

(2006) 05 RAJ CK 0067

In the Rajasthan High Court

Case No : Civil Special Appeal (W) No. 254 of 2006

Union of India (UOI) and Others

APPELLANT

Vs

Bhoora Ram

RESPONDENT

Date of Decision : 24-05-2006

Acts Referred:

Army Rules, 1954 — Rule 13(3)
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 4
Medical Services of the Armed Forces Regulations, 1983 — Regulation 423, 53
Pension Regulations for Army, 1961 — Rule 173

Citation : (2006) 4 RLW 3018

Hon'ble Judges : S.N. Jha, C.J.;Dinesh Maheshwari, J

Bench : Division Bench

Advocate : Vinit Kumar Mathur, for the Appellant; S.P. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, C.J.—This special appeal is directed against the order of the learned Single Judge dated 5.5.2005 in SBCWP No. 9/1996 allowing the writ petition of the respondent with a direction to the appellants herein to release the disability pension. The learned Single Judge observed that the case was squarely covered by the decision in the case of Chhatar Singh, SBCWP No. 1400/1997 decided on 3.1.2005 and accordingly set aside the order by which the respondent's claim of disability pension had been rejected. It may be stated here that Chhatar Singh's case was decided following the decision in the case of Tejpal Singh reported in 2005(2) CVR 1513.

2. The background facts are as follows. On 29.5.1968, the respondent was enrolled in the Indian Army as an MT in the Supply Corps. According to him at the time of enrolment, he was found medically fit and placed him the medical category AYE. On 31.7.1971 he was re-mustered in the Armoured Corps where he was adjusted in the Operator/Driver Trade. According to the respondent he

was again found medically fit and kept in category AYE. The respondent stated that he participated in the 1971 IndoPak conflict in the Western Sector and was promoted to the rank(s) of Lance Naik, Naik, Havildar and then Naib Risaldar which is a post of the rank of Junior Commissioned Officer in 1986. In April 1991 he experienced loss of vision which was diagnosed as Lenticular Bilateral Opacity and placed in lower medical category BEE (Temp). Later he was lowered to category CEE (Perm) with effect from 22.9.1992. In April, 1992 he developed pain in the left arm and was admitted in Medical Hospital, Pathankot. The ailment was diagnosed as Partial Seizure and he was recommended for being placed in the lower medical category on account of said disability too. On 30.3.1993 he was discharged under Rule 13(3)(iii)(b) of the Army Rules, 1954. Contending that the discharge was on account" of diseases which were attributable to or aggravated by military service the respondent applied for disability pension which was rejected on 29.9.1993. Appeal against the decision was rejected on 28.2.1995 and he then Tiled the writ petition in this Court which was allowed by the learned Single Judge giving rise to this appeal.

3. The order of the learned Single Judge has been assailed on the strength of a decision of the Supreme Court in *Controller of Defence Accounts (Pension) and Others Vs. S. Balachandran Nair*, . It was submitted that the discharge was based on medical opinion to the effect that the disease was not attributable or aggravated by military service and the High Court while exercising power of judicial review under Article 226 of the Constitution of India cannot sit in appeal over the opinion and the learned Judge, therefore, committed error in directing release of disability pension to him.

4. Rule 173 of the Pension Regulations for the Army, 1961 provides for grant of disability pension to any person who is invalidated from military service on account of a disability which is attributable to or aggravated by military service where the disability is assessed at twenty per cent or more.

5. On behalf of the respondent reliance was placed on paragraph 7(b) of Appendix II of the Army Pension Regulations and it was submitted that any disease which had not been noted at the time of enrolment will be deemed to have arisen in military service and inasmuch as Lenticular Bilateral Opacities or seizure was not noted in course of medical examination at the stage of respondent's enrolment, the diseases must be held to have been caused by military service. The learned Single Judge therefore did not commit any error in allowing the claim of the respondent. Counsel placed reliance, apart from decisions in *Chhattar Singh and Tejpal Singh (supra)*, on *Union of India and Ors. v. Bodan Lal Yadav* 1994 (1) SLR 390, *Union of India and Ors. v. Rattan Lal* 1998(8) SLR 484 and *Union of India v. Gurnam Singh* 1999(1) SLR 406.

6. In order to appreciate the case of the parties it would be appropriate to notice the relevant provisions of the Army Pension Regulations, 1961 and the Regulations for the Medical Services of Armed Forces, 1983.

