

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

+WP(C) No.5369/1998

Date of Decision: 23.05.2008

#Smt. Munni Devi

.....Petitioner
Through: Mr. G.K. Sharma

Versus

\$Union of India and Others
^

....Respondents
Through Mr.V.P. Singh with
Ms. Shubhra Parashar

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI
THE HON'BLE MR. JUSTICE J.M. MALIK**

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

:

1.The petitioner, widow of the deceased Madan Lal, has approached this Court by means of the present petition for grant of special family pension. Her husband Madan Lal (hereinafter referred to as the 'deceased') was enrolled in the Army on 9.7.1985 as a Gunner/OFC. As per the petitioner, the deceased was hail and hearty when he joined the Army. He

participated in various operations and gave good account of himself. He even actively participated in games and sports which are organised by the Army regularly to develop competitive spirit and/or to ensure their physical fitness.

2. In May 1991, when the deceased was serving in 130 AD Regiment, a game of Kabaddi was organised in which he was also one of the players. However, during that game, the deceased sustained severe injury in his groin. As a result, the deceased developed severely painful swelling in his right scrotum. The deceased was given the treatment in the unit by a General Duty Medical Officer which did not have any effect and his condition continued to deteriorate. On 5.7.1991, he was admitted to 167 Military Hospital where he underwent retrograde Orchiectomy (Right), leaving a corrugated drain through the scrotum. Still his condition did not improve. In August 1991, he was transferred to Malignant Diseases Treatment Centre, Command Hospital, Southern Command, Pune. After various tests he was diagnosed as suffering from Embryonal Carcinoma Testis (Right). To put it simply his right testis was diagnosed as Cancerous. Chemotherapy treatment was started which also could not cure the illness of the deceased as his condition kept on deteriorating. On 4.5.1992, the deceased was placed on

'Dangerously ill list' and transferred to Army Hospital, Delhi Cantt. However, as normally happens with such a disease, it proved mortal and ultimately the husband of the petitioner breathed his last on 25.5.1992.

3. The deceased left behind his widow (the petitioner herein) and two small children and an old father. Family pension was sanctioned to the petitioner which she started getting from the date of her husband's death and continues to get the same. The petitioner, however, wanted special family pension also which is granted to a widow in case her husband dies while on duty due to injury or ailment, which is either attributable to the military service or is aggravated by military service. According to the petitioner, the Commanding Officer, 130 AD Regiment, where the deceased was serving at the relevant time, submitted necessary documents through Records Air Defence Regiment recommending grant of special family pension which was forwarded to the Chief Controller of Defence Accounts (Pensions), Allahabad (respondent No.4) on 4.2.1993. However, the CCDAP, Allahabad turned down the claim of the petitioner for special family pension vide communication dated 29.7.1993 on the ground that the death of the deceased was neither attributable to military service nor aggravated by it. Only family pension was sanctioned. For

two years the petitioner kept on corresponding with the authorities for grant of special family pension. Various reminders including Advocate's notice was sent in this behalf. The petitioner also demanded supply of relevant documents relating to the case. Ultimately, reply dated 2.12.1995 was sent rejecting the request of grant of special pension reiterating the basis thereof. Request for supply of documents was also turned down. Feeling aggrieved, the petitioner submitted a petition for grant of special family pension to the Ministry of Defence/respondent No.1. This petition has also been rejected by the respondent No.1 vide its decision conveyed through communication dated 4.5.1998. Still not satisfied, the petitioner has preferred the instant petition.

4. Case of the petitioner is that she is entitled to special family pension because her late husband sustained the injury in question while on duty and it was aggravated due to service reasons and carelessness on the part of the respondents in not giving the deceased proper treatment in time. Her claim is, therefore, admissible under Rule 2(b), 3, 4, 6(c) of entitlement rules contained in Appx. II of Pension Regulations Part-1 and note 1(c) on page 106 of Pension Regulations Part I. Provisions of paras 212 and 213 and relevant extracts of

para 223 of Pension Regulations Part I, 1961 are reproduced below:-

"Ordinary Family Pension

212. An ordinary family pension may be granted to the family of a Junior Commissioned Officer granted honorary commission as a commissioned officer while on the effective list, who dies during service or after retirement for causes neither attributable to nor aggravated by military service.

Special family pension

213. A special family pension may be granted to the family of an individual if his death was due to or hastened by-

- (a) a wound, injury or disease which was attributable to military service, or
- (b) the aggravation by military service of a wound, injury or disease which existed before or arose during military service."

Relevant extract from Regulation 223

"223. Except in the case of Junior Commissioned Officers while on the effective list, special family pension and gratuity shall be assessed on the substantive rank and the group held by an individual on the date of his death if death occurs in service or on the date of discharge/retirement if death takes place after discharge/retirement."

It is also stated that the CCDP(A) had no authority to reject the genuine claim for pension of the petitioner.

