

(1999) 12 GAU CK 0025
In the Gauhati High Court
Case No : Civil Rule No. 1553 of 1997

Sakuntala Basumatary (Smti)	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 07-12-1999

Acts Referred:

Central Civil Services (Medical Examination) Rules, 1957 — Rule 5(1), 7(2)
Central Civil Services (Temporary Service) Rules, 1965 — Rule 5, 6
Central Reserve Police Force Act, 1949 — Section 2
Central Reserve Police Force Rules, 1955 — Rule 16, 25
Constitution of India, 1950 — Article 14, 21, 311(2)

Citation : (2000) 2 GLT 11

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : B. Choudhury and U. Chakravorty, for the Appellant; K.N. Choudhury, C.G.S.C., for the Respondent

Judgement

J.N. Sarma, J.—The Petitioner herein prays to quash the order at Annexure III. The order is dated 11.10.96. That order is quoted below:

Annexure-III

No. D.V. 1/96-135-EC.III Dated the 11th Oct" 1996.

OFFICE ORDER

No. 953353431 Ct. (GD) Shakuntala Basumatary was declared "UNFIT" to be retained in service (CR-F) by Chief Medical Officer, Base Hospital. I, CRPF, New Delhi on 24.5.96, after her re-medical examination on the grounds of her heart disease. The report of the DMD, Bd, I, was communicated to above Ct. (GD) vide this office letter of even number dated 24.8.96 with information that due to above reasons she can not be retained in service. However, before termination of her services, who was given an opportunity to submit representation against the findings of DMO BH-I, CRPF, New Delhi, within one month from the date of receipt of above show cause notice. The above No. 953353431 Ct. (GD) has

submitted her representation on 11.9.96. I have gone through carefully the representation submitted by above individual and found that she has not brought out any facts contrary to the opinion and findings of CMD, DH-I.

2. After carefully going through the relevant Rules and references, I have come to the conclusion that Ct. (GD) Shakuntala Basumatary has not produced any medical evidence, which may prove that there is possibility of any error in judgment, in the decision of Specialist of BH-1, who examined her and found her unsuitable for retention in service due to her heart disease. Hence she request made by No. 953353431 Ct. (GD) Shakuntala Basumatary, that she may be retained in service and her treatment should be undertaken by the Department, because prior to her enlistment in CRPF she was fit, has no substantial grounds in the light of instructions contained in Rule 5(1) and 7(2) of CCS (Medical Examination) Rules 1957, read with circular order No. 12/79, instructions contained in COI orders 2(g) 5 below SR.4 and instructions contained in Swamy's Manual on Establishment and Administration (P. 239), as no such provision exists to this effect that a person who is unfit on grounds on his or her physical unfitness may be retained in service. Hence giving due weightage to Rule 6 of CCS (Temporary Service) Rules 1965 also, the request of Applicant for retention in service is therefore.

rejected.

3. I, therefore, terminate the services of No. 953353431 Ct (M), Shakuntala Basumatary, due to her physical unfitness, from date of issue of this order i.e. 11.10.1996 (AN).

2. On 20.2.95 the Petitioner have been regularly appointed in pursuance to the selection after satisfying the eligibility/qualification as to age and physical fitness and she was enrolled as a member of the force, that is, of the Central Reserve Police Force (herein after called CRPF). On 20.2.95 by the Respondent No. 2 and 3 u/s 2(d) of the Central Reserve Police Force Act, 1949 and she signed the Recruitment Roll in token of acceptance and served the force for a period of one year eight months till the date of her termination from service. The Petitioner completed her training under Rule 25 of C.R.P.E. Rules, 1955 at the end of the 1st year after appointment to the post of Constable on 20.3.96. The period of training of non of the employees was extended after the date of original appointment. On 24.4.96 after completion of training for one year, the Petitioner was sent for medical examination at the Base Hospital No. 1 C.R.P.F., New Delhi in regular basis and the Petitioner was examined at the Hospital. The Petitioner was diagnosed is having chestes to the normal limits certified by Dr. S.K. Mitra, Radio Diagnosis Base Hospital, New Delhi, Dr. S.K. Mitra. M.D. Base Hospital Radio Diagnostist found that everything is within normal limits on 24.4.96 and this is Annexure-I to the affidavit-in-reply. But on 24.8.96 the Petitioner received a letter with information that the Petitioner can not be retained in service due to her heart disease. But no medical report was communicated to the Petitioner with the aforesaid office letter. The Petitioner was directed to submit the

representation vide letter dated 10.9.96 and that is Annexure-II to the writ application, that is, quoted below:

Sir,

(1) With due respect I beg to inform you that after completion of training in 135(M)BN, C.R.P.F. and obtaining the physical fitness certificate I was appointed as Ct. (GD), 135(M)BN, C.R.P.F. under No. 953353431. I was selected for appointment in C.R.P.F. after satisfying the physical fitness by the physical examination/physical check up by the Senior Medical Officer, C.R.P.F. and declared physically fitness. If I was physically unfit at the time of my selection then I could not be able to get the post of Ct.(GD) under No. 953353431, after physical examination by those Senior doctors and I was to be removed from the post.

