

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 2859 of 2012

Tejen Mitra & Ors.
Vs.
Union of India & Ors.

For the petitioner : Mr. Arjun Roy Mukherjee

For Union of India : Mr. Subrata Roy

Heard on : 21.03.2023 & 23.03.2023

Judgment on : 23rd March, 2023.

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, praying for release of pay and other service benefits payable to the petitioners for the period with effect from 25th January, 2004 to 1st September, 2005.

2. The petitioner no.1, was initially posted as Sub-Inspector, Railway Protection Special Force, (hereinafter referred to as the "RPSF" for short) and on completion of his training he was posted at 1st Battalion RPSF, Assam. Subsequently, he was transferred to 8th Battalion, Chittaranjan.

3. The petitioner nos. 2 to 7 were appointed as Constable of RPSF, Chittaranjan, and on completion of their training they were also posted at 8th Battalion, RPSF, Chittaranjan.

4. The petitioners were medically de-categorized while they were posted at 8th Battalion, RPSF, Chittaranjan. The petitioner no.1 was declared medically unfit for his, the then post of Sub-Inspector but as per medical examination report it was further declared that he was fit for any post for B-1 and below but not fit for RPF and RPSF.

5. The petitioner nos. 2 to 7, were also declared medically unfit. Consequent upon de-categorization all the petitioners were temporarily posted in supernumerary posts at 8th Battalion, RPSF, Chittaranjan. While being so posted in the supernumerary posts, by an order dated 26th September, 2003, issued by the Commandant, 8th Battalion, RPSF, Chittaranjan, the petitioner no.1 was posted in the operational company at "A Coy" and the petitioner nos. 2 to 7 were posted at B, C, D and E Coy. Since the aforesaid postings, transfers were contrary to paragraph 13.03 of Chapter XIII of the Indian Railway Establishment Manual (hereinafter referred to as the "said manual"), the petitioners had requested the Commandant, 8th Battalion, RPSF, Chittaranjan not to post them in operational company due to their medical disabilities.

6. Since their request was not adhered to, a writ application was filed before this Hon'ble Court and in compliance of the order passed in connection with the said writ application, the transfer orders were

cancelled and the petitioners were allowed to continue, to serve at the 8th Battalion, RPSF, Chittaranjan Head Quarter.

7. Incidentally, despite the fact that the petitioners were required to be absorbed in suitable alternative employments, by an order dated 15/24th January, 2004, Commandant, 8th Battalion, RPSF, Chittaranjan, directed the petitioners to once again appear for medical examination.

8. Challenging the said order, a writ application was filed which was registered as WP No. 2524 (W) of 2004.

9. By an order dated 23rd February, 2004, a coordinate Bench of this Hon'ble Court was, inter alia, pleased to dismiss the said writ application.

10. Being aggrieved, the petitioners filed a mandamus appeal, which was registered as FMA 338 of 2005. It is, during the pendency of the appeal, that the Commandant, 8th Battalion, RPSF, Chittaranjan, for the first time, by a letter dated 1st August, 2005 directed the petitioner to join their duty.

11. Despite the petitioners reporting for duty, the petitioners were not permitted to join the duty, inter alia, on the ground that the matter was *sub judice* before this Court. Faced with the aforesaid situation, a connected application, being CAN 7786 of 2005 was filed in connection with the pending appeal, whereupon by an order dated 31st August, 2005, the Division Bench of this Hon'ble Court was pleased to permit the petitioners to join and report to the Commandant, 8th Battalion,

RPSF, Chittaranjan, on 2nd September, 2005 at 11.00 a.m. It is pursuant to the aforesaid direction that the petitioners reported for duty and were permitted to join.

12. The aforesaid mandamus appeal was finally heard and disposed of by a judgment and order dated 1st February, 2008 passed by the Division Bench of this Hon'ble Court. By the aforesaid order, the Division Bench of this Hon'ble Court, while setting aside the order dated 15/24th January, 2004 passed by the Commandant, 8th Battalion, RPSF, Chittaranjan, directed the respondents to proceed and act in terms of paragraph 13.03 of the said manual. This Hon'ble Court by the aforesaid order further made it clear that after absorption, if the petitioners were required for a medical checkup, then they shall obey such an order and subject themselves to such medical checkup, strictly in accordance with law after considering the observations made in the said order.

