

(2010) 11 DEL CK 0163

In the Delhi High Court

Case No : Writ Petition (C) No. 3495 of 2010

Naik Ramesh Chander

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Border Security Force Rules, 1969 — Rule 19(1), 28A, 6
Central Civil Services (Pension) Rules, 1972 — Rule 49

Citation : (2010) 11 DEL CK 0163

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : R. Archana, for the Appellant; Inderjeet Sindhu, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—By way of the present writ petition, it appears that the Petitioner who is a Naik in the Border Security Force (hereinafter referred to as `BSF") seeks implementation of the directions made by the Supreme Court in the judgment reported at Raj Kumar and Others Vs. Union of India (UOI) and Another, .

2. The admitted position is that a GO/Circular dated 27th December, 1995 issued by the Department of Pension & Pensioners" Welfare was erroneously interpreted by the BSF Authorities to mean that any member of the force could resign with the permission of the competent authority even before completing qualifying service, for pension and would be entitled for pension under Rule 19(1) of the BSF Rules, 1969. Pursuant to such interpretation, 2209 personnel sought retirement. Out of these retirees, 447 personnel including the Petitioner were granted pension on such erroneous interpretation of the circular.

3. The issue of the validity of the award of the pension was the subject matter of several litigations which culminated in a final adjudication by the Supreme Court in the judgment reported at Union of India and Others Vs. Rakesh Kumar etc., &

connected matters whereby the Supreme Court held that Rule 19 of the Border Security Force Rules, 1969 did not permit grant of pension which had to be governed under the provisions of Rule 49 of the Central Civil Service (Pension) Rules, 1972.

4. So far as the fate of persons who had proceeded on retirement based on the erroneous interpretation of Rule 19 of the BSF Rules, 1969, the Apex Court had considered the same and so far as their plight was concerned, it pronounced a judgment which is reported at Raj Kumar and Others Vs. Union of India (UOI) and Another, . dividing the personnel into categories and directing as follows:

17. We find that the cases before us can be divided into the following categories:

(A) Pre-circular. Personnel who resigned and were granted pension for special reasons, even prior to the circular dated 27.12.1995

(B) Post-circular: Personnel who resigned pursuant to the circular dated 27.12.1995. These persons can be further divided into two sub-categories:

(i) Personnel who retired in 1996, were sanctioned pension and were therefore asked vide letters dated 31.10.1998 not to report for re-induction. Their pension has been stopped pursuant to the judgment in Rakesh Kumar (supra). These persons can be further divided into two sub-categories:

(a) those who are in a position to be re-inducted into service even now (b) those who cannot be re-inducted into the service as a result of being age barred or due to being medically or physically unfit.

(ii) Those who retired subsequent to 1996, were not sanctioned pension, and were directed to report for re-induction in to service or to forfeit pension benefits by virtue of the circular dated 17.10.1998 and the individual letters.

18. Having considered the peculiar facts arising in each of these groups. we make the following orders:

1 The personnel tailing in category (B)(ii) i.e. those persons who had retired subsequent to 1996 pursuant to the circular dated 27.10.1995 and had not been sanctioned pension, but who have been directed to report for re-induction in service shall necessarily have to forfeit their pension, if they have not reported for service by virtue of the circular dated 17.10.1998. if however, they have reported for service then there is no question of any relief in their case.

2 in the case of persons tailing in category (B)(i), they shall also be given the option of re-induction into service, and those tailing in category (B)(i)(a) shall be so re-inducted, subject to the conditions stipulated in circular dated 17.10.1998 and on condition that they shall refund the GPF and pension amounts drawn by them till re-induction. The authorities shall indicate the deadline by which such persons shall otter themselves for re-induction.

3 In the case of persons who shall fall in category B(i)(b), i.e. persons who had

retired in 1996, were sanctioned pension but who cannot be re-inducted today as they are age-barred or physically or medically unfit or for any other reason including their inability to return the amount of GPF, pension drawn or other dues, there shall be no question of continuing payment of pension which shall be liable to cease as a result of the decision in Rakesh Kumar (supra). We are however of the view that equity demands that in such cases there shall be no recovery of the pension amounts already paid to them.

4 In cases which fall under category (A), i.e. personnel who had resigned prior to the circular dated 27.12.1995 and had been granted pension for special reasons and continued to draw it till the stoppage of pension as a result of the judgment in Rakesh Kumar (supra), we think that irrespective of the position in law, equity demands that, as they have drawn their pension for long periods, they shall not be asked to refund their drawn pension amounts, nor shall their pension be stopped now.

