

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

% *Judgment Reserved on: March 04, 2011*
Judgment Delivered on: March 15, 2011

+ **WP(C) 6111/2007**

CONSTABLE GAJENDRA PRASHAD Petitioner
Through: Mr.Uday Gupta with
Mr.S.B.Sharma and
Mr.M.K.Tripathi, Advocates.

versus

UOI & ANR. Respondents
Through: Dr.Ashwani Bhardwaj, Advocate

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 Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. In August 1990 the petitioner was inducted in ITBP, a Central Para-Military Force as a Constable and discharged his duties to the best of his abilities. Posted at Phobrang in the year 1998, the harsh climatic conditions of the place, where during winters the temperature falls as low as -20° centigrade, took its toll when while on duty the petitioner suffered severe frost bite.

2. The petitioner was diagnosed with 'Peripheral Vascular Disease (PVD)' of both lower limbs and surgery had

to be performed upon the petitioner. The right lower limb, above knee, had to be amputated and the left great toe had to be amputated.

3. The medical board, at which petitioner was examined, opined that the petitioner was completely and permanently incapacitated to perform the duties of a combat constable. The petitioner was placed in extremely Low Medical Category i.e. the category 'EEE'.

4. Based on the opinion of the medical board, a memorandum dated 30.4.2001 was issued by the competent authority i.e. the Commandant 20th Bn. ITBP requiring the petitioner to show such cause as he desired; petitioner was intimated that it was proposed to board him out of service on or before 31.5.2001.

5. The petitioner made a representation highlighting that the left great toe amputation had not rendered any much difference to the agility of the petitioner and as regards the amputation of the right leg, above the knee, he pointed out that with an artificial leg fitted he was in a position to perform the duties of a constable dak and hence stated that it would be wrong to state that the petitioner was rendered unfit to perform any kind of duties which constables could perform.

6. The subject on which the petitioner responded, needs a little clarification by us at this stage. Ministerial work of receiving dak and sending dak as also making general duty diary entries are performed by constables. No doubt, these constables are recruited for combat duty, but since ITBP does not separately recruit persons to discharge secretarial duties, such constables who are literate enough are assigned duties

involving record keeping and also a few other non combat duties. These duties are non-strenuous and can be performed, rather have to be performed, by sitting on a chair and putting the writing material on a desk. The petitioner highlighted that he had studied up to the Senior Secondary i.e. was class 12th passed.

7. The logic of the reasoning of the petitioner as also the need for a compassionate look into the matter was expressed in the opinion of the Commandant of the Unit to which the petitioner was attached. In his forwarding note dated 7.6.2001, addressed to the Director General ITBP the Commandant highlighted that it would be wrong to state that the petitioner was rendered incapacitated to perform any kind of job which could be entrusted to a constable. He also highlighted that as recent as on 26.4.2001, addressing the jawans, the Director General ITBP had himself desired that Low Medical Category personnel of ITBP should be considered with sympathy and not to be boarded out of service till they serve for 20 years, so that they could earn pension, since 20 years' service was the qualifying period to earn pension.

8. The authorities started considering the matter meaningfully and since 31st May was nearing, an interim decision was pending final view that the notice dated 30.4.2001 be kept in abeyance and in respect of said interim decision an office memorandum dated 25.6.2001 was issued, incorporating the interim decision taken.

9. What was the final decision taken? Which we expect to be in the form of a policy, is not known to us, as neither party threw any light on the issue, but, proceeding

ahead, we note that a telegram was sent to the petitioner informing him that the notice dated 30.4.2001 was withdrawn.

10. A conscious decision was taken to assign desk duties to the petitioner and happily for him his job remained intact. Not that the department did any act of charity. The petitioner started discharging duties of a company clerk and served the battalion well since June 2001, for a period of 6 years, when a decision was taken to board out the petitioner and for which a show cause notice was issued to him on 28.7.2007. As per the show cause notice since the *PERIPHERAL VASCULAR DISEASE (PVD) BOTH LOWER LIMBS WITH RT.AK AMPUTATION AND AMPUTATION OF LEFT LT. GREAT TOE* had rendered petitioner in the Low Medical Category 'EEE' and it was stated that after one month thereof, unless petitioner showed a satisfactory cause to withdraw the notice, he would be boarded out.

11. Needless to state the petitioner gave the same response which he had given in the year 2001 and additionally highlighted that for 6 years he had rendered satisfactory service as a company clerk. He stated that in view of said fact there was no reason to board him out of service. Unfortunately, the respondents did not go by the logic of their earlier view taken and passed an order to invalidate petitioner from service w.e.f. 27.8.2007, in respect whereof a written order was passed.

12. The petitioner filed the instant writ petition and on the very first day i.e. 21.8.2007, an interim stay was granted in his favour, restraining the respondents to give effect to the decision taken to board out the petitioner.

