

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

% *Judgment Reserved on: 27th November, 2009*
Judgment Delivered on: 08th December, 2009

+ **W.P.(C) No.9097/2009**

RAKESH KUMAR YADAV Petitioner
Through: Mr.M.G.Kapoor, Advocate

Versus

UOI & ORS. Respondents
Through: Mr.Anil Gautam, Advocate and
Dr.Amit Butola and
Dy.Commandant Yadunath Singh

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. The petitioner was selected as a Constable GD under Border Security Force (BSF) and was posted at the 25th Bn. He was required to undergo training for 24 weeks and for which he was sent to BTC, TC&S, BSF at Hazaribagh, Jharkhand as a

part of Batch No.112 where he commenced his training on 26.12.2005.

2. While undergoing training at Hazaribagh, the petitioner was detected with viral hepatitis (in common parlance jaundice). He was referred to the Composite Hospital TC&S BSF Hazaribagh where he was admitted on 26.5.2006 and his condition not improving was sent to the specialized hospital being Sadar Hospital Hazaribagh on 30.5.2006 from where he was referred back at the Composite Hospital at Hazaribagh on 2.6.2006 where he remained admitted till 4.7.2006 on which date he was discharged being certified fit.

3. Rejoining the training centre, the petitioner complained of general weakness, yellow colouration of urine and sclera. He was examined for a second time at the Composite Hospital TC&S BSF Hazaribagh on 14.7.2006 where he was admitted and remained hospitalized till 20.9.2006. His condition was not improving and he was referred to RIMS Ranchi on 20.9.2006 where he remained admitted till 30.9.2006 and on intensive examination was detected with Hyperbilirubinemia (Gilbert's Syndrome). He remained off training, but in the lines till 12.10.2006 on which date he was re-hospitalized at the Composite Hospital TC&S BSF Hazaribagh where he remained as a patient till 4.11.2006. He

was examined by various experts including a doctor from NRS Medical College Kolkata namely Dr.Abhijit Choudhary who confirmed that the petitioner was suffering from a genetic infirmity resulting in Gilbert's Syndrome.

4. On 14.11.2006 a Medical Board was constituted to assess the suitability of retaining the petitioner in service and the Board gave an opinion that the petitioner was unfit to be retained in service. On 14.2.2007 a notice tentatively proposing to discharge the petitioner from service without pensionary benefits was issued and served upon the petitioner as per the mandate of Rule 13 of the BSF Rules 1969. The petitioner was informed that if he was aggrieved by the decision of the Medical Board he could file an appeal and seek Review Medical Board to be constituted. The petitioner submitted an appeal praying that a Review Medical Board be constituted. The petitioner asserted that Gilbert's Syndrome is not a disease i.e. was not a permanent ailment. The Review Medical Board was constituted which examined the petitioner on 14.11.2007 and opined that the petitioner is a case of Congenital Hyperbilirubinemia (Gilbert's Syndrome); opining the same to be a permanent ailment of which the petitioner could not be cured, the Board recommended that the petitioner was unfit. Subsequently, with effect from

31.12.2007, on ground of medical infirmity petitioner was retired from service under Rule 25 of the BSF Rules 1969 without any pensionary benefits. The reason for not granting any pension was that the petitioner was not even confirmed in service. In fact, he had rendered no service. During training, the medical infirmity of the petitioner was detected.

5. It is not in dispute that under Rule 25 of the BSF Rules 1969, on the Commandant being satisfied that a person enrolled in the BSF is unable to perform his duties by reason of any physical disability, the person concerned may be brought before a Medical Board and if the opinion of the Medical Board is to the effect that the person concerned is physically disabled, the person may be retired from service subject to the right of the person concerned requiring his examination before a Review Medical Board, under which circumstance, the opinion of the Review Medical Board would prevail.

6. The writ petition was filed alleging that medical literature shows that Genetic/Congenital Hyperbilirubinemia is not a disease and does not affect a person's ability to work. Opinions obtained by the petitioner from specialists to the effect that notwithstanding suffering from Congenital Hyperbilirubinemia, the petitioner is not prohibited from physical activities, have been annexed with the writ petition.