(2) I humbly submits that neither I had taken any medical leave/reported sick nor felt ill during my service career. But Medical Officer reported that I have been suffering from heart disease. If even doctor assuming that I have the alleged disease as per finding of Medical Officer then how could I appointed in the aforesaid post after completion of my one year training for appointment in the same as eligible candidate.

(3) I humbly submits that I have been declared physically unfit in as much as the same findings made willingly, as such as I have no any disease at the time of selection even now. Therefore, I am requesting you kindly to consider my case and sought to have been retain in the aforesaid post.

3. Thereafter the impugned order at Annexure-III quoted above was passed terminating the services of the Petitioner from the date of the issue of the order. Hence this writ application.

4. On 18.3.98 an order was passed by This Court with a direction for fresh medical examination by the Cardio Vascular Expert, if available at Base Hospital No. 3 of the C.R.P.F. Group Centre, Guwahati to clarify the medical condition of the Petitioner. That earlier to it the Petitioner appeared before the Guwahati Medical College Hospital in outpatient department for examination and the Cardiologist of Gauhati Medical College Hospital gave the following certificate:

The above mentioned patient was examined and her Cardio Vascular System is found to be normal limit, that is Annexure-IV to the affidavit-in-reply. In pursuance to the order of This Court the Petitioner herein was examined at Base Hospital, C.R.P.F., Guwahati on 24.3.98. That report is dated 24.3.98 and it is quoted below:

Annexure-I

Certified that Miss Shakuntala Basumatary D/O. Baneswar Boro of Village Cadhuli Gaon, P.O. Bekus, Dist. Barpeta is examined to-day on 13.7.96 by me.

On examination, I have detected no abnormality in her. She is physically fit to do

any hard work. She is having sound health. I wish her all success in life.

5. It may be stated herein that no fresh echo was done at the Base Hospital and without that only the opinion and the diagnosis of the earlier report was quoted. Earlier to it, it may be stated that on 24.3.98 the Petitioner appeared before the Chief Medical Officer, Base, Hospital, Group No. 3, C.R.P.F., Guwahati and she was thoroughly examined by the Medical Board for her Cardiac Vascular System and she was medically found fit within normal limit. These are Annexure-I series to the Additional Affidavit on behalf of the Respondent No. 4 and 5. The authority being dis-satisfied with this report again directed the Petitioner to appear before the Chief Medical Officer, Base Hospital, Group No. 3 vide order dated 18.4.98. The Petitioner received this order on 27.4.98 and she appeared before the Chief Medical Officer, who sent her to the Base Hospital, Basistha to a Cardiologist Expert for expert opinion. The Petitioner was further examined by the Cardiologist on 28.4.98 and found neither any complaint nor any past history of such alleged heart disease and found the medical condition of the Petitioner within normal limit But he made the adverse opinion on the basis of the earlier report as quoted above and this is claimed by the Petitioner to be illegal and arbitrary.

6. I have heard Smti. U. Chakaravarty, learned Advocate for the Petitioner and the learned Central Government Standing Counsel for the Respondents. The followings are the submissions made by the learned Counsel for the Petitioner:

1. The Petitioner had been regularly appointed after completion of her one year training under Commandant in 135(M) BN, C.R.P.F., in 1995-96 under the Respondent No. 2. The Commandant (S.G.) 135(M)Bn. C.R.P.F. Group Centre, Gandhi Nagar, Gujrat and in agreement of conditions of Service was entered into on 02.03. 1996.