Rule 173 of the Pension Regulations provides:

173. Primary conditions for the grant of disability pension - 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 or to aggravated by military service and is assessed at 20 per cent or above. The question whether a disability is attributable to or aggravated by military service shall be determined under rule in Appendix II.

Appendix II so far as relevant is as follows:

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

(a) the disablement is due to 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;

(b) the death was due to or hastened by-

(i)(ii)

3. There must be a causal connection between disablement or death and military service for attributability or aggravation to be conceded.

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

7. In respect of diseases, the following rules will be observed:

(a) Cases, in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service.

(c) If a disease is accepted 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.

(d) In considering whether a particular disease is due to military service, it is necessary to relate the established facts, in the actiology of the disease, and of its normal development, to the effect that conditions of service e.g. Exposure, stress, climate, etc. may have had on its manifestation. Regard must also be had to the time factor

7. Regulation 423 of the Regulations for the Medical services of the Armed Forces, 1983 may also be quoted as under:

423. Attributability to service - (a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence, both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carry the high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of doubt could be given more liberally to the individual, in cases occurring in field service/active service areas.

(b) The cause of a disability or death resulting from wound or injury, will be regarded as attributable to service if the wound/injury was sustained during the actual performance of "duty" in armed forces. In case of injuries which were self-inflicted or due to an individual's own serious negligence or misconduct, the Board will also comment how far the disability resulted from self-infliction, negligence or misconduct.

(c) The cause of a disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the armed forces determined and contributed to the onset of the disease. Cases, in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for service in the armed forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to

acceptance for service, the disease will not be deemed to have arisen during service.

(d) The question, whether a disability or death is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the death certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officer, insofar as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be attributed to service will, however, be decided by the pension sanctioning authority.

8. The claim of the respondent has to be considered in the light of the above provisions. As indicated above, the sheet-anchor of the respondent's case is paragraph 7(b) of Appendix II to the Pension Regulations. The words of significance are "deemed to have arisen". The deeming clause expressed by the words "deemed to be" or "deemed to have" is used in a statute to create a legal fiction for believing something as real which is apparently not so. This however, does not fit in the present context, for, to be entitled to disability pension, the disease must be established factually to have been caused by i.e. "attributable to or aggravated by" military service. In interpreting a provision creating a legal fiction, the Court has to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction, it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. From a reading of the aforequoted provisions it would appear that the "fiction" - if any - is circumscribed by conditions and guidelines contained therein and therefore in every case it cannot be said that because the existence of the disease was not noted at the time of enrolment it must have been caused by military service. There should be, among other things, a "casual connection" between the disability and the service conditions vide regulation 423(a) - quoted above.

9. "Deemed to have" in para 7(b) to our mind appears to have been loosely used in the sense "presumed to have". In other words, in terms of paragraph 7(b) a disease which led to discharge will be presumed to have arisen in service if no note of it was made at the time of enrolment in the military service. Presumption however is not conclusive proof of a fact. Section 4 of the Evidence Act lays down that whenever it is directed by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. Presumption thus is always rebuttable which if the medical opinion is to contrary, the disease will not be deemed to have arisen during service. Thus the presumption arising from absence of note regarding existence of any disease at the time of enrolment may be rebutted by medical opinion. The decisions in Chhatar Singh or Tejpal Singh (supra) and other cases proceeded on the assumption as if presumption

under paragraph 7(b) was conclusive proof. Other cognate provisions referred to above were not brought to the notice of the Court. What is required in terms of paragraph 7(b) is that the medical opinion that the disease did not arise during service i.e. it was not attributable to or aggravated by military service should be accompanied by reasons.

10. Counsel for the respondent in the circumstances submitted, and to some extent rightly, that the Medical Board was required to give reasons for holding that the disease was not attributable or aggravated by military service and where reasons are not assigned the disability pension cannot be denied. As a general proposition the submission is well founded and accordingly we called upon counsel for the appellants to produce the relevant records to find out the reasons.

11. The record among other things contains the proceedings of the Medical Board. The proceeding sheet is in three parts. The third part contains opinion of the Medical Board. In column II thereof there are sub-columns meant for reasons perusal of which shows that the Medical Board came to a definite conclusion that both the diseases were not attributable to or aggravated by military service. The diseases were found to be constitutional in nature. As regards Lenticular Bilateral Opacities the disease was found to have developed at the age of 42 years when the respondent was posted in peace area. Partial seizure was also contracted while serving in peace area. There was no evidence of any head injury which could have caused or aggravated the disease. In sub-column (d) the disease was described as idiopathic disorder, not connected with service.

