

05.10.2023.
Item No. 2.
Court No. 1
ap

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CIVIL APPELLATE JURISDICTION
(Appellate Side)

M.A.T. No. 23 of 2021
With
I.A. No. CAN 1 of 2021
And
I.A. No. CAN 3 of 2022
And
I.A. No. CAN 4 of 2022

Union of India & Ors.
Versus
Shri Biplab Barman

Mr. Sudipto Kumar Mazumder, Id. DSGI,
Mr. Ajoy Kumar Singhanian,
Mr. Sourab Kar,
Mr. Saptak Sarkar.

....For the appellant.

Mr. Jagriti Mishra,
Mr. Santosh Kumar Dhar,
Mr. Asit Kumar Das,
Ms. Ananya Bhattacharya,
Ms. Mrinmoyee Das.

....For the respondent.

1. Heard Mr. Mazumder, the learned Deputy Solicitor General of India for the Union and Mr. Jagriti Mishra, Counsel for the respondent/writ petitioner.
2. The facts of the case are that the petitioner was appointed as Constable (General Duty) on 27th May, 2014 in the Sashastra Seema Bal (in short 'SSB').
3. In course of mandatory Basic Recruitment Training Course (in short 'BRTC'), he sustained an grievous injury on 9th January, 2015 and was admitted at the Unit Hospital. He was discharged after

54 days of treatment. He had a steel plate implanted in his leg. The process of recovery was gradual.

4. The petitioner came to be posted in Barasat from 5th March, 2015 to 6th May, 2019 in sedentary duties.

5. On 6th May, 2019 the Commandant, 63rd Battalion on SSB, Barasat issued an order terminating the service of the petitioner under Rule 26 of the Sashastra Seema Bal Rules, 2009. The Rules themselves have been framed under the Sashastra Seema Bal Act, 2007. Rule 26 of the said Rules of 2009 is as follow:

26. Termination of service of enrolled persons on the grounds of unsuitability – *Where a Commanding Officer not below the rank of Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force, the enrolled person shall be-*

(a) so informed;

(b) furnished with the particulars of all mater adverse to him; and

(c) called upon to urge any reasons he may wish to put forward in favour of his retention in the service:

Provided that clauses (a) (b) and (c) shall not apply, if the Commanding Officer not below the rank of Commandant is satisfied that for reasons to be recorded by it in writing, it is not expedient or reasonably practicable to comply with the provisions thereof;

(2) After considering the explanation, if any, the Commanding Officer not below the rank of Commandant, may call upon the enrolled person to retire or resign and on his refusing to do so, the enrolled person may be compulsorily retired or discharged from the service.

6. The petitioner preferred an appeal before the Appellate Authority which has confirmed the order of the First Authority on 23rd September, 2019.

7. The respondent then filed W.P.A. No. 986 of 2019, challenging the aforesaid two orders of the First and the Appellate Authority by the impugned judgment.

8. The learned Single Bench found that the petitioner could not have been terminated under Rule 26. According to the learned Single Judge, if the petitioner's service is required to be put an end on the ground of medical unfitness, the procedure under Rule 27 of the said Rules of 2009 are to be followed.

9. Rule 27 of the Sashastra Seema Bal Rules, 2009 stipulates as follows:

“27. Retirement or discharge of subordinate officers and enrolled persons on grounds of physical unfitness. – (1) Where a Commanding Officer not below the rank of Commandant is satisfied that a subordinate officer or an enrolled person is unable to perform his duties by reason of any physical disability, he may direct that the said subordinate officer or enrolled person, as the case may be, be brought before a medical board.
(2) The medical board shall consist of such officers and shall be constituted in such manner as may, from time to time, be laid down by the Director-General.
(3) Where the said subordinate officer or the enrolled person is found by the medical board to be unfit for further service in the Force, as the case may be, the authority as specified in rule 18, if he agrees with the finding of the medical board, communicate to the said person the findings of the medical board and thereupon, within a period of thirty days of such communication, the person may make a representation against it to the competent authority supported by a prima-facie evidence of error of judgement in the opinion expressed by the medical board and such an evidence shall be from a government doctor not below the status of Civil Surgeon and shall contain specific mention that he has taken into consideration the findings of the medical board before giving his opinion.

(4) Where the person declared to be unfit for further service makes a representation under sub-rule (3), the same shall be forwarded to the next superior officer, who shall have the case referred to be reviewed by a fresh medical board, which shall be constituted in such manner as may from time to time, be laid down by the Director-General.

The superior officer may, having regard to the findings of the fresh medical board, pass such order as he may deem fit.

(5) Where no representation is made against the decision of the medical board under sub-rule (3), the authority as specified in rule 18, as the case may be, may (if he agrees with the findings of the medical board) order the retirement or discharge of person declared to be unfit for further service in the Force.”

10. Before this Court the learned DSG would rely upon a decision of the Delhi High Court dated 22nd February, 2021 in the case of **Ravi Rajan Kumar – Vs. – Union of India** in W.P. (C) No. 2402 of 2021. The facts of the said case, according to the learned Deputy Solicitor General of India, are similar and the petitioner’s termination under Rule 26 therein appears to have been upheld by a Division Bench of Delhi High Court.

11. This Court notes from paragraph 8 of the said **Ravi Rajan Kumar (supra)** that there was a formal appointment order issued to the petitioner therein dated 25th July, 2017 which says that the appointment is purely temporary. It is also stated that he would be on probation for two years from the date of appointment.

12. The said case is, therefore, distinguishable on facts. It is also seen that the petitioner therein could

not complete his probation post the BRTC Training being left incomplete.

