low medical category "B" or "C", reports to hospital for medical board, consequent to issue of orders for his discharge/release from service, in accordance with the prescribed policy, the medical board will ensure that the individual is examined for release purpose only and his existing medical category is not changed.

17. While placing a JCO/OR in a low medical category, the medical board will ensure compliance with following requirements:

(a) they must clearly state in the board proceedings whether or not the disease/disability of the individual is attributable to service. They will also bring out aggravation, if any. In formulating opinion about attributability or non-attributability, all medical officers comprising the medical boards and the approving authorities must follow the guidelines given by the Government in the publication "ENTITLEMENT TO CASUALTY PENSION, ASSESSMENT OF DISABILITY; A GUIDE TO MEDICAL OFFICERS AND MEDICAL BOARDS."

Note: Details of any disability or defects of locomotion will be invariably recorded in the man's medical history sheet for reference in case of future pension claims. This record is of the utmost importance both to the man and the state.

(b) they must record, in clear and precise terms, their recommendation, in part II of AFMSF-15, regarding restrictions to be observed in the employment of the individual owing to his disease/disability, for the guidance of OC unit. The

employment restrictions will also be entered in IAB-64 of the individual by the MO who has handled the case.

8. The copies of the discharge slips also produced, which show that the deceased Munusamy had been transferred to Command Hospital, Calcutta for re-categorisation, as he had been diagnosed as "Obstructive Jaundice". Then, on 17.06.1970, he had been placed under low medical category "CEE" temporarily for one year with coin lesion ante-tubercular treatment for one year. Then, he had been discharged on 12.12.1970, as unsuitable for further Military service under Army Rule 13, item (v). The records show that his character had been very good and that he was enrolled at the age of 18 and it says that he is unsuitable for Military service. From the extract of the Army Orders above, it is seen that individuals in categories B and C will be returned to their respective regiment depending upon the employability restrictions recommended by the medical board and if it is not found possible to utilise their services, they will be returned to their regiment. Then, a constant watch has to be kept on their medical categorisation. It is seen from paragraph 16 of the Special Instructions extracted above, the persons, who are in a permanent low medical category, consequent to issue of orders for discharge in accordance with a policy, the Medical Board will ensure that he is examined for release purpose and his existing medical category is not changed. Guidelines also have been given as to the Medical Board to state whether or not the disease/disability of the individual is attributable to service and the entitlement of casualty pension should also be made.

9. In 1972, the late Munusamy made a claim for pension. This was forwarded for an early necessary action. It must be remembered that this was at a time when the records were available, whereas at present, the appellants plead that the records have been destroyed as per the policy of destruction. It will be appropriate for us to presume in this case that if the late Munusamy's case was one of rejection outright, then the contemporaneous order would have indicated it. Whereas the order dated 07.09.1972 shows that his petition has been forwarded for early necessary action. Therefore, we will presume that he was entitled to pension. Thereafter, in 1986, they rejected his case stating that his service was no longer required and therefore, he was discharged, because he had not achieved permanent classification. If he had been placed under temporary medical category, as can be seen from the discharge slips produced before us, it was for the authorities to produce him before the Medical Board to enable the Medical Board to examine him and do the re-categorisation. For what they had failed to do, the pensioner and his family cannot suffer.

10. For Junior Commissioned Officers and Other Ranks and Non-combatants (enrolled), to which the late Munusamy belongs, the Rule 113 provides that while any individual, who is dismissed, is ineligible for pension or gratuity and an individual, who is discharged, remains eligible for pension or gratuity. Disability Pensionary Awards provides that disability pension may be granted to an

individual depending on the percentage of disability and Rule 175 states that if the disability of an individual is wholly or partly, due to his serious negligence or misconduct, the amount of disability pension may be reduced. Unless the negligence is proved, the authorities are liable to pay disability pension in full. It may be reduced only if they proved that it is wholly or partly due to serious negligence or misconduct. It shows that duty to prove lies on the authorities. It is also seen that refusal to undergo medical treatment is another ground for reducing or withholding the disability pension. Detailed directions have also been given with regard to disposal of TB/Leprosy cases and Appendix "A" to Army Order 150/75, which deals with Medical Treatment and disposal of Armed Forces Personnel and their families suffering from Pulmonary Tuberculosis/Leprosy, provides that unless who are discharged from service will be deemed to have been invalidated out of service from the date of discharge from service for the purpose of grant of disability pension on the basis of the recommendation of the invalidating medical board.

