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28.01.2021
(Suvendu)

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI

WPA 986 of 2019

Biplab Barman
Vs.
The Union of India & Ors.

Mr. Amalesh Roy
Mr. Ashit Kumar Das
Mr. Santosh Kumar Dhar
Mr. Deborshi Dhar
.....for the petitioner

Mr. Sudipto Majumdar, Ld. ASG,
Mr. Dipayan Pathak
..... for the Union of India

The petitioner was appointed to the post of Constable (General Duty) on 27th May, 2014 in the Sashastra Seema Bal (for short, “SSB”). The petitioner suffered an accident on 9th January, 2015 and was admitted to the Unit Hospital on the same date. The petitioner was discharged after treatment on 3rd March, 2015. According to the petitioner, he was under treatment for 54 days. The case of the petitioner is that despite a gradual recovery after being treated in the Unit Hospital and thereafter being discharged from the said hospital, the petitioner was posted in Barasat from 5th March, 2015 to 6th May, 2019.

The petitioner is aggrieved by the order of removal dated 6th May, 2019 issued by the Commandant, 63 Bn SSB Barasat (W.B.) and the order dated 23rd September, 2019 of the Appellate Authority/Deputy Inspector General, Frontier Hqrs. SSB Siiguri, confirming the order of the Commandant. It appears from an order passed by a Coordinate Bench on 26th August, 2019 in WPA 264 of 2019 that the earlier writ petition filed by the petitioner was disposed of with a direction on the Appellate Authority to dispose of the appeal preferred by the petitioner against the order of removal of the petitioner passed by the Commandant. The petitioner has challenged both the orders of removal passed by the Commandant dated 6th May, 2019 and the Appellate Authority dated 23rd May, 2019 which confirmed the order of the Commandant but changed the expression from “Removed from Service” to “Discharged from Service” with effect from 6th May, 2019.

Learned counsel for the petitioner places several documents to show that the petitioner was fit for service after being treated for 54 days in hospital. Counsel submits that before being declared “unfit” the petitioner was recommended to be sent to the medical board and further that a notification of the Ministry of Home Affairs dated 25th November, 2009

defines medical fitness in a particular manner and includes that fit for all duties may have limitations as to the type of duties and area of employability depending on whether the duties involve severe stress or demand acuity of hearing/vision of both ears or eyes. Counsel submits that the petitioner was removed for reasons which were wholly arbitrary and do not take into account relevant facts of the petitioner's circumstances.

Learned counsel appearing for the respondent nos. 2 to 6, being the SSB, submits that as per Notification dated 1st June, 2011 issued by the Ministry of Home Affairs, candidates on direct appointment are required to qualify the Basic Recruit Training Course (BRTC) within a period of two years from the date of appointment and further that not more than two chances will be given for qualifying the BRTC failing which services are liable to be terminated. Counsel further relies on the expression "active duty" as defined in Section 2(1)(a) under The Sashastra Seema Bal Act, 2007 which provides that "active duty" would mean any duty as a member of the Force during the period in which such person is attached to or forms part of the Force. Counsel submits that the petitioner was under medical treatment till the date of a show-cause notice issued to the petitioner on 30th March, 2019. It is also

submitted that the petitioner was unfit for discharging the duties of the SSB and was therefore removed/discharged from service.

On hearing learned counsel for the parties and on perusing the documents placed, the factual aspect of the matter is required to be clarified. The petitioner was appointed to the post of Constable (General Duty) on 27th May, 2014 and suffered the injury while in training on 9th January, 2015. The petitioner was discharged from the Unit Hospital on 3rd March, 2015. On the same day the petitioner was repatriated on medical grounds and was directed to report at SSB, Barasat where the petitioner was allowed to discharge his duties as Constable (General Duty). The documents annexed to the affidavit-in-opposition of the answering respondents show that from 16th July, 2016 to 21st October, 2016 the petitioner was under treatment for a fracture in the right hip joint and that the “rod” was scheduled to be removed in December, 2016. This would appear from internal/intra office note exchanged between the offices/adjunct of the SSB. According to these internal communications, the petitioner was “under treatment”. A subsequent intra office note dated 18th January, 2017 referring to a hospital note dated 21st October, 2016 states that the petitioner “May be send to Medical Board”. The same status is shown in a

intra office note dated 30th January, 2017. An internal fax message from the Commandant to the officials of the SSB at Siliguri dated 13th January, 2018 states that the petitioner is “ UN FIT” and that the reasons for not completing BRTC within two years from the date of appointment is stated as “20.6.16”. There are similar internal fax messages which show that the petitioner was declared unfit by reason of the right hip joint injury. The last internal fax message is dated 19th July, 2018 annexed to the affidavit of the respondents and reiterates that the petitioner “sustained injury during BRTC for which he had fractured RT shaft of femur causing shortening of leg. He is under treatment and physiotherapy till date”.

