
(2008) 11 JH CK 0032
In the Jharkhand High Court

Shailendra Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-11-2008

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33, 47

Citation : (2008) 119 FLR 1101 : (2009) 1 JCR 150

Hon'ble Judges : Dabbiru Ganeshrao Patnaik, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.G.R. Patnaik, J.—The petitioner was enrolled as a constable under the BSF during the year 1987. During militant action while he was deployed in Jammu and Kashmir, he sustained injury on 10.9.1992. A duly constituted medical board declared him unfit on 11.6.1999 on ground that he was 100% disabled. Consequently, he was retired from service due to physical unfitness on 10.11.1999 under the provisions of Rule 25-F of the BSF Act, 1969. with all benefits, except the pension since had allegedly refused to sign the pensionary papers, y Against the order of his retirement, "the petitioner moved the Patna High Court in CWJC No. 3058 of 2000. While disposing of the said writ petition, the High Court remitted the case of the petitioner to the respondents to take an appropriate decision in accordance with the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Disabilities Act). Pursuant to the order and on re-consideration, the order of his retirement was withdrawn and he was reinstated in service under the provisions of the aforesaid Disabilities Act, 1995 on 21.5.2002. Subsequently, by impugned order dated 24.1.2005 (Annexure 9) issued under the signature of the respondent No. 3 the petitioner's service were again terminated from 31.1.2005 on the ground of his physical unfitness. Prior to the issuance of the impugned order, the petitioner had moved this Court for a direction against the respondents to pay him the lump sum compensation under

the rules applicable to the disabled persons. The writ petition vide, W.P. (S) No. 4562 of 2004 was disposed by this Court on 15.9.2004 with a direction to the respondents to consider his representation and to pay him his legitimate dues. The petitioner filed his representation dated 15.10.2004. About a month later, he was produced before the medical board and he was declared 100% unfit and disabled and pursuant thereto, his services were terminated.

3. The grievance of the petitioner is that after his reinstatement in service pursuant to the earlier order of the High Court and subsequently on his filing another writ application claiming compensation of the lump sum amount, the respondents had borne a grudge against him and had intentionally constituted a fresh Medical Board and had produced him before the Medical Board knowing fully well that on an earlier occasion, the Board had examined and declared him 100% disabled. Such action on the part of the respondents was deliberate and only for the purpose of creating a ground for terminating the services of the petitioner.

4. The petitioner has challenged the order of his termination of service by relying exclusively on the provisions of Section 47 of the Disabilities Act, 1995.

5. Mr. S.N. Prasad, learned Counsel for the petitioner would argued that even though the petitioner was found to be 100% disabled but the benefit of Section 47 of the Disabilities Act makes it obligatory on the part of the respondents to shift the petitioner to some other post with the same pay and the service benefits. The respondents could not therefore dispense with the petitioner's services only on the ground that he had suffered 100% disability.

6. Elaborating the grounds, learned Counsel explains that the plea of the respondents that from the provisions of Section 47 of the Disability Act. BSF has been exempted, is misleading and cannot be of any advantage to the respondents. Learned Counsel explains that by resorting to the provisions of Rule 25 of the BSF Rules the respondents had earlier terminated the services of the petitioner on the ground of his disability. Later, pursuant to the order of the High Court and by extending the benefit of Section 47 of the Disability Act, the petitioner was reinstated in service as a Typist in May, 2002. Under the notification of the Central Government, exemption of BSF from the provision of Section 47 of the Disabilities Act, 1995 was notified in September, 2002. Prior to the sale notification, the petitioner was in service after reinstatement and therefore the subsequent withdrawal of the provisions of Section 47 of the Disability Act from being applicable to the BSF could not be applied with retrospective effect.

7. The respondents have filed their counter affidavit wherein they have inter alia, denied and disputed the claim of the petitioner. While admitting the fact that the petitioner was employed as a constable in the BSF and in course of the militant action, he sustained injuries which, even after five years of medical treatment, had left him with 100% disability and also admitted the fact that the earlier order

of petitioner's termination from service on the ground of his disability was withdrawn pursuant to the orders passed by the High Court in the earlier writ petition; the stand of the respondents is that petitioner's reinstatement in service was made in May, 2002 by extending the provisions of Section 47 of the Disabilities Act, 1995. Later, the BSF was exempted from the provisions of Section 47 of the Disabilities Act, 1995 under the notification dated September, 10, 2002 issued by the Central Government. The petitioner could no longer be entitled to any benefit under the Disability Act. The Medical Board was constituted to examine the petitioner to assess as to whether he continued to suffer from the disability or not, so that he could be continued in service. The Medical Board found him suffering from 100% disability. It is explained that since the Medical Board did not find him fit for the defence services, the petitioner was retired from service w.e.f. 31.1.2005 under the provisions of Rule 25 of BSF Rule, 1969 and Rule 38(1) of the CCS (Pension) Rules with service pension. The petitioner was accordingly paid a sum of Rs. 10,85,508/-towards capitalized value for his disability and an ex gratia, payment of Rs. 5000/-received from the State of Jammu and Kashmir.