5. It appears that the mistake in interpretation of Rule 19 of the BSF Rules was realized by the Border Security Force on 15th January, 1998 which took certain steps for remedying its error. Two circulars dated 14th October, 1998 & 17th October, 1998 were issued by it re-inviting to duty such personnel who had so retired but had not been sanctioned pension. The relevant portion of three such circulars which have bearing on the issue raised in the present writ petition deserve to be extracted and read as follows:

(i) Circular dated 14th October, 1998 The Director General BSF after careful consideration has now decide that all BSF personnel who have resigned under Rule 19 during 1996, 1997 and 1998 with less than 20 years of service under mistaken impression with pensionary benefits and not granted pension may be taken back immediately. Their period of absence may be regularized as EL/HPL due and remaining period will be regularized by granting EOL.

Such personnel will have to refund GPF and other dues paid to them and will retain their seniority.

2. Keeping in view of the above, I have been directed to advised you to place report to this unit for your reinstatement as early as possible.

(ii) Circular dated 17th October, 1998 In continuation of this Date's letters 24.01.1997 - Pers/BSF dated 15th Jan 98, 21.01.1997 - Pers/BSF dated 23rd March 98 and Signal No. R-3408 dated 12th Oct.98, the following procedure may be adopted while considering the cases on the subject cited:

a) In exercise of powers conferred under Rule 28-A read with Rule 6 of BSF Rules 1969, the Director General directs that all personnel who have resigned after the circular of 27 Dec. 1995 with less than 20 years of service under the mistaken impression that pension was due to them may be taken back in service treating their period of absence as an Earned Leave/Half Pay Leave as due and treating the remaining period as leave without pay (EOL) as a special case. The

personnel will have to refund GPF and other dues paid to them. They will retain their seniority. Commandant will have a special police certification carried out about their period of absence.

b) A Registered/AD letter be sent to all personnel whose resignation was accepted after circular of December, 1995 with pensionary benefits but were not granted pension, to join back the duties in the Force immediately. They will retain their seniority on re-instatement in service and the period of absence will be treated as Earned Leave/Half Pay Leave as due and leave without pay (EOL) for the remaining period of absence as a special case subject to police verification of their period of absence. It should also be made clear that if a member of the Force is not interested to re-join, he will not be entitled to any pension. However, this will be subject to order of the Hon'ble Court in any case pending before it.

c) All communication should be issued to affected personnel accordingly. The progress on the subject be intimated to this HQ for record.

A list of cases available in this Dte is enclosed.

(iii) Circular dated 31st October, 1998 In respect of the above mentioned, it is to inform you that in the event of your receiving pension, it has been directed by BSF Headquarters that you cannot be re-inducted and as such there is no need for you to report to the Headquarters of the Battalion.

2. If any other personnel who is also getting pension, they are not required to report for duty and it is only those personnel who are not getting pension, they are required to report to the headquarters of the battalion so that an appropriate order for their re-induction can be issued.

6. These circulars make it amply clear that the Respondents have not treated the resumption of duty by the retirees as cases of fresh induction or as if they were being recruited into service for the first time. The Respondents have themselves regularized the period of the retirees' absence towards leave which may have been due to them. The Respondents have even maintained the seniority position of such retirees on resumption of service vis-a-vis those who had not taken retirement.

It is noteworthy that these circulars have the approval of the Supreme Court in the afore-noticed judgment.

7. So far as the present Petitioner is concerned, it appears that he was the beneficiary of pension which was granted to him under Rule 19 of the BSF Rules, 1969. However, based on the afore-noticed judgment of the Supreme Court reported at Union of India and Ors. v. Rakesh Kumar (supra), payment of his pension was stopped w.e.f. 25th July, 2001. After the passing of the judgment dated 4th January, 2006 in Raj Kumar and Ors. v. UOI and Anr. (Supra), the Respondents started initiating steps towards re-induction of such personnel who had been the beneficiary of the pension.

8. The Petitioner is stated to have reported to the BSF Centre on 22nd August, 2006 for being medically examined. It is the Petitioner's contention that he was arbitrarily found medically 'unfit' for re-induction.

9. The Petitioner is aggrieved by such declaration of medical unfitness without the general medical evaluation of numerals of categorization of the medical SHAPE of the Petitioner. It has also been contended by the Petitioner that no medical evaluation by an expert in the specialty concerned was conducted. The Petitioner has made a grievance that he cannot be treated as a case of fresh induction into the BSF and that a medical examination in terms of the standards as prescribed or are conducted for new recruitment, cannot be effected. It has been contended that the Petitioner is entitled to a medical examination by experts in the specialty concerned and is entitled to be re-inducted based on the SHAPE categorization upon such medical evaluation.