13. Pursuant to the aforesaid order passed by the Division Bench of this Hon'ble Court, the Commandant, 8th Battalion, RPSF, Chittaranjan, by an order dated 5th June, 2011, was inter alia pleased to regularize the unauthorized absence of the petitioners with effect from 25th January, 2004 to 1st September, 2005, by treated such period as leave without pay.

14. Challenging the aforesaid direction insofar as the same directed leave without pay, the present writ application has been filed. The petitioners not only claim arrears of salary but also financial

upgradation in terms of the Modified Assured Career Progression Scheme.

15. Mr. Mukherjee, learned advocate representing the petitioners submits that the Division Bench of this Hon'ble Court having setting aside the order dated 15/24th January, 2004 and having interpreted the provisions of paragraph 13.03 of the said manual by holding that once a railway servant was declared medically unfit, he shall be given suitable alternative employment but before that status is confirmed, the employee concerned has to be kept on a supernumerary post, and that he cannot be subjected to re-examination. The Commandant, 8th Battalion, RPSF, Chittaranjan, had erred in regularizing the petitioners' absence as leave without pay.

16. By referring to paragraph 13.03 of the said manual he says that once a member of the force is declared medically unfit and is decategorized, no officer has the authority to permit the said railway servant to perform duties in the post beyond that date. If the railway servant cannot be immediately adjusted against or absorbed in any suitable alternative post, he may be kept on a special supernumerary post, in the grade in which the concerned employee was working on regular basis before being declared medically unfit, pending location of suitable alternative employment for him with the same pay scale and service benefits, efforts to locate suitable alternative employment starting immediately. The special supernumerary post so created will stand abolished as soon as the alternative employment is located.

17. Since the petitioners were decategorized and were declared medically unfit, the Commandant, 8th Battalion, RPSF, Chittaranjan, at the first instance, exceeded his jurisdiction in directing the petitioners to be posted in operational company in A, B, C, D and E Coys. The respondent no.4, subsequently, despite having revoked such an order, in compliance of the direction passed by this Court, had once again exceeded his jurisdiction in directing the petitioners to appear for re-examination.

18. The petitioners were at all material times, ready and willing to report for duty. It is the Commandant, 8th Battalion, RPSF, Chittaranjan, who prevented the petitioners from attending the duty. The petitioner cannot be penalized for wrong, which they did not commit. No enquiry had been conducted against the petitioner. Denial of pay tantamount to punishment. Without holding any enquiry, the petitioners could not have been inflicted with the punishment of denial of pay and other service benefits. The aforesaid order has far-reaching consequences. The same also denies the petitioners the right to financial upgradation, in terms of the Modified Assured Career Progression Scheme. The Railway Protection Force Act, 1957 (hereinafter referred to as the "said Act") and the Railway Protection Force Rules, 1957 (hereinafter referred to as the "said Rules") do not authorize the Disciplinary Authority to inflict punishment of this nature. The aforesaid punishment cannot be sustained. This Hon'ble Court may be pleased to set aside the same.

19. *Per contra*, Mr. Roy, learned advocate representing the Union of India by referring to affidavit-in-opposition submits that after de-categorization of the petitioners, supernumerary posts were created, and all the petitioners were accommodated in such supernumerary posts. In support of his aforesaid contention, he places before this Court a copy of an office order dated 17th January, 2003, by which the supernumerary post had been created for the petitioner no.1. He, however, submits that since the cases of medical de-categorization of RPSF personnel were abnormally increasing and since there was a tendency for a number of RPSF staff, for working on supernumerary posts by getting themselves medically decategorized, on some pretext or the other after rendering less number of years of service, the matter was examined by the Board whereupon it was decided to get all cases of medical de-categorization, be examined by duly constituted Medical Board. It is in compliance of the board's instruction, the battalion order dated 24th January, 2004 was issued, directing the petitioners to report to the Chief Medical Director, New Delhi for medical re-examination. The respondent no.4 cannot be faulted for issuing the aforesaid order. He, however, submits that the petitioners refused to adhere to the said order and absented themselves from duty, with effect from 24th January, 2004 without any information and authorisation.