13. The petitioner therein was found unfit to do any duty whatsoever even during probation. He availed regular leave for medical treatment. It is in those facts that the Delhi High Court held that the case fell under Rule 26 of the said Sashastra Seema Bal Rules, 2009.

14. The next decision dated 1st March, 2021 relied upon by the learned Deputy Solicitor General of India is the case of ***Dinkar Kumar Singh – Vs. – Union of India & Ors.*** in ***W.P. (C) No. 12363 of 2019***. The facts of this case are substantially similar to the ***Ravi Rajan Kumar's*** case (supra). The said latter decision is mentioned and followed in the ***Dinkar Kumar Singh's case*** (supra) as well.

15. Mr. Jagriti Mishra, Counsel for the respondent would rely upon a decision of the Supreme Court of India in the case of ***Union of India & Ors. – Vs. – Rajpal Singh*** reported in ***(2009) 1 Supreme Court Cases 216*** at paragraphs 24, 25 and 26 thereof.

16. The facts of the said case are that the Army discharged the respondent a JCO under Rule 13(3)I(iii) of the Army Rules, 1954 on the recommendation of a 'Release Medical Board'. The JCO was found in the 'lower medical category' for two years after being commissioned. Since the JCO was serving for two years it was held that he could only be discharged

under Special Category of Rule 13(3)I(ii) on the recommendation of an “Invalidation Board” and not by a “Release Medical Board” under the general powers under Rule 13(3)I(iii). At paragraphs 24, 25 and 26 it was stated as follows:

24. *It is plain that a discharge on the ground of having been found “medically unfit for further service” is specifically dealt with in Clause (I)(ii) of the Table, which stipulates that discharge in such a case is to be carried out only on the recommendation of the Invalidating Board. It is a cardinal principle of interpretation of a statute that only those cases or situations can be covered under a residual head, which are not covered under a specific head. It is, therefore, clear that only those cases of discharge would fall within the ambit of the residual head viz. I(iii) which are not covered under the preceding specific heads. In other words, if a JCO is to be discharged from the service on the ground of “medically unfit for further service”, irrespective of the fact whether he is or was in a low medical category, his order of discharge can be made only on the recommendation of an Invalidating Board. The said Rule being clear and unambiguous is capable of only this interpretation and no other.*

25. *Having reached the said conclusion, we feel that the appellants were bound to follow Rule 13(3)I(ii), more so having placed the respondent in low medical category (permanent) for a period of two years from October 2001 he was discharged from service on 31-8-2002, relying on the recommendation of the Recategorisation Board held on 24-10-2001. As noted in the show-cause notice extracted above, the said Board had placed the respondent in “permanent low medical category”. Be that as it may, the main ground of discharge being medical unfitness for further service, the appellants were bound to follow the prescribed rule.*

26. *It is well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Justice Frankfurter in Vitarelli v. Seaton [3 L Ed 2d 1012 : 359 US 535 (1958)] , where the learned Judge said: (US pp. 546-47)*

“An executive agency must be rigorously held to the standards by which it professes its action to be judged. ... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. ... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.”

The afore-extracted observations were approved and followed in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421 : 1975 SCC (L&S) 101] and then again in Amarjit Singh Ahluwalia (Dr.) v. State of Punjab [(1975) 3 SCC 503 : 1975 SCC (L&S) 27] wherein, speaking for a three-Judge Bench, P.N. Bhagwati, J. had observed that though the above view was not based on the equality clause of the United States Constitution and it was evolved as a rule of administrative law but the principle remains the same, namely, that arbitrariness should be eliminated in a State action. (Also see Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] .)

17. This Court, however, finds that the principles laid down in the **Rajpal Singh’s case** (supra) are clearly applicable in the facts of the instant case.

18. This Court has carefully considered the pleadings in the Court below. The petitioner sustained injury in course of the BRTC and was treated for 54 days at the Unit Hospital. He obviously could not complete the Training.

19. Despite the above, the respondent did not invoke Rule 26 of Rules of 2009 at the relevant point of time. He was allowed to serve at the Sashastra Seema Bal Unit at Barasat, West Bengal, from 5th March, 2015 to 6th May, 2019. The petitioner has by default and/or by conduct been allowed to serve in the Sashastra Seema Bal for four years. He was, therefore, defacto in service.

20. This Court is of the clear and unequivocal view that the appellant cannot invoke Rule 26 to discharge the writ petitioner/respondent. The only Rule under which the petitioner can be dealt with for medical unfitness is Rule 27 of the Rules of 2009.

21. It is submitted by the Counsel for the parties that a Co-ordinate Bench of this Court had in its order dated 2nd March, 2023 directed constitution of the Medical Board and asked the petitioner to present himself for assessment. The Medical Board is stated to have been declared the petitioner unfit for service.

22. Since the Medical Board already having found the petitioner unfit for service, let appropriate orders be passed by the respondent authorities under Rule

27 of the Sashastra Seema Bal Rules, 2009 within a period of one month from date. All the consequential benefits to the petitioner shall be made available to him.

23. With the aforesaid observations and the discussions, the impugned judgment is upheld. M.A.T. No. 23 of 2021 shall stand dismissed.

24. In view of the dismissal of the appeal itself, all connected pending applications are dismissed.

25. Interim order, if any, shall stand vacated. There will be no order as to costs.

26. Learned Deputy Solicitor General of India seeks stay of operation of the order. In the facts and circumstances of the case, let this judgment be stayed for a period of 45 days from date.

27. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)