

(2013) 12 OHC CK 0007
In the Orissa High Court
Case No : W.A. No. 38 of 2007

Union of India and Others

APPELLANT

Vs

Smt. Kamalavati

RESPONDENT

Date of Decision : 16-12-2013

Acts Referred:

Citation : (2014) 118 CLT 75 : (2014) 1 OLR 440

Hon'ble Judges : A.K. Goel, C.J.; Akshaya Kumar Rath, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dr. A.K. Rath, J.—Union of India and its functionaries have filed the aforesaid mentioned appeal challenging, inter alia, the order dated 13.9.2005 passed by the learned Single Judge in O.J.C. No. 8056 of 2000, whereby and where under the learned Single Judge allowed the writ application and directed the Union of India to calculate the disability pension of the late husband of the writ petitioner and pay the same to her within a period of six months from the date of receipt of a copy of the order.

2. Case of the petitioner is that her husband was enrolled as a sepoy in the Indian Army on 27.8.1980. His enrollment number was 13950776. He earned many laurels for his outstanding works. In the year 1990, he was directed to appear before the Medical Board. On the recommendation of the medical board, he was discharged from services on 10.7.1990. After discharge from service, he made a representation for payment of disability pension. An intimation was sent to him that his case was being considered and the same was forwarded for payment of disability pension. But then the same was turned down vide Annexure-2. On being unsuccessful, he preferred an appeal. During pendency of the appeal, he expired and thereafter the petitioner submitted an application for payment of pension to her. The said petition was rejected on the ground that her husband was not given disability pension and accordingly she was not entitled to any pension. An intimation was also sent to the petitioner that the appeal filed by

her husband has been rejected. Challenging the said orders vide Annexures 3 and 4 as well as the order in Annexure-2, the petitioner has filed the petition.

3. Pursuant to the issuance of notice, a counter affidavit has been filed by opposite parties 1 to 3 contending, inter alia, that the late husband of the petitioner was admitted to 155 BH on 13.4.1989 and was discharged on 12.5.1989. He was diagnosed as neurosis. It is further stated that the disability was neither attributable to nor aggravated by military service, as the disease was considered as constitutional in nature and unconnected with military service. In view of the same, the claim of the late husband of the petitioner for payment of disability pension was turned down by the competent authority as well as the appellate authority.

4. Relying on paragraph-173 of the Pension Regulations, 1961 for Army, learned Single Judge came to hold that the late husband of the petitioner was entitled to disability pension and as a consequence, after his death the petitioner is entitled to family pension. Having held so, learned Single Judge directed the opposite parties to calculate and pay the disability pension to the petitioner within a period of six months from the date of receipt of the order.

5. We have heard Mr. S.D. Das, learned Asst. Solicitor General and Mr. Ashutosh Panda, learned counsel for the respondent. Mr. Das submits that the late husband of the petitioner was diagnosed as neurosis. The disability is neither attributable to nor aggravated by military service, as the disease is considered as a constitutional in nature and unconnected with military service. He further submits that the medical board has rejected the claim of late husband of the petitioner. He further submits that the learned Single Judge has not given any finding of the report of the medical board and, as such, the order is not sustainable. He cites a decision of the apex Court in the case of Union of India (UOI) and Another Vs. Talwinder Singh, to buttress his submission that the opinion of the medical board regarding attributability and aggravation of disability due to military service ought to be given credence and the Court should not grant such pension brushing aside opinion of medical board. Mr. Panda, learned counsel for the respondent, relies on an unreported decision of this Court in the case of Sri Sarat Kumar Lenka v. Union of India and others (O.J.C. No. 2041 of 1989 decided on 19.3.1991) and the decision of the apex Court in the case of Dharamvir Singh Vs. Union of India (UOI) and Others, .

6. One thing is crystal clear from the counter affidavit filed by the appellant that the late husband of the petitioner was diagnosed as neurosis. The only point which survived for our consideration is as to whether the disease neurosis can be held to be attributable to and aggravated by the military service.

7. In Talwinder Singh (supra) the sole question arose for consideration before the apex Court was that if a person enrolled in Army suffers from injury at his home when on leave, whether such injury can be held to be attributable to aggravated by the military service. In the said case, the respondent while on leave sustained

injuries. In the facts and circumstances of that case, their Lordship held that opinion of the medical board, which is an expert body, must be given due weight, value and credence. Person claiming disability pension must establish that the injury suffered by him bears a casual connection with military service.

8. In the instant case while late husband of the petitioner was in military service suffered injury and was examined by the medical board. The Board opined that he was 40% disabled.

9. In *Dharmarvir Singh* (supra) after having a survey of earlier decisions, the apex Court in paragraph-28 of the report held as follows:

28-A. Conjoint reading of various provisions, reproduced above, makes it clear that:

(i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173).

(ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. Rule 5 r/w Rule 14(b).

(iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9).

(iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [Rule 14(c)].

(v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [14(b)].

(vi) If medical opinion hold that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)].

(vii) It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the "Guide to Medical (Military Pension), 2002" - "Entitlement: General Principles" including paragraphs 7, 8 and 9 as referred to above.

In paragraph-30, their Lordship further held that in the absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the medical board to call for records and look into the same before coming to an opinion that the deceased could not have been detected on medical examination prior to acceptance for military service, but nothing is on record to suggest that any such record was called for by the medical board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. The ratio of the said case applies in full force to the facts and circumstances of the present case.

10. There is no pleading nor any submission is advanced by learned Assistant Solicitor General that the medical board called for records to find out as to whether the late husband of the petitioner suffered from the said disease before entering into the military service.

11. In the absence of any note in the service record at the time of acceptance of joining report of the late husband of the petitioner, it was incumbent on the part of the medical board to call for the records and look into the same before giving an opinion that the disease could not be detected by the medical examination prior to acceptance of the military service. Moreover in *Sarat Kumar Lenka (supra)* this Court directed the Union of India and his functionaries to pay disability pension. The facts of the said case are almost identical to the present one. In the said case the ailment was diagnosed as neurosis (Anxiety State). The petitioner was discharged from service.

12. In view of the authoritative pronouncement of the apex Court in the case of *Dharmarvir Singh (supra)* we have no hesitation to come to the conclusion that the late husband of the petitioner was entitled to disability pension and after his death, the petitioner is entitled to family pension.

13. We directed the appellant to calculate and pay the disability pension of the late husband of the petitioner within a period of two months from the date of passing of the order. We further direct that the correct family pension shall be paid forthwith.

The writ appeal is dismissed. There shall be no order as to costs.