20. Pursuant to the direction passed by the Division Bench of this Hon'ble Court the decision for medical re-examination of the petitioners was set aside. By placing before this Court a communication in writing

dated 29th December, 2010 issued by the Deputy Secretary Railway Board, Government of India ministry of railways, Mr Roy submits that by such letter the respondent no.4 was conferred with the authority to decide the matter pertaining of the period of absence of absence of all the staff involved in the case. Let a copy of the communication dated 29th December, 2010, as placed before this Court by Mr. Roy in course of hearing today, be kept with the record.

21. It is pursuant to the aforesaid authority given to the respondent no.4 that the order dated 5th January, 2011 had been passed. The respondent no.4 cannot be faulted for having passed the said order.

22. By referring to Rules 151, 146, 141, 147 and 33 and schedule II and III of the said Rules, he submits that it is within the administrative powers of the superior officer to appropriately deal with the erring members of the force. He says that it is for the authority to take appropriate decision with regard to internal administration, there was no irregularity, in the respondent no.4 directing the unauthorized absence of the petitioners to be regularised, as leave without pay.

23. Heard the learned advocates appearing for the respective parties and considered the materials on record. I find admittedly the petitioners had been de-categorized and were declared medically unfit in terms of paragraph 13.03 of the said manual. Records also reveal that even after the petitioners were decategorized, the Commandant, 8th Battalion, by an order dated 29th September, 2003 posted the petitioners no. 1 to 7 to the operational company of A to E Coy. Since,

according to the petitioners, the same could not have been done and was contrary to paragraph 13.03 of the said manual, a writ application was filed whereupon pursuant to the direction passed by this Court, the transfer orders were withdrawn. I find that the respondents had created supernumerary posts for the petitioners. Circumstances under which the supernumerary post can be created would more fully appear from the relevant portion of the said manual which is extracted hereinbelow:-

“ INDIAN RAILWAY ESTABLISHMENT MANUAL
VOLUME-1
(REVISED EDITION 1989)

Chapter XIII – Absorption of Medically
Incapacitated Staff in Alternative Employment

ADVANCE CORRECTIN SLIP NO.77

Substitute the following for the existing Chapter XIII and paragraphs 1310-1315 therein:

Chapter XIII

*Absorption of disabled /medically
decategorised staff in Alternative
Employment.*

1301. *A Railway servant who fails in a vision test or otherwise by virtue of disability acquired during service becomes physically incapable or performing the duties of the post which he occupies should not dispensed with or reduced in rank but should be shifted to some other post with the same pay scale and service benefits.*

1302. *Classification of Railway Servants declared medically unfit:- Railway servants acquiring disability during service and declared medically unfit are divisible into two groups:*

- (i) Those completely disabled for further service in any post in the railway, i.e. those who cannot be declared fit even in the 'C' medical category; and*
- (ii) Those disable/incapacitated for further service in the post they are holding but declared fit in a lower medical category and eligible for retention in service in posts corresponding to this lower medical category.*

1303. *The railway servants both in group (i) and group (ii) of para 1302 above cease to perform the duties of the posts, they are holding from the date they are declared medically unfit for the present post. No officer has the authority to permit the Railway Servant concerned to perform the duties in the post beyond that date. If such a Railway Servant cannot be immediately adjudged against or absorbed in any suitable alternative post he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit pending location of suitable alternative employment for him with the same pay scale and service benefits, efforts to locate suitable alternative employment starting immediately.*

The special supernumerary post so created will stand abolished on as the alternative employment is located.

(quoted from the judgment and order dated 1st February, 2008 in FMA 338 of 2005)".