8. On behalf of the respondents, it is explained that having regard to the type of the work carried on by the personnel employed in the defence service, the Central Government in the Ministry of Social Justice and Empowerment exempted all categories of combatant personnel from the provisions of Section 47 of the Disability Act, 1995 vide, notification dated 10.9.2002. Accordingly, a corresponding proviso (ii)(iii) of Rule 11 of the BSF Tenure of Posting and Deputation Rules, 2000 has also been deleted by notification dated 20.7.2002.

9. Admittedly, the petitioner was initially appointed as a constable on the post of a combatant personnel under the respondents BSF. During his tenure of service, he sustained injuries resulting in 100% disability. The service conditions under the BSF (Tenure of Posting and Deputation) Rules, 2000 were applicable to the petitioner. The rules did not provide that the personnel having 40% or above disability are to be retired on the basis of the recommendations of the Medical Board.

10. The provisions of Section 47 of the Disability Act, 1995 were applicable to the personnel employed in the Security Forces including the BSF. As such, despite 100% disability of the petitioner, the respondent authority did extend him the benefits of the provisions of Section 47 of the Disability Act, 1995 and reinstated him in service. The recommendation in the case of the petitioner was made pursuant to the direction of the High Court in the earlier writ petition filed by the petitioner. However, considering the type of the work carried on by various categories of the posts of combatant personnel in the Armed Forces, the Central Government in exercise of powers conferred u/s 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 exempted all categories of the posts of combatant personnel of the defence Forces including the BSF from the provisions of the said Act. The respondents are

therefore not under any obligation to continue with the services of the personnel who have suffered disability above 40% and neither can the petitioner take any benefit of the provisions of the Disabilities Act, which is no more applicable to the case of the petitioner.

11. The contention of the petitioner that the Central Government notification under which the BSF is exempted from the provisions of Section 47 of the Disability Act, cannot take effect retrospectively in the case of the petitioner, appears to be a misleading statement. Under the provisions of the Rules of BSF Tenure of posting and Deputation rules, 2000, the respondent authority did have the power to get its personnel examined by a Medical Board in order to assess to extent of disability suffered by any of them and to act upon the recommendations of the Medical Board. The mere fact that the petitioner was reinstated in service pursuant to the benefit of the provision of Section 47 of the Disability Act extended to him does not curtail the authority of the respondents to act in pursuance of the rules under the BSF Tenure of posting and Deputation Rules 2000, and to reduce the tenure of posting of the personnel who have been declared as disabled to the extent of 40% and above. It may be noted that as stated in the counter affidavit filed by the respondents, on account of the nature of his disability, the petitioner was found unfit to do even sedentary job. This fact appears to have been admitted by the petitioner himself as per his statement in para 21 of the writ petition, wherein he has acknowledged that he is not in a position to move of his own and he is moving on a wheel chair. The next stand taken by the petitioner is that though the impugned order of termination of his service was passed purportedly under the provision of Section 25 of the BSF Rules 1969, but the respondents have not followed the rules which provide that a copy of the medical report should be supplied to the personnel/petitioner in order to enable him to file his representation before the superior authority and till final decision of the superior officer, the termination order cannot be given effect to. The petitioner was not supplied a copy of the medical report and therefore could not file any representation before the superior authority.

12. The respondents have replied by stating that on receiving the order of termination of the service of the petitioner, he had submitted his representation for considering his reinstatement in service under the provisions of the Disability Act. The representation was considered and rejected by the concerned authority of the respondents since the provision of the aforesaid Disability Act was no more applicable to the combatant personnel employed under the respondent BSF. This fact has not been denied by the petitioner.

13. Even otherwise, it is not the case of the petitioner where he could claim that he was totally unaware of the result of his examination conducted by the Medical Board. In fact, he was fully aware of the result of the Medical Board which found him 100% unfit and disabled. Such acknowledgment of the petitioner is reflected from the averments made in the writ petition. The petitioner has not claimed that he has made any improvement in his physical condition and has acknowledged

the fact that he does still suffer from 100% disability and is in fact unable to move himself and his loco motion, is dependent on a wheel chair. The petitioner therefore cannot claim that he was not made aware of the result of his examination by the Medical Board, or that he was not given an opportunity to submit his representation before his superior authority. The fact that he had submitted his representation to the superior authority, as stated by the respondents in the counter account, has not been denied by the petitioner. The petitioner has further admitted the fact that he has been paid the entire lump sum compensation applicable to his disability. The petitioner as such has not made out any ground to quash the impugned order of his retirement.

14. As regards fixation of payment of pension, it has been pointed out by the respondents that the petitioner has been willfully abstaining from submitting his pension papers.

15. In view of the above discussion, I do not find any merit in this writ application. Accordingly, this writ application is dismissed. In the event the petitioner submits his pension papers, the respondents shall process the same within three months from the date of submission of the papers, in order to enable the petitioner to receive his pension.