GAHC010253572018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3001/2020

KESHAV RAJ SHARMA
S/O- LATE BHAGAT RAM SHARMA
VILL- TELKAR
P.O- JAURE AMB
DIST- HAMIRPUR
HIMACHAL PRADESH

VERSUS

THE UNION OF INDIA AND 2 ORS
REP. BY THE SECRETARY TO THE GOVT OF INDIA
MIN OF HOME AFFAIRS
NORTH BLOCK
NEW DELHI- 110001

2:THE MAHANIDESHALAYA
ASSAM RIFLES
HEAD QTR
DIRECTORATE GENERAL ASSAM RIFLES
SHILLONG
MEGHALAYA
PIN- 793011
3:THE COMMANDANT
31ST ASSAM RIFLES
C/O- 99 APO
PIN- 932031

Advocate for : MS. S BORA
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 2 ORS

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 12-02-2024

1. Heard Ms. S Bora, learned counsel for the petitioner. Also heard Mr. A.K. Dutta, learned counsel for the respondent Nos.1 to 3.

2. The present writ petition is filed assailing that though the petitioner is entitled for pension in terms of Rule 38 and Rule 49 of CCS (Pension Rules), 1972, however, the same has not been granted to him inasmuch as he was discharged from service on 30.09.1991 for the reason of suffering from Non Organic Psycosis.

3. The brief facts leading to filing of the present writ petition are as under:

I. The petitioner herein was appointed as a Rifleman and was enrolled in Assam Rifles on 04.02.1983. After completion of his basic military training, he was posted at 12th Assam Rifles. While he was posted at 31st Assam Rifle located at Kokrajhar, Assam in the year 1991, the petitioner suffered from mental illness and accordingly, he was admitted at the Unit Hospital and he was thereafter referred to 5 Air Force Hospital for his further treatment. After treatment at the Air Force Hospital the petitioner returned back to his unit and resumed his duty. However, after 20 days the problem recurred. He was referred again to the Air Force Hospital and after some treatment, recommendation for discharge of the petitioner from service on medical ground was made. Though, the discharge order dated 30.09.1991 records the exemplary service of the petitioner, however, according to the employer the petitioner

was to be discharged from service on medical ground. It is also reflected that there is also a mention in the discharge report as regard Medical Invalid Pension, though it is not clear whether it is a recommendation or not. However, according to the petitioner no disability pension has been granted till date.

4. **ARGUMENTS ON BEHALF OF LEARNED COUNSEL FOR THE PETITIONER**

I. Ms. S Bora, learned counsel for the petitioner argues that the petitioner was held to be entitled for invalid pension. However, when no disability pension was paid the petitioner represented before the authorities. Such representation was considered by his employer and by a communication dated 24.07.2019 the claim of pension was declined on the ground that the 40% disability of the petitioner is not attributable/not aggravated by service condition.

II. The further reason was that for grant of disability pension under CCS (Extraordinary Pension) Rules, 1939 the minimum 60% disability is prerequisite for grant of such disability pension and therefore, the 40% disability not being attributable/not being aggravated by service condition the petitioner is not eligible for grant of disability pension and due to constraint of rules.

III. The learned counsel for the petitioner submits that a member of Armed forces is presumed to be in sound physical and mental condition upon entering service, if there is no note or entry to the contrary in his record and in the event, he is subsequently discharged from service on medical ground, onus to prove that deterioration in his health was not due to service condition, lies on the employer and in case of failure on the part of the employer to

discharge such burden the benefit of doubt thereof must go to the employee. According to the learned Counsel, there is no material to show that the petitioner is having any such disease at the time of entry into service.

5. The impugned order was considered by a communication dated 24.07.2019, however,

I. Claim of pension was declined on the ground that 40% disability of the petitioner is not attributable/not aggravated by service condition;

II. For the grant of disability pension under CCS (Extraordinary Pension) Rules, 1939, the minimum 60% disability is prerequisite for grant of such disability pension.

6. **ARGUMENTS ADVANCED BY THE UNION OF INDIA**

I. The Union of India has filed an affidavit and took a stand that the petitioner has been suffering from "Non Organic Psycosis" with effect from 27.06.1986 and therefore was placed under low medical category CEE (temporary) with effect from 23.12.1988. Finally he was placed in medical category (EEP) (permanent) with effect from 06.1.1991 and was recommended for invalidation from service. The respondent Union has also brought on record the medical report on the basis of which the disability was assessed to be at 40% and was declared to be not attributable/not aggravated to service condition. Such report of the medical board shall be dealt at a later stage of this judgment.

II. The further contention of the Union of India is that on the date of invalidation i.e., on 30.09.1991 the petitioner had put a

total 8 years 7 months 17 days of service and therefore, he was ineligible for grant of invalid pension for want of 10 years qualifying service in terms of Rule 49 of the CCS (Pension Rules), 1972 (for short 1972 Rules).