24. As would appear from the above once a railway servant is declared medically unfit, he is not only retained in the supernumerary post till such time a suitable alternative employment is located for him, but he also continues to enjoy the same pay scale and the service benefits which he had been enjoying, at the time when he was declared medically unfit and had been de-categorized. It would also appear from the aforesaid paragraph that no officer has any authority to permit such railway servant who had been de-categorized to perform any duty beyond the said date of de-categorization. Incidentally, the Commandant, 8th Battalion, while proceeding in terms of the direction issued by the Railway Board, had directed the petitioners to appear for re-medical examination and a movement order to such effect was also issued. Since the petitioners did not comply with such movement order, the petitioners were treated to be absent from duty unauthorisedly. Such fact would corroborate from the statement made by the respondent no.4, in the affidavit affirmed by him on 17th May, 2017.

25. I find that subsequently although, the respondent no. 4 had called upon the petitioners to join their duties, they were not permitted to join. Whereupon, the petitioners had moved a connected application in the pending appeal. Pursuant to the order dated 31st August 2005

passed by the Division Bench of this Hon'ble Court, the petitioners were permitted to join their duties on 2nd September 2005. The said appeal was finally heard and disposed of by the Division Bench of this Hon'ble Court by an order dated 1st February 2008. The Division Bench, by the aforesaid order after interpreting the provisions of paragraph 13.03 of the said manual concluded that once a member of the force had been declared medically unfit under paragraph 13.03 of the said manual, and if he cannot be immediately posted or absorbed in a suitable post, then he shall be kept on a supernumerary post, in the grade he was working, before being declared medically unfit. The Division Bench of this Hon'ble Court further concluded that the rule does not provide that once a member is declared medically unfit, the instructions contained in paragraph 13.03 of the said manual can be bypassed and instead the concerned de-categorized /already medically unfit staff, can be once again sent for re-medical examination. On the basis of the observations made as aforesaid, it is apparent that the order dated 24th January 2004 could not have been enforced since, the Court directed the respondents to act in terms of paragraph 13.03 of the said manual.

26. I find that subsequent to passing of the aforesaid order, the respondent no. 4 consequent upon authorisation given to him by Railway Board, vide letter dated 29th December 2010, by order dated 5th January 2011 was, inter alia, pleased to regularize the period of unauthorized leave of the petitioners, however, on "no work no pay"

basis, i.e., leave without pay. The question for consideration in the present writ application is whether the said respondent no.4 having found that it had no jurisdiction and authority to direct the petitioners to appear for re-medical examination, could treat the petitioners not to have discharged their duties, for the petitioners not complying with the direction/movement order, as issued by him on 24th January 2004 which had in effect been set aside by the Division Bench of this Hon'ble Court.

27. I further find it has already been held that the respondent no. 4 could not have subjected the petitioners to re-medical examination as such the failure on the part of the petitioners to adhere to such direction could not tantamount to absence from duties. I still further find that the respondent no. 4, in paragraph 4 of sub paragraph 3 at page 5, of the affidavit affirmed by him on 17th May, 2017, has, *inter alia*, stated “... However the petitioners, were refused to join the duties by the commanding officer 8/BN/RPSF, with a view that the case was still pending and no order dated 23.08.2004 of the Hon'ble Court was recorded by No. 8/BN/RPSF till 28.08.2002.”

28. Having so concluded, and having regard to paragraph 13.03 of the said manual, in my view, the respondent no.4 could not have denied the pay to the petitioners, for the period of absence which was regularized, especially when the petitioners were prevented from joining their duties, as admitted by the said respondent in his affidavit, as also by reasons of administrative overreach in issuing the movement orders,

during the subsistence of de-categorisation and prior to the petitioners being accommodated in an alternative post.

29. In view thereof, the aforesaid order dated 5th January 2011, insofar as the same denies pay and other benefits to the petitioners is set aside and quashed. The petitioners shall be entitled to all benefits, as were admissible to them, by treating them to have continued in service from 25th January 2004 to 1st September 2005 with full pay and other consequential benefits as the petitioners may be entitled to as per service conditions.

30. Accordingly, the writ petition is allowed and disposed of.

31. There shall be no order as to cost.

32. Urgent photostat certified copy of this judgment if applied for be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)

sb/saswata.