2. The Petitioner in pursuance of the selection process of enrollment had obtained a health certificate on physical fitness from Recruiting Medical Officer as otherwise no candidate shall be enrolled unless obtain a health certificate in the prescribed form CRP-1 and after satisfying the eligibility to physical fitness the Petitioner was appointed/enlisted as Constable of the C.R.P.F. on 20.02.1995 by the Respondents Nos. 2 & 3 after impartation of training for one year and as the Petitioner was enlisted as enrolled followers in the Force, then the Petitioner was sent for medical examination absorbed on similar and regular basis in the following year i.e. 20.02.1996 and 24.04.1996 at the Base Hospital-1, C.R.R.F., New Delhi and declared physically fit with the findings that the heart of the Petitioner is in the normal limits certified by Dr. S.K. Mishra, M.D. Radio Diagnosis, Base Hospital, C.R.P.F., New Delhi-72 (Annexure-I of the Affidavit-in-reply at pages 23 & 24).

3A. During the period of her service the Petitioner neither took medical leave nor reported sick and performed her hard work in the field easily till the date of receipt of show cause notice as well as order of termination dated 11.10.96. But

the Petitioner received surprisingly the such office/show cause notice and order of termination dated 11/10/96 that the Petitioner can not be retained in service due to her heart disease without communicating such adverse medical finding/report of the Respondent No. 4 which is mandator/condition precedent to supply a copy of the adverse medical report of medical examination to the Petitioner and afford her opportunity to show cause against the proposed termination under Govt. Order No. 2 of Govt. of India under Sub-rule 4 and instructions of Swamy's Manual of establishment and Administration to defend her physical unfit condition made by Respondent No. 4 in an effective manner. But the Respondent No. 2 did not observe the proceeding as above under the provisions of law as well as order No. 5 of Government of India's order below S.R. 4 of Swamy's Manual. Thus failure on the part of the Respondent No. 2 to provide the Petitioner with a copy of adverse medical report of the Respondent No. 4 amounts to denial of opportunity to show cause against proposed termination committed manifest error of law as well as constituted violation of principle of natural justice in the absence of any communication of adverse medical findings of Respondent No. 4, the Petitioner was not in a position to prefer an appeal inasmuch as the Petitioner was not guilty of the proceeding framed under law as required for the Government servant under Article 311(2) of the Constitution of India and render the termination invalid, ab-initio-void and liable to be set aside quashed.

B. Even after assuming bit not agreeing that the Petitioner has such alleged disease, based on the finding of adverse medical report dated 24.5.96, as she was on duty/service. The Petitioner being a Government Servant was facing a disciplinary proceeding and the Petitioner should have been supplied with a copy of the aforesaid adverse medical report of the Respondent No. 4 with a direction of medical leave for treatment to make her physically fit for continuation of her service but neither the Petitioner was directed to proceed on leave under the provision of Central Civil Service (Leave) Rule, 1972 nor communicated with any adverse report for termination from service. As such the Respondent No. 2 was not justified in issuing the office letter and or show cause notice with a direction to submit her representation within one month by producing any fitness certificate challenging the adverse Medical report dated 24.5.96 as per opinion of the Respondent No. 2.

C. The Petitioner when in response to the show cause notice submitted representation dated 11.9.96 along with medical fitness certificate by an independent practitioner on 10.9.96 without receiving the adverse medical report of Respondent No. 4 to defend the adverse opinion and for correct decision in respect of the matter in question in accordance with law and as to the maintainability of the same if the Respondents were satisfied on the findings of independent registered practitioner specialists as produced as a piece of evidence about the possibility of an error of findings of Respondent No. 4, it could be open to them to allow and/or refer the case for re-examination by the Medical Board as may be considered necessary under Govt. of India's Order No. 2(b) below

S.R. 4 of Swamy's Manual (Medical certificate of fitness) to confirm the medical finding of the Respondent No. 4.

D. Without referring the case for reexamination by the Medical Board and confirming the alleged disease, the Petitioner was terminated vide order dated 11.10.96 under Rule 6 of the Central Civil Service (Temporary Service) Rules, 1965 is most arbitrary, illegal, unreasonable, violation of Principles of natural justice as because the Respondents could not have been competent to declare her as permanently incapacitated for service. Hence, the order of termination has been passed in misleading, biased and malafide intention in regard to the termination of the Petitioner from her service in as much as there was no legality and validity of the actions of the Respondent No. 2 in adopting special procedure under Rule 6 of the Central Civil Service (Temporary Service) Rules, 1965. As such impugned order of termination is arbitrary, without jurisdiction, unreasonable, not tenable in law.