III. It was the further contention that the petitioner is also not entitled for disability pension under Central Civil Services (Extra Ordinary Pension) Rules 1939 (for short, 1939 Rules) as his disease was declared not attributable to or not aggravated by service condition.

IV. Yet another contention is that Civil Services (Pension) Amendment Rules 2018 was enacted and given effect to with effect from 04.01.2019 whereby the qualifying service of 10 years for grant of invalid pension under Rule 38 of the Rules 1972 has been done away with. However, the petitioner's case cannot also be considered in terms of the amended rule in view of the fact that such rule had come into effect from 04.01.2019 whereas the petitioner was discharged on 30.09.1991.

V. Another issue being raised by the Union is that the petitioner has approached this court after lapse of 29 years of his invalidation from service and therefore, the writ petition is barred by law of limitation and therefore, liable to be dismissed on this ground alone. In this regard the Union has relied on the judgment passed by a coordinate bench in WP(C) No.329/2012, the judgment of Meghalaya High court passed in WP(C) No.343/2013, decision of Delhi High court passed in CN No.34288/2016, and decision of this Court passed in WP(C) No.726/2012.

7. **DETERMINATION**

I. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties. Perused the materials on record including the proceeding before the Medical Board. The decisions relied on by the learned counsel for the respondents are also given due consideration.

II. Invalid pension under Rule 38 of the Rules 1972 can be granted to a Government servant, when the Government servant retires from service on account of any bodily or mental infirmity which has permanently incapacitated him from his service. A Government servant applying for such invalid pension is required to submit a medical certificate of incapacity issued by a Medical Board in case of gazette and non gazetted government servant, who is getting a pay not exceeding a certain amount *per-mesne* and in case of other employees, such certificate is to be issued by a civil surgeon or a District Medical Officer or Medical Officer of equivalent status.

III. Rule 3(A) of the Rules 1939, provides that disablement is to be accepted as due to Government service subject to the condition that it is certified that such disablement is due to wound/injury or disease attributable to government service. The said rule further mandates that such disablement shall also be accepted as "due to Government service", when such disease, either existed before or arose during the government service that continues and remains aggravated.

8. In the case in hand, the record annexed with the affidavit in opposition including the medical case sheet, summary and opinion of the Medical Board discloses the following.

A. The proceeding before Medical Board shows that the petitioner was under treatment. However, follow up and drug compliances has been irregular.

B. At the time of discharge, the petitioner has little complaints with occasional spontaneous irritation of mind and occasional unusual dreams. He appears almost normal with the aforesaid complaint. His memory is intact and speech is normal.

C. His percentage/degree of disablement as compared with a healthy person of same age and sex is 40% and the cause is not attributable to service.

9. From the record, this court has not found any material on record to show that there was any disability involving any physical or mental condition at the time of entry into the service on 04.02.1983. It is found in the proceeding of the Medical Board that such condition was first revealed in the year 1986 and the same was managed with psychotic medicines and finally he was examined by a Specialist Doctor on 06.01.1991 and Medical Board was conducted on 04.10.1991 as discussed herein above. On such examination also the patient was found almost normal with little complaints like occasional spontaneous irritation of mind and occasional unusual dreams like dreaming of a girl. His replies to the queries made were also mostly found by the Medical Board as recorded to be normal and well oriented to the place, time and person.

10. Law on the basis of the judgments of the hon'ble Apex court enunciated in various determinations made can be culled out in the following manner: (Ref ***Dharambir Singh Vs. Union of India*** reported in ***(2013) 7 SCC 316***, ***Ex Hav Mani Ram Bhaira Vs. Union Of India***, ***Civil Appeal No.4409/2011*** decided on 11.02.2016, ***Satwinder Singh Vs. Union***

of India, ***Civil Appeal No.1695/2016*** decided on 11.02.2016, ***Sukhwinder Singh Vs. Union of India*** reported in ***(2014) 1 SCC 364***

i. There is a presumption of sound physical and mental condition at the time of entry into the service. In case of a medical discharge, any deterioration in health is presumed to be due to military service.

ii. Diseases leading to discharge are presumed to have arisen during service, if not noted at the entry into service.

iii. If a disease could not have been detected at entry, the Medical Board must provide reasons;

iv. Burden to establish discontent between the disease and the service in armed forces lies with the employer and the employee need not prove the origin of the disease.

11. Now coming to the case in hand, it is seen that the Medical Board has not recorded any reason for concluding that disability was not attributable to the service inasmuch as from the said report it is clear that at the time of the entry i.e., in the year 1983, the petitioner was not having any psychiatric disorder.