With reference to the opinion of Dr.Abhijit Choudhary it is asserted that even said doctor has categorically written '*this is not a disease*'. With reference to a certificate issued by the doctor at the Base Hospital recording that this disease does not prohibit physical activity, the petitioner asserts that under circular dated 28.1.2003 it was indicated that physical infirmities justifying retirement from service within the first two years of employment were incurable diseases like Cancer, HIV +, Mental Disability, Epilepsy etc. It was urged that the said circular required the disease to be incurable as a condition for retirement from service. In a nutshell, the petitioner asserts that Congenital Hyperbilirubinemia (Gilbert's Syndrome) is neither a disease, much less incurable.

7. What is Gilbert's Syndrome?

8. In 1907 Gilbert submitted a report pertaining to patients of jaundice. Before Gilbert gave his report it was known that the bile enzyme breaks down fat and that bile is excreted by the liver. It was also known that liver filters impurities and toxins. Where the liver was unable to consistently process the yellowish brown pigment called bilirubin it remains present in the blood. Chronic cases of jaundice were found to be actually a Genetic/Congenital infirmity inherited by birth. Gilbert noted that such persons

having an inherited abnormality which causes reduced production of an enzyme involved in processing bilirubin. This leads to high levels of unconjugated bilirubin in the blood stream. This infirmity was called Gilbert Syndrome by the experts in the field.

9. Further research was conducted which revealed that this infirmity did not result in known and definite pattern of resultant side effects on the human body. Conventionally understood a disease is something which produces or triggers other effects affecting the human body. For example, a simple cough is not treated as a disease as it has no effect on the body. Some people would call every de-stability of the body as a disease but prefer to label those as having no affect on the body as benign diseases. It was in this context of the debate that many a literature refers to Gilbert's Syndrome as benign.

10. But, as tools of research were refined it came to be noted that those who inherit Gilbert Syndrome may sometimes, occasionally, commonly or frequently report fatigue, tiredness, panic attacks, poor memory, depression, irritability, loss of appetite, stomach pain and cramping, abdominal pain, swollen lymph nodes and weight loss. In other words, every person afflicted with Gilbert's Syndrome may not show afore-noted symptoms with the same

frequency. For somebody it may be a case of occasionally suffering from the resultant affect. For somebody it may be more than occasionally but less than commonly i.e. sometimes. For others it may be reported more than sometimes but less than frequently i.e. commonly reported and for some unfortunate ones it may be reported frequently.

11. The issue at hand required to be decided by us is not whether Gilbert Syndrome is a disease. The rule in question i.e. Rule 25 of the BSF Rules 1969 does not require that the person concern has to be suffering from a disease. The Rule states: *"Where a Commandant is satisfied that a Subedar, a Sub-Inspector or an enrolled person is unable to perform his duties by reason of any physical disability, he may direct"*. Thus, the issue which has to be posed and answered is: whether the petitioner is unable to perform his duties by reason of any physical disability. For facility of reference Rule 25 of the Border Security Force Rules 1969 reads as under:-

"25. Retirement of subordinate officers and enrolled persons on grounds of physical unfitness. –(1) Where a Commandant is satisfied that a Subedar, a Sub-Inspector or an enrolled person is unable to perform his duties by reason of any physical disability, he may direct that the said Subedar, Sub-Inspector or the enrolled person, as the case may be, brought before a Medical Board.

(2) The Medical Board shall be constituted in such manner as may be determined by the Director-General.

(3) Where the said Subedar, Sub-Inspector or enrolled person is found by the Medical Board to be unfit for further service in the Force, the Inspector-General, the DIG or, as the case may be, the Commandant may, if he agrees with the finding of the Medical Board order the retirement of the Subedar, the Sub-Inspector, or as the case may be, the enrolled person:

Provided that before the said Subedar or Sub-Inspector or as the case may be, the enrolled person is so retired the finding of the Medical Board and the decision to retire him shall be communicated to him.