4. The Respondents Nos. 5 and 6 have enough power to reconsider the Petitioner by referring the case for fresh re-medical examination by the Anr. Civil Surgeon or Fresh Medical Board to prove the findings of the Respondent No. 4 with confirmation and come into their own conclusion under order 2(6) of the Govt. of India's order below S.R 4. Moreover, the Respondents No. 5 & 6 remained silence and had not taken any proceeding under law. The Petitioner at the time was denied from procedural fairness in as much as the valuable fundamental rights conferred upon the Petitioner were taken away by the Respondents is wholly illegal, a colourable exercise of power beyond the provisions of law and sustainable in law. In view of the above the order of termination itself violates the provision of me Articles 14, 21 and 311(2) of me Constitution of India as well as violates the principles of natural justice of the Petitioner without affording such opportunity of re-examination in case of possible error of findings of Respondent No. 4. Thus, this invalid proceedings did not help the Respondent to terminate the Petitioner from her service vide impugned order of termination dated 11.10.96.

5. The Petitioner being a member of the Force was enrolled for a period of three years for which she was engaged and would have been continued as temporary Government employee unless the Petitioner claim discharge as per schedule to the Act and under Rule 16 of the Central Reserve Police Force Rule, 1965. The Petitioner, moreover, continued her service in Force for a period of 1 year 8 months w.e.f. 20.2.95 to 11.10.96 and as such she acquired me status of temporary Government employee and here appointment was governed by the Central Civil Service (Temporary Service) Rules, 1965. In view of the above, the termination from service is without justification and on unreasonable fact is not reliable, acceptable inasmuch as the Petitioner is entitled to the benefit of doubt of such alleged disease because she is still fit to perform any hard work.

6. Even if assuming but not agreeing that the Petitioner was suffering from such alleged disease. It was not possible for her to continue the hard training in force

for one year as well as would not continue her service till the date of termination. In that positive and undisputed situation the Petitioner was not at all suffering from any such alleged heart disease. Hence the Respondent No. 2 acted most arbitrarily, improperly and erroneously in an unjustifiable manner without appreciating the finding of the independent registered specialist and had no justification to terminate the Petitioner on the adverse findings of Respondent No. 4 by making an erroneous interpretation of the Rule 6 of the Central Civil Service (Temporary Service) Rule, 1965 in an unjustifiable manner without appreciating the limitation and restrictions imposed on the Petitioner under the provisions of the Central Reserve Police Force Rule, 1965.

7. Even assuming but not agreeing such alleged disease, the non-adduced evidence of medical examination does not incriminate the Petitioner and termination of service was not proportionate with the findings of the authority as because all present clinical investigations dated 24.3.98 in pursuance of order of this Hon''ble Court dated 18.3.98 have shown her physical fitness. But how the Respondents declared the Petitioner unfit by declaring that the Petitioner is suffering from different types of heart disease viz. (i) Valvular heart disease, (ii) Mild Tricuspid Regurgitation vide medical report dated 24.3.98 and (iii) Mitral Regurgitation vide medical report of independent cardiologist dated 29.4.98 relied on the previous report dated 14.5.96 which was not adduced by the Respondents at all is not understood.

8. Again further when the Respondents found the Petitioner physically fit on various investigations, then the Respondents referred the case before an independent Cardiologist, 151 Base Hospital, Vasistha, Guwahati on the adverse of the Id. Counsel of the Respondents. As such the Respondents intentionally abuse the power for exceeding jurisdiction when the Respondents have no jurisdiction to express opinion whether the Petitioner to be examined further or not without taking further leave of this Hon''ble Court.

9. Again the independent cardiologist, 151, Base Hospital Vasistha declared the Petitioner unfit relied on the previous report dated 14.5.96 which could have not been produced before this Hon''ble Court is arbitrary, without jurisdiction, illegal, not tenable in law in as much as the concerned medical authorities have no jurisdiction to express such adverse opinion illegally biased on medical report dated 14.5.96 in this regard in spite of submission of present and fresh medical examination report including ECHO in pursuance of order dated 18.3.98 passed by this Hon''ble Court to confirm whether the Petitioner has such alleged disease or not for continuation of her service. Hence, the impugned opinion is illegal and not sustainable in law as well as liable to be cancelled the failure on the part of the medical authorities concerned to produce ECHO report itself constitutes violation of principle of natural justice and ultravires the procedure under Rule 6 of the Central Civil Service (Temporary Services) Rules, 1965 and renders the opinion invalid.

10. There was malafide intention in termination of the Petitioner's service as

because the Petitioner in the meantime obtained a physical fitness certificate from the Cardiology Department of Gauhati Medical College on 23.7.97 after medical examination by the Resident Physician of Cardiology, Gauhati Medical College with a finding that the Petitioner's Cardiovascular system is found to be within normal limit.