13. It is not in dispute that the medical disability of the petitioner which was opined in the year 2001 continues to be the same and there is no deterioration in the physique or the health of the petitioner. In fact, we must confess, that when the petitioner stood up in court on 4.3.2011 when we heard arguments in the writ petition, we saw him more smart in his turn out vis-à-vis other constables of para-military forces we see in court, who appear before us as litigants, but even as the security personnel deputed in the Delhi High Court complex. Not an inch of fat or flab on the stomach; a slim and trim jawan with a perfect body stood up when we wanted to see the petitioner. Indeed, learned counsel for the respondents was constrained to admit that notwithstanding the loss of a limb, the petitioner has kept himself more than physically fit and we are informed that the petitioner joins the morning drill at the Unit and ensures that his sedatary duties do not make him either dull or a flabby person.

14. The legal issue which needs to be considered is whether a vested or an accrued right enured in favour of the petitioner when the decision was taken in the year 2001 that the petitioner was not unfit for all kinds of duties which constables had to discharge and that he was fit to discharge duties of a company clerk, which duties are performed by such constables who had better educational qualification. If not, the supplementary questions would arise: Whether the said decision gave birth to a legitimate expectation for the petitioner to be assured that as long as he was fit to perform duties of a company clerk, he would not be boarded out.

15. On the first question, since service under a Government is a matter of status and not a contract, it being settled law that subject to the test of reasonableness and not taking away vested and settled rights, the Government is empowered to unilaterally add or subtract to or from the service conditions of its employees, it would be difficult to hold that any right vested or accrued to the petitioner, for the obvious reason there was no policy framed nor any regulation framed in the year 2001, in respect whereof a right would vest or settle in favour of the petitioner. From the pleadings of the parties and the documents annexed it is clear that a one of decision was taken to accommodate the petitioner. But, the said one of decision has a sound legal and administrative reasoning. The petitioner suffered the disability which placed him in Low Medical Category while performing duties in a hostile condition and there was logic and reason to let the petitioner serve, if he could, on a job where the department lost nothing. Since constables perform duties of a company clerk, why would it be that a physically fit jawan be made to do said duties and not a physically handicapped jawan. It would be a win-win situation. Physically fit jawans would be available for combat duties and those with disabilities, but not of a kind to render them totally unfit, could be accommodate on desk duties. This win-win situation would be in harmony with the concept of a welfare state, which India proclaims to be.

16. In this connection we may note that vide circular order No.28/1989, the Director General CRPF, another Central Para-Military Force has notified a policy decision taken by

CRPF, with the approval of the cadre controlling ministry, i.e. the Ministry of Home Affairs, in which it has been noted that after equipping themselves with artificial limbs, two officers in the Indian Army have reached the level of Generals and thus it has been conveyed that a decision was taken not to board out CRPF jawans unless not found fit for any kind of duties and requiring identification of less strenuous jobs on which handicapped jawans could be adjusted. Called light duty jobs, 4 were identified, being: (i) Dak/office runner; (ii) telephone operator; (iii) attendants in recreation rooms, welfare centres; and (iv) RTO duty.

17. ITBP is also a Central Para-Military Force and is directly under the administrative control of the Ministry of Home Affairs. Prima facie, we find it illogical that one Central Para-Military Force should have a benevolent policy pertaining to its jawans who suffer disabilities while on duty and the other Central Para-Military Force would have none.

18. We expect the Ministry of Home Affairs to be rational and logical and frame uniform policies pertaining to rehabilitation and/or retention in service of all personnel serving under different Central Para-Military Forces.

19. We have to answer the supplementary question which arises for consideration i.e. on the issue of legitimate expectation.

20. Having opined that the petitioner was fit to discharge light duties and having retained petitioner in service to perform light duties and letting petitioner serve for 6 years, would certainly give birth to a legitimate expectation for the petitioner to believe that if he ensured that his physical fitness

remained the same and he discharged duties to the satisfaction of his superiors, he would be permitted to serve till the age of superannuation.

21. We find that the medical board opinion qua the petitioner rendered in the year 2007 continues to be the same as it was in the year 2001. The physical health or the condition of the petitioner has not deteriorated. The disability continues to be the amputation of the right lower limb above the knee and amputation of the left greater toe. If, on the same disability the petitioner was found fit to be adjusted against a lighter duty, we see no reason why he should be boarded out after 6 years. We highlight that the medical board opinion in the year 2007 does not certify or opined that the petitioner was in such Low Medical Category that he could not even perform the duties of a company clerk. Now, jawans are needed to perform wide and varied duties. These may be actual combat. These may be duty as a Sentry at a post. These may be duty in a recreational room. These may be duty as a telephone operator. These may be duty as the dak clerk. Thus, it stands to logic and reason and hence would be a part of fairness in action, a facet of Article 14 of the Constitution, to be observed by the State, that a lowly paid constable at the lowest rung of a Central Para-Military Force who is rendered physically disabled while on active service should be retained in service unless found unfit for any kind of job assigned to constables.

22. The peculiar facts of the instant case have compelled us to hold as aforesaid, and thus we dispose of the writ petition quashing the decision taken to board out the

petitioner. We issue a direction to the respondents to let the petitioner serve under it as long as the petitioner can discharge the duties of a company clerk.

23. We would expect the Ministry of Home Affairs to take a policy decision on the matter and for which we direct the Registry of this Court to send a copy of this decision to the Ministry of Home Affairs.

24. The writ petition stands disposed of in terms of para 22 above.

25. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MARCH 15, 2011
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