

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No.12714/2006

% Date of decision: July 09, 2008

Ex. Nk. B.B. Suresh Kumar ...PETITIONER
Through: Mr. S.R. Kalakal, Advocate.

Versus

Union of India & Ors. ...RESPONDENTS
Through: Mr. Aakash Pratap, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. | To be referred to Reporter or not? | No. |
| 3. | Whether the judgment should be reported in the Digest? | No. |

SANJAY KISHAN KAUL, J. (ORAL)

1. Rule DB.
2. At the request of the learned counsel for the parties the petition is taken up for final disposal.
3. The petitioner was enlisted in the Army on 28 Aug. 1983 and on completion of his training he was posted to the Infantry Battalion. The petitioner claims that he has served at many difficult locations in the Army at high altitude, mountainous

terrain, hot and humid climate and was exposed to adverse climatic conditions in the country.

4. The petitioner started suffering a problem with his vision on 27.7.1991 and reported the same to the Medical Authority. The petitioner on medical examination was placed in a low medical category CEE (TX24 weeks) on 17.12.1999. The petitioner was ultimately placed in a permanent low medical category BEE (P) on 22.6.2000 and was brought before a Medical Board in June 2002, which recommended that the petitioner should be invalided out of service with 20% disability. The petitioner was invalided out of service on 31.3.2003. The grievance of the petitioner is that he was not paid disability pension as there was no compliance of regulation of 423 of the Regulations for Medical Service and Entitlement. The claim of the petitioner was in fact forwarded to PCDA (P) Allahabad but did not find favour on the ground that invaliding Medical Board did not find the disease of the petitioner attributable to or aggravated by the military service. This information was received by the petitioner vide letter dated 11.8.2003 and the petitioner submitted an appeal on 16 January, 2004 but to no avail. The legal notice sent by the petitioner was once again replied to that the disease of the petitioner was declared by the PCDA (P) Allahabad as not attributable to service. The petitioner thus filed the writ petition.

5. In the writ petition it is stated that the petitioner was diagnosed as a case of "Ventricular Sclerosis" when a CT scan

was carried out. The invaliding Medical Board is alleged not to have followed the Regulation of 423 referred to above as no reasons were given as to why the disease of the petitioner was not attributable to or aggravated by the Military Service since the petitioner has served for a period of 20 years and did not suffer from any disease on his entry in the service. The petitioner claims that in the year 1999 he was posted to a high altitude and snow bound area where he was exposed to snow and was not provided with the snow goggles. Thus the petitioner suffered from the reflection of snow and started having difficulty of loss of vision in both his eyes. No specialist treatment could be organized then and therefore given thus routine treatment was given to the petitioner. The aggravated problem came to light when the petitioner was transferred to the Base Hospital by when the damage to his eyes has already been done. Our attention has not been drawn to any rebuttal to this material averment which shows the claim of the petitioner as to why he suffered from this problem. No parawise counter affidavit has been filed nor these material aspect have been dealt with in the counter affidavit.

6. The records have been produced before us which show that the Medical Board while dealing with the relevant claim only put 'No' or 'Yes' and stated that the disease was constitutional. The summary of opinion at the beginning only states that it is an old case of eye problem. There are no details given as to when such problem was detected, however the report corroborates the

fact that the aggravation did start in 1999 as alleged by the petitioner.

7. Learned counsel for the petitioner has drawn our attention to the Division Bench Judgment in the case of Ex. Sepoy Gopal Singh Dadwal Vs. UOI 2006 (4) SCP 342. It is contended on behalf of the respondent that a Special Leave Petition has been filed against this judgment and there is possibly stay of the operation of the orders but no such stay order has been shown to us.