11. The appropriate authority has committed grave error of law apparent on the face of the record in placing reliance on the previous report and non-reliance of medical college report and in passing the present opinion on that basis. As is clear, while passing the impugned opinion, the appropriate authorities ought have been given importance and reliance upon present physical condition/findings of the Petitioner, not biased on previous report dated 14.5.96 which was not at all mentioned in the order of termination dated 11.10.96.

12. There must be some material or evidence on record on the basis of which the appropriate authorities may form an opinion by recording a definite finding to that effect. In the absence of such finding or material on record neither inference can be drawn nor conclusion can be arrived at that situation. The above approach of the appropriate authorities cannot be said to be legal and in accordance with law inasmuch as the authorities were not right in observing that the Petitioner would not be able to continue her service.

It is also submitted that the satisfaction as contemplated by Rule 6 of Central Civil Service Rules, 1965 must be based on objective facts, i.e. permanent incapability. There must be evidence and material to arrive at the conclusion and satisfaction. Termination from service of the Petitioner and/or grounds and/or reasons put forth by the Respondents is a mala fide intention and a negative finding for not accepting the case of the Petitioner for reinstatement in service. Hence, it is incumbent upon the appropriate authorities to come to a present finding and definite conclusion that the Petitioner is invalid. In the absence of such a finding or conclusion, no order/opinion can be made which is wholly arbitrary prima facie illegal, without jurisdiction not sustainable in law. As such, the Respondents should be directed by this Hon'ble Court that the Petitioner be reinstated in service with all monetary and service benefit.

13. Since the Respondents could not prove, declare and/or confirm the alleged disease of the Petitioner by the medical authorities concerned to be completely and permanently incapacitated for further service as she was on duty at the time of the receipt of order of termination dated 11.10.96, the order of termination rendered invalid and liable to be set aside and quashed.

14. Even assuming but not agreeing that the Petitioner has such alleged disease and the Petitioner continued her service for the last 1 year and 8 months without any disease and acquired the status of Government servant under Central Government Service (Temporary Service) Rule, 1965 the Respondents No. 5 & 6 being disciplinary authorities have enough power to consider the Petitioner for other post for which she may be suitable has been considered against direct

recruitment in die said Department under the Order No. 9 of Government of India below S.R. 4 and instructions and administration contained in Swamy's Manual without passing such impugned order of termination from service due to physical unfitness. So the Respondent Nos. 5 and 6 had gone behind die provisions of law as well as ultravires the Government orders as stated above with a malafide intention is most arbitrary, illegal, unreasonable and colourable exercise of power and render die order of termination invalid. In view of the above the undisputed position that the Petitioner is not physically unfit as declared and diagnosed with confirmation by consultant cardiologist of GNRC Heart Institute, Guwahati on 30.10.98 vide its fresh ECHO, the Respondents committed a manifest error of law in declaring the Petitioner as unfit for continuation of her service.

7. An affidavit-in-opposition as well as an Additional Affidavit and affidavit-in-reply has been filed on behalf of the Respondents and the Petitioner. The authority wants to rely on Rule-6 of Central Civil Service (Temporary Service) Rules. Rule-6 of the Central Civil Service (Temporary Service) Rules, 1965 is quoted below:

6 Termination of temporary service on account of physical unfitness.

Notwithstanding anything contained in Rule 5, the services of a temporary Government servant may be terminated at any time without notice on his being declared physically unfit for continuance in service by an authority who would have been competent to declare him as permanently incapacitated for service had his appointment been permanent.

That will show that he or she must be declared physically unfit for continuance in service by an authority who would have been competent declaring her as permanently incapacitated for service, had his appointment/her appointment been permanent There is nothing to show that the authority who declared the Petitioner to be physically unfit for continuance in service was an authority competent to declare the permanent incapacity. Further there is the provision for re-examination of the Petitioner by Anr. Medical Board as provided in the Fundamental Rules regarding medical certificate of fitness and that was done in this case. But the second report is absolutely on the basis of earlier report. No fresh examination was done. This is nothing but a mockery of the whole thing. It appears that the authority was bent upon to throw away the Petitioner from service. Accordingly the order dated 11/10/96 (Annexure-III) shall stand quashed. The Petitioner shall be taken back in service within a period of three months from the date of receipt of this order.

8. The Petitioner shall obtain the certified copy of this order and shall produce the same before the appropriate authority to do the needful in terms of this order.