12. From a bare reading of Rule 3(A) of the Rules 1939, it is clear that there is a presumption in favour of the employee. The said rule prescribes that when a disease is detected during government service and remains aggravated, the same is to be deemed to be accepted as arose due to the Government Service. At the same time, as discussed hereinabove, the law is also equally well settled that even the presumption is to the effect that when at the time of entry into the service, no disease is recorded it is to be presumed that such disease has been acquired due to the service in the armed forces. Therefore, the argument of the Union of India and the reason of rejection of the claim of the petitioner relying on Rule 3(A) of the

Rules 1939 is not sustainable in law, more particularly in view of the presumption prescribed and the admitted fact in the case in hand is that the disease was not detected at the entry into the service but the same was detected during the course of service and the same was aggravated resulting in discharge of the petitioner after rendering more than 8 years 7 months and 17 days of service.

13. Regarding the qualifying service of disability pension, this court is of the considered opinion that Rule 49 of the Rules 1972 shall not be applicable in the case in hand for the reason that the pension claim was disability pension and not an invalid pension inasmuch as for grant of disability pension, no qualifying period is prescribed.

14. Another important aspect of the matter is that there is a difference between invalid pension and disability pension. Invalid pension is granted under Rule 38 of the CCS Pension Rules, 1972 when Government servant seek invalidation for any bodily or mental infirmity, whereas a disability pension is granted under Rules 1939, when the employer discharges the employee having found acquiring disability due to service condition.

15. The qualifying service mandated under Rule 49 of the Rules 1972 shall be applicable when an invalid pension is sought by the employee under Rule 38 of the said Rules. In case of an invalid pension under Rule 49 of the Rules 1972, it is the employee who is to seek for such an invalid pension and who is to produce a certificate and establish his invalidation. On the other hand, in case of a disability pension, it is the employer who is to have a satisfaction on the basis of medical record/examination of the employee carried out by the employer that the employee has become disabled to perform his duties and accordingly, he is to be discharged from the service and when such disability is attributed to service condition, the

employee is entitled for disability pension. Thus in case of an invalid pension it is the employee who seeks discharge and therefore, there shall be a relevance of qualifying service. On the other hand, in case of a disability pension it is the employer who discharges the employee after arriving at a satisfaction that he has become disabled to perform his duties for reasons attributable to service condition and therefore, the legislature in its wisdom has not prescribed for any qualifying service for a disability pension under Rule 3(A) of the Rules 1939. Accordingly, it is held that the respondents could not have rejected the case of the petitioner for grant of disability pension on the basis of want of qualifying service and also for the reason that the disease was found to be not attributable/not aggravated to service conditions inasmuch as in the given facts of the case the petitioner shall be entitled for a pension under Rule 3(A) of the Rules 1939.

16. Coming to the delay in approaching this court, it is well settled that the law of limitation is not applicable in case of a proceeding under Article 226 of the Constitution of India. Though such writ petition can be dismissed on the ground of approaching this court after unreasonable delay and for negligence and latches on the part of the petitioner.

17. Law is equally well settled that pension is not a bounty but is a right. Non-payment of pension including disability pension is a continuing wrong which gives rise to recurring/continuing cause of action. In this regard this court can gainfully place reliance on the ratios laid down by the Hon'ble Apex Court in the case of M***.R. Gupta Vs. Union of India and Others*** reported in ***(1995) 5 SCC 628***, ***K. Shankarnayar Vs. Devaki Amma Malathy Amma*** reported in ***(1996) 11 SCC 428*** and ***Union of India and others Vs. Tarsem Singh and others*** reported in ***(2008) 8 SCC 648***.

18. In the case in hand, the claim of the petitioner for disability pension was rejected on 24.07.2019 and the writ petition was filed on

28.07.2020. The employee has not taken any ground in rejecting the claim of pension for delay, rather the claim was decided on merit on 24.07.2019. Therefore, in the considered opinion of this court there is no unreasonable delay in approaching this court for grant of disability pension. Accordingly the contention of the Union of India regarding delay stands rejected.

19. The judgments relied on by the respondent Union of India in the given facts of the present case are not at all relevant and applicable.

20. In view of the aforesaid reasons and discussions, it is held that the petitioner is entitled for disability pension and the impugned decision dated 24.07.2019 is illegal and arbitrary. Accordingly, the respondents more particularly, the respondent No.2 and 3 are directed to grant disability pension to the petitioner from the date of his discharge on medical ground. Such pension be paid within a period of 6 months from the date of furnishing of a certified copy of this order by the petitioner. If such pension is not paid within the aforesaid period, the same will carry an interest @ 6% per annum.

21. In terms of the above, the writ petitions stand disposed of.

JUDGE

Comparing Assistant