8. Be that as it may, nothing precludes us from perusing the judgment and seeing the ratio. We consider it appropriate to utilize some observation made therein on the basis of what was stated by the medical specialist who appeared in court in pursuance to the direction passed in that case. It would be relevant to refer to para 15 which reads as under:-

“In furtherance to direction of the Court, medical specialists have appeared during the course of hearing of these petitions. In response to query by the Court, the medical specialists have expressed their opinion that ‘Constitutional disorder’ or ‘Constitutional disease’ would relate to a situation where the Medical Board is unable to find a cause for the disease which a person is suffering from. In those circumstances it is recorded that the disease is neither the attributable nor aggravated by army service. In other words, if the medical authorities failed to determine cause, onset or arrive at a definite diagnostic opinion in relation to disease of a member of the force, it is bound to adversely affect the interest of the member in relation to grant of disability pension. According to these experts, the constitutional disorder would normally result in recording the remark ‘not attributable

to nor aggravated by military service' without any further or proper diagnosis. Butter- Worths Medical Dictionary, defines 'Constitutional' as:- "Relating to the state of constitution, inherent in the Constitution of mind or body, relating to the bodily system as a whole". The expression Constitutional Disorder or disease would thus have to be understood even in its common parlance as something which is relatable to human mind and/or body. Its existence in either of them could be specifically diagnosed both in relation to cause, time of its existence as well as onset of the disease. This can hardly be termed as just and fair approach in consonance with rules and regulations. The disease like Schizophrenia, Neurosis and other Psychiatric related disease can be aggravated if not attributable to Army service. If they are constitutional diseases or disorders, then they must be relatable to human body and/or mind and can be detected by proper diagnose including the time i.e. pre or post joining the Army. It would be required of the authorities concerned to reasonably show on record that such diseases or their basic symptoms existed prior, though the disease manifested later or even co-relate the onset of the disease to a period prior to the joining of service by the petitioner. It is reasonably expected that the medical experts would be able to even trace the cause, origin of the disease as was done in the case of JC 264149-M Ex. Naib Sub. Marut Sharan Tiwari v. Union of India and others, being CWP No. 23320 of 2005 decided on 13.7.2006."

9. The aforesaid portion of the judgment in fact is what is opined by the specialist doctors of the Army who appeared before the court and thus there can be no dispute about this and the stay of the operation of the judgment, if any, would not, in any, case affect these observations.

10. Our attention has also been drawn to the judgment in CWP No. 2221 of 2005, Ex. Sub. Major Ram Kishan v. UOI decided on 14.3.2006 where it is observed as under:-

“15. When an individual is found suffering from any disease or has sustained injury, he is examined by the medical experts who would not only examine him but also ascertain the nature of disease/injury and also record a decision as to where the said personnel is to be placed in a medical category which is lower than ‘AYE’ (fit category) and whether temporarily or permanently. They also give a medical assessment and advice as to whether the individual is to be brought before the release/invaliding medical board. The said release/invaliding medical board generally consists of three doctors and they, keep in view the clinical profile, the date and place of onset of invaliding disease/disability and service conditions, draws a conclusion as to whether the disease/injury has a casual connection with military service or not. On the basis of the same they recommend (a) attributability, or (b) aggravation, or (c) whether connected with service. The second aspect which is also examined is the extent to which the functional capacity of the individual is impaired. The same is adjudged and an assessment is made of the percentage of the disability suffered by the said personnel which is recorded so that the case of the personnel could be considered for grant of disability element of pension. Another aspect which is taken notice of at this stage is the duration for which the disability is likely to continue. The same assessed/recommended in view of the disease being capable of being improved. All the aforesaid aspects are recorded and recommended in the form AFMSF-16. The Invaliding Medical Board forms its opinion/recommendation on the basis of the medical report, injury report, Court of inquiry proceedings, if any, charter of duties relating to peace or filed area and of course, the physical examination of the individual.

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It was also held that the opinion given by the doctors of the Medical Board shall be given due weightage and primacy in the matter of ascertaining as to whether or not the injury/illness sustained was due to or was aggravated by the military service which contributed to invalidation from the military service.

At this stage we may also take up the plea raised by the petitioner that the disease from which the petitioner had suffered cannot be said to be constitutional in nature. This submission is sought to be supported by this Court in Satpal Singh v. Union of India and others (supra) is now stood impliedly repealed by the decision of the Supreme Court in the case of Controller of Defence Accounts (Pension) and others v. S. Balachandran Nair, reported as 2005(4) SCT 607 (SC) :AIR 2005 SC 4391. In the said decision the Supreme Court after considering the various provisions and the decisions on the subject including the case of Union of India and another v. Baljit Singh, reported as 1996(1) SCC 315 held that Medical Board's opinion to the effect that illness and disability suffered by the respondent therein was not attributable to military service cannot be substituted by the Court in order to arrive at a contrary finding. It was also held that where a medical board found that there was absence of proof of the injury/illness having been sustained due to military service or being attributable thereto, the High Court's direction to the Government to pay disability pension was not correct. The Supreme Court also dealt with the contention that the fact that the employee was posted at sensitive border area and, therefore, his illness is fully attributable to military service was negative by the Supreme Court in the said decision. We may also refer to the decision of the Division Bench of this Court in Md. Tanwir Alam v. Union of India and others (supra). In the said case also the petitioner was enrolled as Nursing Assistant and while undergoing training he developed the said disease within a short period when the aforesaid disease was diagnosed. Despite the said fact the Division bench has held that the decision of the appropriate medical authority