(4) The Subedar, the Sub-Inspector or, as the case may be, the enrolled person may, within a period of fifteen days from the date of receipt of such communication, make a representation to the officer next superior in command to the one who ordered the retirement.

(5) The said superior officer shall have the case referred to a Review Medical Board which shall be constituted in such a manner as may be determined by the Director-General.

(6) The superior officer may, having regard to the finding of the Review Medical Board, pass such order as he may deem fit.

(7) Where a representation has been made to a superior officer under sub-rule (4), and order passed under sub-rule (3), shall not take effect till it is confirmed by such superior officer."

12. Whether or not Gilbert Syndrome should be treated as a disease is a matter of debate amongst the experts in the field for the reason those who suffer from Gilbert Syndrome do not show a consistent pattern of resultant infirmity of the body. Further, Gilbert Syndrome does not inhibit normal

functioning of a body. But, all scientists and experts in the field commonly agree that Gilbert Syndrome is the result of a genetic/congenital deformity inherited through parents. Thus, generically speaking Gilbert Syndrome has to be treated as a physical disability which may assume aggravated forms in those who come in the category of 'Frequently Reported Cases' i.e. qua those on whom resultant effects as noted above frequent reoccur.

13. Now, there is enough data to show that those who suffer from Gilbert Syndrome resultantly get fatigue, tired, have stomach pain and cramping etc. etc. It is obvious that if these persons adopt a lifestyle which involves excessive physical activity, they would be rendered unable to perform their duties. Standard text on Gilbert Syndrome opines that: *the fact is that there is a striking degree of similarity in the symptoms suffered by those with Gilbert's Syndrome, and these symptoms can be incredibly disruptive to one's life. Luckily, it is not life threatening.* It is apparent that experts in the field are unanimous that Gilbert Syndrome disrupts one's normal life, though it is not life threatening.

14. As the saying goes, the proof of a pudding is in its eating.

15. A resume of how the petitioner withstood his training, as noted in paras 2 to 5 above shows that the petitioner could not even undertake the training of 24 weeks. Repeatedly, he had to be hospitalized. Being inducted as a Constable under BSF it was obvious that the training program required strenuous physical activity because the petitioner had to be trained as a soldier. There is empirical evidence that the petitioner is unsuitable for strenuous physical work and thus cannot perform the duties of a soldier by reason of the physical disability which repeatedly surfaces due to Gilbert Syndrome. It need hardly be re-stated that Gilbert Syndrome is a non-curable congenital-genetical defect as of today. Maybe, as Science grows, a cure may be found later on.

16. Pertaining to the plea that the office circular dated 28.1.2003 indicates which diseases have to be treated as the ones pursuant where to power under Rule 25 of the BSF Rules 1969 can be exercised, suffice would it be to state that the same have been noted by us in para 6 and the same do not show any genus relating to a specie and hence it cannot be said that the expression 'etc.' in the circular has to be read *ejusdem generis* gathering the genus from the preceding words to determine what would be the specie of the expression 'etc.'.

17. That some of the doctors have opined that the petitioner is fit for normal duties would mean the fitness expected from a person undertaking normal activities and not a person who has to perform physically strenuous duties. Besides, what is the use of opinion and theories where there is empirical data with reference to a fact. The empirical data, which is a matter of fact, pertaining to the petitioner is evidenced by his repeatedly falling sick and requiring to be hospitalized resulting in his not even completing the 24 weeks training. From 26.5.2006 till 4.11.2006 the petitioner remained virtually hospitalized. Due to medication whenever he was brought back to normal, soon thereafter the sickness would resurface. It is apparent that as and when the petitioner undertook a strenuous physical activity, Gilbert Syndrome showed its effect requiring the petitioner to be re-hospitalized.

18. We are fully satisfied that the BSF Authorities have acted within the mandate of Rule 25 of the BSF Rules 1969.

19. Since the petitioner could not even successfully undergo the training and has rendered no service under BSF having remained in employment for less than two years we hold that the writ petition requires to be dismissed.

20. The writ petition is dismissed.

21. Noting that the petitioner is without a job we refrain from imposing any cost.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

December 08, 2009
mm / Dharmender