5. It is not in dispute that as per the aforesaid provisions in the pension rules to which reference is made by the petitioner,

she would be entitled to special family pension in case the injury/disease is related to military service, i.e. it is either contracted during military service or is aggravated as a result thereof. The entire question boils down to the determination of the issue as to whether the disease with which the husband of the petitioner suffered, namely, Disseminated Carcinoma Testis (Embryonal) is related to military service. To put it differently, what is to be determined is as to whether this disease has any causal connection with the performance of the Army duties.

6. Before addressing this issue, it would be appropriate to complete the narration of facts by stating the developments which took place during the pendency of the writ petition. On 5.11.2001, the petitioner, widow of the deceased, also passed away. She is survived by her two minor children, a daughter named Neetu Yadav and a son named Vikas Yadav. They were allowed to be substituted in place of the petitioner on 6.9.2005 and, therefore, the present petition is pursued by the two children of the deceased and the petitioner. It is not in dispute that the minor children of the deceased would also be entitled to special family pension, if it is held to be admissible.
7. The submission of the learned counsel for the petitioner was that the deceased had sustained injury to his scrotum during

May 1991, while on duty during organised game of Kabaddi, which culminated into Embryonal Carcinoma Testis (Right) because of negligence and delay in treatment in the unit. No record of treatment was given by the Unit Resident Medical Officer. It was not provided even when asked for by the petitioner. It was also pointed out that the following note is recorded by Lt. Col. M.P. Jai Prakash, Classified Specialist (Medicine), MD TC CH, Pune on 2.12.1991 at 1930 hrs.: "Completed IV courses of chemotherapy given with inadequate doses/drugs and delay due to non-availability of drugs". On this basis it was sought to argue that it is evident that treatment with inadequate doses of medicine at the MD TC CH, Pune also contributed to the death of the deceased. The deceased was diagnosed as a case of Embryonal Carcinoma Testis Right at the MD TC SC, Pune after detailed medical examination and Laboratory analysis. He was treated there from 4.8.1991 to 4.5.1992. The deceased was given 7 courses of chemotherapy with inadequate doses of medicines.

8. Learned counsel for the petitioner also submitted that since injury was sustained while on duty, i.e. while playing Kabaddi as an organised game, pension would be admissible on the strength of Para 271 of the Regulations for the Army 1987 Vol. 1, which provides that injuries sustained by officers, JCOs, WO

and/or take part in such Parades, games and sports or deaths arising from these injuries will be considered to have occurred while on duty.

9. In this connection text of Para 271 of the Regulations for the Army 1987 Vol. 1 is reproduced below:-

"271. PT and Games:- All PT and exercises, including PT Games, carried out as part of a soldier's training during Parade hours under a PT instructor or a platoon or company commander are compulsory. Games and sports out of Parade hours are not compulsory, but if organized by or with the approval of military authorities will be regarded as PT injuries sustained by Officers, JCOs, WOs and/or, NCS(E), taking part in such Parades, games and sports or death arising from these injuries will be considered to have occurred while on duty."

10. As per Appendix II (Entitlement Rules for Casualty Pensionary Awards, 1982, "Injuries sustained by the personnel of the Armed Forces in impromptu games and sports outside Parade hours, which are organized by, or with the approval of the local service authority, and death or disability arising from such injuries, will continue to be regarded as having occurred while 'on duty' for purposes of these rules."

11. As per Para 9 of the said Appendix II, "the claimant shall

not be called upon to prove the conditions of entitlements. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat services cases." It is also argued that no medical board proceedings in relation to the death of the deceased have been produced by the respondents except for a certificate of attributability. Learned counsel also submitted that CCDAP, Allahabad, who rejected the claim of special family pension on the ground that the deceased died of Disseminated Carcinoma Testis (Embryonal) is not attributable to military service because of "disability was of constitutional nature" is without any jurisdiction inasmuch as, the said CCDAP was not competent to give any medical opinion. Further, Medical Advisor (Pension) had not examined the deceased and as such, he also could not have arrived at the conclusion that wound/injury of the deceased was not attributable to the military service or aggravated because of military service. It was emphasised that the Commanding Officer had recommended the award of special family pension vide his letter dated 4.2.1993 and, therefore, Accounts Officer had no authority to reject the same. Learned counsel also challenged the conceptual basis of "constitutional" disease by submitting that there was no such term like "injury'disability

of constitutional nature" and as it had not been defined anywhere in the pension regulations. He referred to a judgment of this Court in the case of Sep. Gopal Singh Dadwal Vs. Union of India, 2007 (1) SLR 616 (Delhi) (DB) and particularly the following observations therefrom:-