coming to the conclusion that the disease of the employee was not related to the military service cannot be interfered with.

We may also refer to the decision of Shri Bhagwan (supra). In paragraph 185,186,187 reference was made to other decisions of the Single Judges of this Court. The Division Bench of this Court overruled the Single Judge's decision holding that when the medical board has given a categorical opinion that the petitioner's ailment was constitutional and even the CCDA had opined that the petitioner was not suffering from any ailment which could be attributed to or aggravated by military service and that it did not exist before or during military service, such opinion could not be set aside merely because it was felt that the word "constitutional" is not an adequate reason for denying disability pension. In our considered opinion, the law is, therefore, crystal clear on the subject needs no further reiteration.

In the backdrop of the aforesaid legal position which is made clear by several decisions of this Court as also by the Supreme Court the facts of the present case are required to be considered. Here is also a case where the Release Medical Board has given its definite opinion that the disease from which the petitioner is suffering is constitutional in nature and that the said disease and disability is neither attributable to nor aggravated by the military service. The said report of the medical board will have definite primacy, but in the facts of the present case we also find that there was a medical board earlier constituted which examined the petitioner medically and found that there was Hypertension from which the petitioner was suffering. It was held by the said Medical Board that the disease was aggravated by military service. Therefore, there is a conflict of opinion between the two medical boards, one gave its opinion in 1974 whereas the other medical board has given its opinion in 1983. It is true that the despite the opinion given by the medical board in 1974 the petitioner worked with the respondents for 10 more years and he stood discharged from service after completing his tenure. But it is apparent on the records of

the case that the petitioner was still suffering in 1983 from the same disease i.e. Hypertension and there was an additional disease, namely, Achalasia Cardia (Optd) from which he was found to be suffering from."

11. The facts of the present case are glaring. The petitioner served the respondents for 20 years. There was no eye problem detected either at the stage of the petitioner joining of the service or for a period of 17 years thereafter. The first detection was three years prior to his being invalidated out of the service. This coupled with the averments made in the writ petition about the petitioner serving at a high altitude and snow bound area without the snow goggles aggravated the problem are un rebutted.

12. There can hardly be any doubt in such a case that there is no basis as to why the disease was called constitutional disease in the present case. In fact the medical experts had opined on this aspect of constitutional disorder or constitutional disease that the same relates to a situation where the medical board is unable to find a cause for the disease which the person is suffering from and in those circumstances it can be recorded that the disease is neither attributable to nor aggravated by military service. In other words, the medical authority who failed to determine the cause onset or arrive at a definite diagnostic opinion in relation to the disease as quoted aforesaid.

13. We are thus of the view that in the present case, no purpose would be served by referring the case to an appeal medical board or any further review medical board which course we would have

normally preferred. The present case is one where the petitioner cannot be deprived of his disability pension, his tenure being cut short on account of onset of the disease.

14. In so far as the percentage of the disability is concerned, the petitioner was invalided out of service with 20% disability. It is not in dispute that any person who has been invalided from 01.1.1996 is entitled to disability pension @ 50% in case the percentage of disability is zero to 50% on the principle of broad banding as per the circular dated 31.1.2001. The petitioner is thus entitled to disability pension @ 50%.

15. A writ of mandamus is issued directing the respondent to pay the disability pension of the petitioner @ 50% from the date of his invalidation from service along with arrears within a period of two months from today. The petitioner shall also be entitled to cost assessed as Rs. 5,000/-.

SANJAY KISHAN KAUL, J.

JULY 09, 2008
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MOOL CHAND GARG, J.