

Jharkhand High Court

Daroga Yadav vs The Union Of India (Uoi) And Ors. on 23 March, 2006

Equivalent citations: 2006 (2) JCR 353 Jhr

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Bench: S Mukhopadhaya, N N Tiwari

JUDGMENT S.J. Mukhopadhaya, J.

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1. The petitioner was in the services of the Border Security Force (hereinafter referred to as the B.S.F.). In the extremist attack in Jammu & Kashmir State, he sustained Page 658 bullet injuries resulting into complete blindness. He was declared 100% disabled. By the impugned order No. A 228/Estt-1/2004/33930-39 dated 31st December, 2004, he has been made to retire from service on the ground of physical disability, declaring him unfit for the services w.e.f. 31st December, 2004 under the cloak of Rule 25 of the B.S.F. Rules, 1969, whereas the petitioner claimed protection under the provision of "The Persons with Disabilities (equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Disabilities Act, 1995).

2. In the present case, the questions arise for determination are:

(a) Whether the petitioner is entitled to get protection under Section 47 of the Disabilities act?

(b) Whether the impugned order of retirement dated 31st December, 2004 is illegal and arbitrary ?

Relevant Facts:

3. The petitioner was in the services of B.S.F. He was appointed as a constable on 25th May, 1986 and after training was sent to Punch border in Jammu & Kashmir State. On 24th May, 1991, while he was on patrolling duty at Copwara in the State of Jammu & Kashmir, the extremists attacked on him and other members of the Battalion. Fourteen army personnel including the petitioner were injured. The petitioner sustained bullet injuries on his back, hand and both the eyes, resulting into 100% blindness. He was treated in the All India Institute of Medical Sciences, New Delhi, where he was declared 100% blind on 11th November, 1993. However, his services were not dispensed with. Subsequently, the Disabilities Act, 1995 came into force. In view of provisions laid down under Section 47 of the said Act. By an Order No. A 186/CAS/estt-1/TC & S-98/8449-51 dated 23rd October, 1998, the petitioner was attached with the Administrative Wing of B.S.F. at Hazaribagh for Hindi typing.

4. In the impugned order dated 31st December, 2004, it has been mentioned that a Medical Board held on 27th September, 2004 which placed him in the medical category SiHtAiPiEs with 100% disabled and the said Board also considered him unfit for further service. But by the letter written by the petitioner dated 13th December, 2004 addressed to the Inspector General, B.S.F., C.G.O. Complex, Lodi Road, New Delhi (Annexure-3), he has denied such fact and specifically stated that

he has not been examined by any Medical Board nor he was given any information regarding any such report of a Medical Board. By the said letter, he also requested to supply a copy of the notice by which he was informed to appear before the Medical Board. It was alleged that on the basis of a forged report of so called Medical Board, steps were taken to retire him.

5. It may be mentioned that the Respondents by letter No. A-254/estt-1/2004/5098-99 dated 7th December, 2004 earlier informed the petitioner that on the recommendation of a Medical Board, they have decided to superannuate him from service. Having received the said letter, the petitioner had sent the said protest letter dated 13th December, 2004. The petitioner at Paragraph-! 7 to the writ petition has specifically denied any notice to appear before the Medical Board, but the Respondents have not controverted the said statement in reply to Paragraph-17 to the writ petition, the following statement has been made:

That in reply to para 17 of the writ petition, the answering respondents say and submit that it is an irony that the petitioner although is totally blind is demanding Page 659 for retention in service whereas, it is well known fact that BSF Is in Armed Force of the Union and the personnel of this Force are to be deployed in difficult terrain and conditions in the Borders of the country and therefore, the claim of the petitioner has no locus standi.

6. The Respondents have enclosed a copy of the report of a Medical Board stated to have held its meeting on 27th September, 2004 (Annexure-B to the counter affidavit). Though signature of three doctors and two others have been obtained, the place of 'signature of individual is blank. It neither bears the signature of the petitioner nor his thumb impression. The Respondents have not enclosed copy of any notice and to be sent to the petitioner for appearance before the Medical Board nor have mentioned the memo number or date of such notice. In fact, they have not denied the petitioners' statement that no notice was ever served on him nor have denied the fact stated by the petitioner that Medical Board had not examined him.

7. The petitioner has stated that he was examined by the Medical Board in the year 1993 when he had sustained injuries and was declared 100% blind. In the letter dated 7th December, 2004, while reference of Medical Board's recommendation has been shown, the date thereof has not been mentioned.

Thus, there is a genuine doubt raised by the petitioner in respect to Medical Board report said to have been signed on 27th September, 2004 and approved by the approving authority on 3rd November, 2004.

8. Learned counsel for the Central Government relied on Notification S.O. 995 E dated 10th September, 2002 issued by the Central Government in exercise of powers conferred by proviso to Section 47 of the Disabilities Act, 1995. By the said notification, the Central Government has exempted all categories of posts of 'Combatant Personnel' of Central Para-military Force; Central Reserve Police Force; Central Industrial Security Force; Indo-Tibetan Border Police; Border Security Force; and Assam Rifles. It was submitted that all categories of posts of 'Combatant Personnel' having been exempted from the rigor of Section 47 of the Disabilities Act, 1995, it was

open to the Respondents to dispense with the services of petitioner.