12. The point for consideration is whether this Court can sit in appeal over the opinion of the Medical Board? The point is not *res integra*. Reference may be made to *Union of India (UOI) and Another Vs. Baljit Singh*, and the following observations therein may usefully be noticed:

...It is seen that various criteria have been prescribed in the guidelines under the Rules as to when the disease or injury is attributable to the military service. It is seen that under Rule 173 disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. If these conditions are satisfied, necessarily the incumbent is entitled to the disability pension. This is made amply clear from Clauses (a) to (d) of para 7 which contemplates that in respect of a disease the Rules enumerated thereunder required to be observed. Clause (c) provides that if a disease is accepted 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. Unless these conditions are satisfied, it cannot be said that the sustenance of injury per se is on account of military service. In view of the report of the Medical Board of doctors, it is not due to military service. The conclusion may not have been satisfactorily reached that the injury though sustained while in service, it was not on account of military

service. In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service.

13. Reference may also be made to Union of India (UOI) and Others Vs. Dhir Singh China, Colonel (Retd.), and relevant observations therefrom may be quoted as under:

...We have already referred to the opinion of the Medical Board which found that the two disabilities from which the respondent was suffering were not attributable to or aggravated by military service. Clearly therefore, the opinion of the Medical Board ruled out the applicability of Regulation 53 to the case of the respondent. The diseases from which he was suffering were not found to be attributable to or aggravated by military service, and were in the nature of constitutional diseases. Such being the opinion of the Medical Board, in our view the respondent can derive no benefit from Regulation 53. The opinion of the Medical Board has not been assailed in this proceeding and, therefore, must be accepted.

14. The above two decisions were noticed and followed by the Supreme Court in Union of India v. S. Balachandran Nair (supra). The Supreme Court held that in view of the legal position referred to above and the fact that the Medical Board's opinion was to the effect that the illness suffered by the respondent was not attributable to or aggravated by military service, the High Court was not justified in allowing the claim of disability pension.

15. It may be relevant to mention here that the appellants in their reply before the Single Judge stated the manner in which the claim for disability pension is examined at different levels. As per Rule 27(c) of the Pension Regulations the Joint Director AFMS who is an officer under Director General, Armed Forces Medical Services attached as Medical Advisor (Pension) in the office of the Controller of Defence Accounts (Pension), Allahabad ensures consistency in assessment of disabilities. Based on the physical examination of the person, the invaliding medical board/release medical board/re-survey medical board makes recommendation regarding attributability of his invaliding disability to service conditions and extent thereof in case of such disease. The pension sanctioning authority considers such recommendation and on medical issues consults the Joint Director, AFMS/DGAFMS. These authorities after careful consideration of all medical records, record their opinion as regards the aetiology of the disease and the extent thereof. The pension sanctioning authority is required to take such opinion into consideration while sanctioning disability pension. The Joint Director, AFMS who is a specialist, ensures uniform application of the entitlement rules and the provisions contained in the Guide to Medical Officer. At the appellate stage also the recommendations are reviewed by appropriate higher medical authority, namely, Deputy DGAFMS (Pensions)/DGAFMS who give their views on medical issues on the first and final appeals.

16. It would thus appear that not only at the stage of medical board but also at the stage of grant of pension including disability pension, and the appellate stage, the matter is processed by experts at various levels and on the basis of the expert opinion and on consideration of the record the decision is arrived at.

17. In these premises, we are of the view that the learned Single Judge committed error in upholding the claim of the respondent for grant of disability pension merely on the basis of paragraph 7(b) of Appendix II of the Pension Regulations. Paragraph 7(b) creates presumption about the disease being attributable to or aggravated by military service unless noted at the time of enrolment but such a presumption is not conclusive; it is rebuttable and where the medical opinion holds to the contrary, and reasons have been assigned, the High Court cannot sit in appeal over such opinion while exercising power of judicial review under Article 226 of the Constitution of India.

18. In the result, the appeal is allowed, the order of the learned Single Judge is set aside and the writ petition of the respondent is dismissed.