The dispute in the instant matter relates to the petitioner being discharged from duty on the ground of being found to be medically unfit but most specifically under Rule 26 of the Notification dated 1st June, 2011 which requires candidates on direct appointment to qualify the BRTC within a period of two years from the date of appointment and further that a candidate will only be given two opportunities for qualifying the BRTC failing which services are liable to be terminated.

Two issues arise from the documents on record which need to be considered.

The petitioner was appointed on 27th May, 2014 although the internal fax message refers to the date of appointment as 20th June, 2014 and suffered serious injuries while undergoing BRTC on 9th January, 2015. The petitioner was discharged from Unit Hospital in March, 2015. There is no document on record which certifies that the petitioner continued to remain in hospital beyond March, 2015. The internal fax messages/intra office notes refer to further intra office communications and records that the petitioner is “under treatment”. The status of the petitioner was repeatedly certified as being “under treatment” by intra office notes till 2018 by referring to internal communications of October, 2016. Notably, the intra office note of 18th January, 2017 indicates that the petitioner may be sent to the medical board which is reiterated by the further similar internal communications. However, there is no document showing that the petitioner was certified by a medical board upon a subsequent examination to be medically unfit for discharging his duties. The specific averment in the writ petition that the petitioner was repatriated under an order dated 3rd March, 2015 and joined the SSB, Barasat on 5th March, 2015 where the petitioner was allowed to discharge his normal duties as Constable (General Duty) till 6th May, 2019 and that the petitioner was fit

for all duties at any posting has been disputed in the affidavit-in-opposition by a bare statement that the medical officer declared that the petitioner was unfit for undergoing BRTC. The affidavit-in-opposition significantly states that “*he was fit for limited light duties*”. The allegation on the part of the respondents that the petitioner was declared medically unfit by the medical officer for undergoing BRTC has not been corroborated by a single document from which the Court can arrive at such a finding.

The second issue is Rule 26 which has been relied upon in the impugned order of the Appellate Authority dated 23rd September, 2019 confirming the order of the Commandant dated 6th May, 2019 and discharged the petitioner from service with effect from 6th May, 2019. The Appellate Authority/Deputy Inspector General, SSB, Silliguri has wholly relied on Rule 26 namely that there is no provision for retaining a candidate in the service of the SSB who has not completed BRTC within a period of two years from the date of appointment. On perusing the relevant Rule, this Court is of the view that Rule 26 must be read conjointly with the attendant facts in respect of a candidate. It cannot be applied without due assessment of facts which may have interfered with an applicant undertaking BRTC within two years from the date of the applicant’s appointment. In this

case, the admitted fact is that the petitioner suffered serious injuries in the nature of fracture in the hip bone while undergoing the first BRTC. The petitioner was under active medical treatment for 54 days thereafter. The subsequent status report of the petitioner remaining medically unfit has been discussed above and the lacuna therein noticed. There cannot be any certification of being medically unfit in the absence of documents from a certified medical board declaring the medical condition of the petitioner. Further, since the petitioner was appointed on 27th May, 2014, the two years would presumably end on 26th July, 2016. In this context there is also no document indicating that after 54 days of the initial hospitalization the petitioner was given any opportunity to take the second BRTC. The fact, that the petitioner was considered as fit for limited light duties, has been stated in the affidavit-in-opposition of the respondents and there is no answer as to why the petitioner was suddenly served with a show-cause notice on 30th March, 2019 after the petitioner was discharging his normal duties as Constable in Barasat.

Having found the gaps in the factual position leading to the service of the show-cause notice and the removal and subsequently the discharge of the petitioner from service by the answering respondents,

this Court is of the view that the reasons given in the impugned orders are arbitrary and without due consideration of the factual scenario which prevented the petitioner from undertaking a second BRTC within 26th July, 2016. The impugned decision fails to consider the possible areas, in the facts of this case, where the Rule was required to be relaxed. There cannot be a strict and total application of Rule 26 without carving out exceptions by reason of compelling circumstances.

In view of the above, WPA 986 of 2019 is allowed in terms of prayer (a). The impugned orders dated 6th May, 2019 and 23rd September, 2019 are set aside. The concerned respondents including the Commandant (respondent no.5) are directed not to give effect to the impugned orders of removal/discharge from service.

Urgent photostat certified copy of this order, if applied for, be given on the usual undertakings.

(Moushumi Bhattacharya, J.)