9. Learned counsel for the petitioner urged Notification S.O. 995E dated 10th September, 2002 is prospective and cannot be given retrospective effect to persons disabled in the year 1991. The petitioner having been given protection under Section 47, it cannot be taken away by Notification dated 10th September, 2002.

10. Though the aforesaid argument is attractive, but it cannot be accepted, the petitioner having never allowed any benefit like extension of service. "The Persons with Disabilities (Equal opportunities, Protection of Rights And Full Participation) Act, 1995" was enacted to give proclamation on the full participation and equity of people with a disability. It was extended to the whole of India except Jammu & Kashmir.

Under Section, 47 prohibition has been imposed from dispensing with services or reducing in rank of an employee who acquires disability during his service. If a person is not found suitable for a post having become disable is to be shifted to some other post with same scale of pay and service benefits. If it is not possible to adjust against any post then such person is to get an employment on a supernumerary post until he attains the age of superannuation.

11. In view of the said prohibition, it was not open to the Respondents to dispense with his service, but such prohibition having been lifted by Notification S.O. 995E dated Page 660 10th September, 2002, in respect to all categories of posts of 'Combatant Personnel', it is open to the competent authority to dispense with services of a disabled person who is not in a position to perform job against post of 'Combatant Personnel', but only after following the procedure.

12. In view of aforesaid finding, we hold that the petitioner cannot claim protection under Section 47 of the Disabilities Act, 1995 and thereby the first question is answered in affirmative i.e. in favour of the Respondents and against the petitioner.

13. So far as the second question relating to legality and propriety of the impugned order dated 3rd December, 2004 is concerned, a genuine doubt has been raised by the petitioner that he was not medically examined by a Medical Board in the year, 2004. The Respondents have failed to meet the same. They have not disputed the statement made by the petitioner that he was not noticed to appear before the Medical Board nor he was examined. This can be a good ground to declare the order dated 31st December, 2004 as illegal, if the allegation is found to be correct.

14. In the impugned order dated 31st December, 2004, while retiring the petitioner from service on the ground of physical unfitness, Rule 25 of B.S.F. Rules, 1969 has been referred. The said rule relates to retirement of Subordinate Officers and Enrolled Persons on the ground of physical unfitness, as quoted hereunder:

25, Retirement of subordinate officers and enrolled persons on ground 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, to be brought before a Medical Board.

(2) The Medical Board shall be constituted 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, 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 Sy & 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 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.

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15. As per the aforesaid Rule 25, the Commandant is required to direct the enrolled person to be brought before a Medical Board. The Medical Board to be constituted as per determination by the Director General. After the report of Medical Board if the Commandant agrees with the finding of the said Board then the decision to retire is to be communicated to him. The enrolled person within a period of fifteen days from the date of receipt of communication can make representation to the officer next superior in command. The superior officer in such case will refer the matter to a Review Board, as may be determined by the Director General. The superior officer having regard to the finding of the Medical Board is required to pass appropriate order. Where the representation has been made against the order passed under sub-rule (3), the said order cannot take effect till the superior officer confirms the same.

16. In the present case, by letter dated 7th December, 2004, the D.I.G. informed the petitioner that on the recommendation of the Medical Board, there is a proposal to retire him from service w.e.f. 31st December, 2004 on the ground of disability. The petitioner represented against the said proposal before the next superior officer i.e. I.G., B.S.F., New Delhi vide his representation dated

13th December, 2004. He specifically alleged that he was not asked to appear before the Medical Board in the year 2004 and thereby there was no occasion for report of unfitness to be submitted by a Medical Board. Though such objection was made but it was not disposed of and the notice of retirement given under Sub-rule (7) of Rule 25 was given effect to by D.I.G. and Commandant, T.C. & S., B.S.F., Hazaribagh by the impugned order dated 31st December, 2004, though there was a prohibition to give effect to such order till it is confirmed by the superior officer made under Sub-rule (7) to Rule 25 of B.S.F. Rules, 1965.

17. In view of the above discussions and consideration, we have no other option but to hold the impugned order dated 31st December, 2004 (Annexure-4) as illegal and arbitrary. The second question is thus answered in affirmative i.e. in favour of the petitioner and against the Respondents.

18. In the result, the impugned order dated 31st December, 2004 is set aside. The consequential order, contained in letter No. 16 dated 3rd January, 2005 (Annexure-5) directing the petitioner to vacate the residential quarters is also set aside. The petitioner is reinstated with all consequential benefits. He will remain in service till he attains the age of superannuation or any appropriate order is passed to that regard by the competent authority, in accordance with law, and after following the due procedures and hearing the petitioner. The Respondents will implement the decision and pay the consequential benefits to the petitioner within two months from the date of receipt/production of a copy of this order.

19. The writ petition is allowed with the aforesaid observations and directions. However, in the facts and circumstances, there shall be no order, as to costs.

Narendra Nath Tiwari, J.

20. I agree.