

(2005) 07 KL CK 0055

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32226 of 2004

Sajeesh Kumar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-07-2005

Acts Referred:

Entitlement Rules for Casualty Pensionary Awards, 1982 — Rule 2, 4
Pension Regulations for Army, 1961 — Rule 173

Citation : (2005) 107 FLR 707 : (2005) 3 KLT 812

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

**Advocate : A.V.M. Salahudin and A. Viswanathan Nair, for the Appellant;
Thomas Mathew Nellimoottil, A.C.G.S.C., for the Respondent**

Judgement

S. Siri Jagan, J.—In this Writ Petition, the petitioner challenges the orders of the respondents by which his claim for disability pension was rejected. Petitioner was enrolled in the Indian Army on 1.3.1994. After undergoing training for a few months, he developed pain in joints and had fever. He reported to the medical wing and was referred to the Command Hospital Air Force (CHAF Bangalore). His disease was diagnosed as "Seropositive Rheumatoid Polyarthrititis old V-67." Thereafter, he was invalided out of service on account of his disability caused by the said disease. Later, he applied for disability pension, which was rejected by Ext.P1 order. His appeal against Ext.P1 order was also rejected by Ext.P2. His further appeal Ext.P3 was also rejected by Ext.P4. All these orders proceed on the basis that the disease of the petitioner was a constitutional disease, which cannot be said to be attributable to military service or aggravated by military service. These orders are under challenge in this Writ Petition.

2. Petitioner submits that, at the time of enrolment in military service, the petitioner had undergone thorough medical examination in respect of his physical and mental faculties. Only after satisfying about his physical as well as mental health, he was enrolled in the Indian Army. At that time, the medical

examination did not reveal any physical ailment whatsoever much less rheumatoid arthritis. As such, the disease now contracted by the petitioner is certainly attributable to military service or even if it is assumed for the sake of argument that the disease was a constitutional disease, which cannot be held to be due to military service, the same must certainly have been a preexisting disease aggravated by military service as is clear from the fact that at the time of enrolment, no such disease was detected after thorough medical examination.

3. I have heard both sides. Counsel for the petitioner presses into service a Full Bench decision of this Court in *Baby Vs. Union of India (UOI)*, in which, this Court has categorically held that it is for the Department to prove that the disease on account of which the military personnel was invalided out of service is not attributable to military service or not aggravated by military service. Counsel would submit that the circumstances would, beyond a reasonable doubt, disclose that the disease of rheumatoid arthritis contracted by the petitioner is certainly attributable to military service or at least aggravated by the arduous training undergone by the petitioner in the military.

4. Counsel for the respondents, on the other hand, on the basis of medical records produced, argued that the disease rheumatoid arthritis is a constitutional disease which cannot be regarded as attributable to military service.

5. The relevant rule to be considered for deciding as to whether a person invalided out of military service is entitled to disability pension, is Rule 173 of the Pension Regulation for the Army, 1961, Part I, Rule 173 reads thus:

"173. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 per cent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II."

As can be seen from Rule 173, if the disability which is attributable or aggravated by military service is assessed at 20% or over, the disability criteria for grant of disability pension is satisfied. The question whether the disability is attributable or aggravated by military service has to be determined as per the Rules in Appendix II. Appendix II is Entitlement Rules. Rule 2(a) of the Entitlement Rules reads as follows:

"2. Disablement or death shall be accepted as due to military service provided it is certified that:-

(a) the disablement is due to a wound, injury or disease which --

(i) is attributable to military service; or

(ii) existed before or arose during military service and has been and remains aggravated thereby;

xxx xxx xxx"

Going by the above Rules, what has to be decided is whether the disease of rheumatoid arthritis is attributable to military service or existed before or arose during military service and has been and remains aggravated thereby. In order to deny disability pension to a military personnel, who has been invalided out of service, the respondents have to prove non-existence of both the above conditions. As is clear from the decision cited by counsel for the petitioner, the onus of proof is on the Department to prove the same. The contention of the respondents is that rheumatoid arthritis is a constitutional disease which cannot be stated to have been arisen on account of military service or attributable to military service. Assuming that to be so, the Department has to further prove that the said disease did not exist before his enrolment in service and has been and remains aggravated by military service. The records produced by respondents before me does not give any indication as to whether the disease did not exist before and has not aggravated because of the military service.

6. The petitioner was enrolled in the Army only on 1-3-1994. As admitted in the counter affidavit itself, the petitioner was admitted in hospital on 26-8-1994, barely four months after such enrolment. It cannot be taken that rheumatoid arthritis will develop within a short period of four months. That being so, in the absence of any evidence to the contrary supplied by the respondents the onus of proving to the contrary being on them, I must assume that this was a pre-existing disease. If that be so, taking into account the arduous nature of the military training, it would be only reasonable to conclude that the pre-existing disease of the petitioner was aggravated by the arduous military training, and hence attributable to military service.

7. In any event, Rule 4 of Appendix II reads as follows:

"4. In deciding on the issue of entitlement all the evidence, both direct and circumstantial, will be taken into account and the benefit of reasonable doubt will be given to the claimant. This benefit will be given more liberally to the claimant in field service cases."

Going by the said rule, the benefit of reasonable doubt will be given to the claimant. In fact, this has also been approved in the decision of the Full Bench in Baby's case supra. As such, I have no doubt in mind that at least, there is a reasonable doubt as to whether the disease of rheumatoid arthritis found in the petitioner was a pre-existing one which was aggravated by military service. Therefore, at least the benefit of doubt has to be given to the petitioner.

8. The result of the above discussion is that the respondents have not succeeded in discharging their onus in proving that the disease of rheumatoid arthritis contracted by the petitioner is neither attributable to nor aggravated by military service. As such, the petitioner is entitled to disability pension.

9. Therefore, there will be a direction to the respondents to compute the

disability pension due to the petitioner in accordance with rules and pay the same to him with arrears within a period of two months from the date of receipt of a copy of this judgment. The Writ Petition is disposed of as above.