"In furtherance to direction of the Court, medical specialists have appeared during the course of hearing of these petitions. In response to query by the Court, the medical specialists have expressed their opinion that 'Constitutional disorder' or 'Constitutional disease' would relate to a situation where the Medical Board is unable to find a cause for the disease which a person is suffering from. In those circumstances, it is recorded that the disease is neither attributable nor aggravated by army service. In other words, if the medical authorities failed to determine cause, onset or arrive at a definite diagnostic opinion in relation to disease of a member of the force, it is bound to adversely affect the interest of the member in relation to grant of disability pension. According to these experts, the constitutional disorder would normally result in recording of such opinion as 'not attributable to nor aggravated by military service' without any further or proper diagnosis. Butterworth's Medical Dictionary, defines 'Constitutional' as: "Relating to the state of constitution, inherent in the Constitution of mind or body, relating to the bodily system as a whole." The expression Constitutional Disorder or disease would thus have to be

understood even in its common parlance as something, which is relatable to human mind and/or body. Its existence in either of them could be specifically diagnosed both in relation to cause, time of its existence as well as onset of the disease. This can hardly be termed as just and fair approach in consonance with rules and regulations. The disease like Schizophrenia, Neurosis and other Psychiatric related disease can be aggravated if not attributable to Army service. If they are constitutional disease or disorders, then they must be relatable to human body and/or mind and can be detected by proper diagnose including the time, i.e. pre or post joining the Army. It would be required of the authorities concerned to reasonably show on record that such diseases, on their basis symptoms existed prior, though the disease manifested late or even co-relate the onset of the diseases to period prior to the joining of service by the petitioner."

12. Relying upon another judgment of this Court in Smt. Reshma Devi Vs. Union of India, MLJ 1998 Delhi 92, it was submitted that this Court has held that when husband of the petitioner was enrolled in the Army, he was medically examined and the medical board did not say that he suffered from any disease and the disability occurred later. Under Pension Regulation No.223 read with Regulation No.213 of the Pension Regulations Part I Army "if death occurs in service,

the official will be entitled to special family pension." Similar view has been taken by Punjab and Haryana High Court in the case of Kanta Devi Vs. Union of India and Ors., reported as 1999 (1) SLR 668. In another case entitled Keshar Singh Vs. Union of India and Ors., reported as Mil LJ 1999 All. 40, the Allahabad High Court has held that if no note was made at the time of the petitioner's entry into service that he was suffering from a certain disease, inevitably it must follow that the disability from which the petitioner was suffering and has led to his discharge or death is attributable to military service.

13. After examining the entire case in detail keeping in view all the facts and the legal position highlighted by the learned counsel for the petitioner in the judgments, note whereof is taken above, we are of the opinion that the petitioner is entitled to the relief claimed in this petition and she be given the special family pension on the premise that the disease in question because of which her husband died is to be treated as either attributable to the military service or at least aggravated by it. In this behalf, we may note that it is not in dispute that it was the injury suffered by the deceased in May 1990, when he was playing *Kabaddi*, which became the cause of his death ultimately. Game of *Kabaddi* was organized by the respondent/employer, i.e., concededly, playing such a

game is treated as part of duty as the soldiers are compulsorily made to participate in such games. While playing the game of *Kabaddi* the deceased sustained injuries in the groin. He was even given treatment for this injury which had resulted in swelling in his right scrotum. As his condition deteriorated and the injury could not be cured, on 5.7.1991 he was admitted to 167, Military Hospital. There he underwent retrograde Orchidectomy (Right) leaving a corrugated drain through the scrotum. Even this did not cure him and in August, 1991 he was transferred to Malignant Diseases Treatment Centre, Southern Command, Pune where he was diagnosed as suffering from Embryonal Carcinoma Testis (Right), i.e., cancer of the testis. When the disease of cancer with which the husband of the petitioner was found suffering and because of which he ultimately died, is traced with the aforesaid event, and not in isolation, the conclusion would be obvious. The respondents cannot take a myopic view of the entire matter in taking the cause of death as cancer and coming to the conclusion that cancer is allegedly 'constitutional disease' and thus, cannot be attributed to the service. Even if there were some traces of cancer, it was clearly aggravated because of the severe injury sustained by the deceased in his groin while playing the game of *Kabaddi*

and the said injury getting worsened with the period of time as the treatment given by the respondents themselves did not bear any positive effect. In these circumstances, though we feel that the disease is to be treated as attributed to service and even if it is presumed that it was not so, it is beyond pale of doubt that under the aforesaid circumstances it would be treated as aggravated by the military service, namely, the injury in the groin was suffered by the deceased while in military service. We, therefore, allow this writ petition and direct the respondents to grant special family pension to the petitioner on the ground that death of the deceased was attributable to and/or aggravated by the military service with effect from the date of death of the petitioner's husband. Arrears of pension shall be paid within three months. The petitioner shall also be entitled to costs quantified at Rs.5,000/-.

(A.K. SIKRI)
JUDGE

May 23, 2008
HP.

(J.M. MALIK)
JUDGE