10. It is noteworthy that the impugned order dated 16th September, 2008 issued by the Respondents has stated that the Petitioner was found "medically UNFIT due to hypertensive AND ECHO MILD LVA XRAY PA view - Cardiomegaly". A review medical examination of the Petitioner conducted on 11th January, 2008 also has recorded the same position.

11. It is, however, an admitted position that there was no specialist in the concerned specialty in either of the boards. The Respondents have claimed that opinion had been sought from the Civil Hospital, Siliguri, North Bengal. However the Respondents are unable to place the opinion before us or any record of the examination which was conducted. It is trite that so far as medical condition is concerned, authoritative and binding opinion on the same can only be rendered by a medical expert in the field concerned. In the instant case, there is no such opinion is available.

12. Be that as it may, learned Counsel for the Petitioner has pointed out that even assuming the position stated by the Respondents to be correct, still the Petitioner could not have been found as medically unfit for the re-induction. Our attention is drawn to the General Medical Evaluation of Numerals guidelines which requires medical evaluation based on five factors in SHAPE. The functional capacity of the personnel is numerically graded based on SHAPE and duties are assigned on the assessment of the individual's functional capacity. Learned counsel for the Petitioner has contended that in view of the circulars dated 14th, 17th & 31st October, 1998, the Respondents were bound to have done the numerical evaluation and ought to have obtained an opinion with regard to the functional capacity of the Petitioner. The Petitioner was required to be re-inducted and placed accordingly upon receipt of such opinion. We find substance in the above contention. As noticed above, there is no record of the SHAPE evaluation of the Petitioner. No assessment of his functional capacity has been undertaken. In any case, the medical examination is not by a board with the necessary expertise to opine on the Petitioner's condition.

13. There is also substance in the Petitioner's contention that the assessment of fitness can be only after SHAPE categorisation which would also determine the assignment of duties.

14. The Respondents have produced some of the available records so far as the Petitioner is concerned. We find that the Respondents have placed a certificate before us certifying that as per the service record of the Petitioner's medical categorization, he was in SHAPE I for the years 1994, 1995 & 1996 till his resignation. There is no entry for low medical categorization of the Petitioner in his record. In this background, certainly injustice has resulted to the Petitioner in the treatment which has been met out to him and he appears to have been denied reinduction on pure conjectures and erroneous application of the principles governing the evaluation of medical fitness for the re-induction.

15. We are informed that the Border Security Force does not have a cardiologist and normally are made referrals to Civil Hospital for evaluation of medical fitness of personnel who may be requiring examination by cardiologists.

16. Having regard to the aforementioned facts, we deem it appropriate to refer the petition for his medical evaluation to the specialists available with the defence force who would be the best placed to evaluate and render a fair assessment of the Petitioner's medical category.

17. In view of the above discussion, we find merits in this writ petition. We accordingly, direct as follows:

(i) The Petitioner shall appear before the Commandant, Army Hospital (Research and Referral), Delhi Cantt. with all records of his medical examination and treatment, if any, which may be in his power and possession, at 11.00 a.m. on 7th December, 2010.

(ii) The Respondents shall also ensure that the complete original record relating to all medical examinations of the Petitioner is placed before the Commandant, Army Hospital (Research and Referral), Delhi Cantt. on 7th December, 2010.

(iii) The Commandant, Army Hospital (Research and Referral), Delhi is directed to constitute a Board of concerned Specialists/Experts for examination of the Petitioner in the matter. The records which are produced by the Petitioner as well as the Respondent shall be placed before the Board so constituted.

(iv) The medical board, constituted in terms of our order shall be at liberty to examine the Petitioner as well as the above records produced by the parties, on a date and time appointed by it which shall be informed to both parties. The Board shall thereafter take an independent view in the matter uninfluenced by the reports produced by the parties and assign SHAPE categorisation.

(v) The report shall be communicated to both the parties.

(vi) If the report is found in favour of the Petitioner, it shall be open for the Respondents to proceed so far as the re-induction of the Petitioner is concerned

based upon the medical evaluation and SHAPE categorisation which is received by them upon the afore-noticed medical examination of the Petitioner. The Respondents shall take a reasoned view on the report of the Army Hospital (R & R) within four weeks of receipt thereof.

(vii) The order passed by the Respondents shall be forthwith communicated to the Petitioner.

This writ petition is allowed in the above terms.

Copy of this order be given dasti to parties under the signatures of the court master of this Court.