11. In this case, the records also show that the deceased Munusamy was recommended for coin lesion ante-tubercular treatment for one year. This order is dated 17.06.1970. Therefore, he should have been given treatment at least till 16.06.1971 until the Medical Board had re-assessed his condition. On the other hand, he was discharged on 12.12.1970 without his completing one year treatment and more importantly, just one day short of the 5 years period, which would have given him the category of permanent classification eligible to benefits and privilege to be treated in Military Hospital. It is very important to note that on the date of discharge, he had completed 4 years and 364 days. We will not deny the respondent her relief merely because the appellants plead that the records have been destroyed, when we have contemporaneous record showing that gunner's case even when he was alive had been recommended for early action. If the deceased Munusamy had been granted his disability pension at that time, then the respondent herein would have been automatically entitled to family pension without any controversy. Moreover, the deceased was discharged in 1972. The Rules provide that the records should be destroyed after 25 years. Then the records could have been destroyed only after 1997. By this time, he had made a claim for pension. The State must be fair in its action. We are unable to see why, Munusamy had to be urgently discharged just one day before he completed 5 years of service. We are unable to see why the authorities had discharged him before the completion of one year period of treatment. We are unable to see any reason other than medical reason for terminating him unfit for Military Service. Therefore, we have no option but to hold that the action is arbitrary.

12. In *Union of India v. Neki Ram* AIR 2004 SC 1235, a Sepoy, who had been discharged on the ground of permanent disability, filed a suit for grant of disability pension. The trial Court found that there is no evidence to rebut the presumption that the plaintiff had developed the disease in the course of his service. It was contended on behalf of the Union of India that in the absence of

proof of injury or the illness developed due to Military service, there cannot be a decree to pay him disability pension and for this purpose, it relied on the decision of the Supreme Court in *Union of India (UOI) and Another Vs. Baljit Singh*, . But, the Supreme Court rejected this contention on the basis of the factual findings and they observed the fact that the respondent was hale and hearty when he joined service and could not have taken ill of the kind complained unless it be in the course of service or aggravated due to the service, was relevant and therefore, dismissed the civil appeal filed by the Union of India.

13. In this case, while we are not granting disability pension, it may not be out of place to point out that there are records to show that the writ petitioner's husband was hale and hearty when he joined service and developed coin lesion ante-tubercular only after he joined service.

14. It is the case of the writ petitioner that she is a cattle grazer without knowledge of law or access to legal remedy and it is in these circumstances that she had come to this Court after a passage of time. The facts show that the deceased army man had been discharged one day short of five years period, which would have given him the category of permanent classification eligible to benefits and privilege to be treated in Military Hospital, though there was no urgency for the discharge since the records show that his case should come up for review after 12 months" period and that 12 months had not elapsed and these facts indicate that there had been some arbitrary and unfair action on the part of the State, which severely prejudiced a poor woman, who is bereft of her husband, who has a disabled boy, who deserves substantive and real justice and not indifference which violates her right to life as enshrined in Article 21 of the Constitution of India.

15. An almost identical matter came before the Supreme Court in *S.K. Mastan Bee Vs. The General Manager, South Central Railway and Another*, . The appellant before the Supreme Court was the widow of a railway employee, who died in harness on 21.11.1969. Because of ignorance and lack of legal assistance, she did not make her claim until 12.03.1991. Her claim was rejected by the Railways on the ground that her husband on the date of death was not in the service of the Railways, who had been earlier medically invalidated. This contention of the railways was rejected by the learned Judge of the Andhra Pradesh High Court, who allowed the writ petition and issued direction for payment of family pension with arrears from the date of death. The Division Bench also agreed with the learned single Judge with regard to the right to receive family pension and the objection regarding alternate remedy before the Central Administrative Tribunal, but confined the retrospective effect to a period subsequent to 1.4.1992 i.e. the date on which the legal notice was given by the appellant on the ground of laches. The Supreme Court set aside this restriction. The relevant paragraph of the said judgment reads as follows:

6. We notice that the appellant's husband was working as a Gangman who died while in service. It is on record that the appellant is an illiterate who at that time

did not know of her legal right and had no access to any information as to her right to family pension and to enforce her such right. On the death of the husband of the appellant, it was obligatory for her husband's employer viz. the Railways, in this case to have computed the family pension payable to the appellant and offered the same to her without her having to make a claim or without driving her to a litigation. The very denial of her right to family pension as held by the learned Single Judge as well as the Division Bench is an erroneous decision on the part of the Railways and in fact amounting to a violation of the guarantee assured to the appellant under Article 21 of the Constitution. The factum of the appellant's lack of resources to approach the legal forum timely is not disputed by the Railways. The question then arises on facts and circumstances of this case, was the Appellate Bench justified in restricting the past arrears of pension to a period much subsequent to the death of the appellant's husband on which date she had legally become entitled to the grant of pension? In this case as noticed by us hereinabove, the learned Single Judge had rejected the contention of delay put forth by the Railways and taking note of the appellant's right to pension and the denial of the same by the Railways illegally considered it appropriate to grant the pension with retrospective effect from the date on which it became due to her. The Division Bench also while agreeing with the learned Single Judge observed that the delay in approaching the Railways by the appellant for the grant of family pension was not fatal, in spite of the same it restricted the payment of family pension from a date on which the appellant issued a legal notice to the Railways i.e. on 1.4.1992. We think on the facts of this case inasmuch as it was an obligation of the Railways to have computed the family pension and offered the same to the widow of its employee as soon as it became due to her and also in view of the fact that her husband was only a Gangman in the Railways who might not have left behind sufficient resources for the appellant to agitate her rights and also in view of the fact that the appellant is an illiterate, the learned single Judge, in our opinion, was justified in granting the relief to the appellant from the date from which it became due to her, that is the date of the death of her husband. Consequently, we are of the considered opinion that the Division Bench fell in error in restricting that period to a date subsequent to 1.4.1992.

Therefore, in this case the Supreme Court in fact held that the pension ought to be paid right from the date of death.

16. In the present case, the Sepoy Munusamy died in 1973. His application for disability pension was not granted and this was also not pursued. We would also have granted the same, but for the fact that in this case there are no records to show the circumstances under which he was discharged from service and further he was discharged one day short of five years, which would have given him the category of permanent classification eligible to benefits and privilege to be treated in Military Hospital. The employee thus could not complete 15 years of service, which would give him the right of service pension. The learned Counsel for the appellant submitted that there are no records to prove the entitlement of

the appellant and the appellant cannot grant her anything immediately on the basis of conjecture. The learned Counsel for the writ petitioner submitted that the misery undergone by the writ petitioner is so much that even a limited relief would be welcomed. It is in these circumstances, we have decided to grant the relief only from the date of the writ petition.

17. One of the grounds pleaded is laches. In the circumstances of the case, when the authorities had sat on the representation given by the deceased Munusamy without disposing it expeditiously, we do not think, we in our exercise of jurisdiction under Article 226, should hold that the respondent's prayer suffers from the defect of laches. However, we have to balance the equity since the jurisdiction under Article 226 is entirely discretionary. We, therefore, feel that in this case instead of allowing the writ petition as prayed for, we will make this modification. The appellants shall calculate the family pension as payable to the respondent had they paid the disability pension for the deceased Munusamy after he was discharged. However, the commencement of the family pension will be only from the date of filing of the writ petition. The respondent will not be entitled to any arrears of pension right from the date of discharge viz., 12.12.1970 or from the date of late Munusamy's death. The arrears of family pension shall be calculated from the date of the writ petition and the entire amount shall be paid within three months from today. If the payment is delayed, thereafter the amount shall bear interest @ 9% per annum till the date of payment. The writ appeal is partly allowed. No costs. Consequently, M.P. No. 1 of 2008 is closed.