

Civil Appeal

**Present: The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Prasenjit Mandal**

M.A.T. No. 1157 of 2009

With

C.A.N. 9740 of 2009

Judgment on: 16th April, 2010.

Union of India & Anr

Versus

Shri Haripada Das & Ors

POINTS:

FREEDOM FIGHTER'S PENSION-Writ petitioner, a freedom fighter-Government unable to furnish record-Writ-petitioner could not prove compliance with the requirements of the SSS Scheme for getting pension-Whether he is entitled to pension-Swatantrata Sainik Samman Pension Scheme, 1980

FACTS:

This Mandamus-Appeal is directed against an order passed by a learned Single Judge by which His Lordship disposed of a writ-application filed by the respondents by setting aside the order passed by the appellant No.2 and directing the appellants to grant freedom-fighter-pension to the writ-petitioner under the provisions of Swatantrata Sainik Samman Pension Scheme, 1980, with effect from the date of his application for obtaining pension. Being dissatisfied, the Union of India and the Under Secretary, Government of India, Ministry of Home Affairs, Freedom Fighters' Division have come up with the present appeal.

HELD:

By making an application for information as to whether he was involved in the case, or whether he was arrested in the case, and what was the result of the case, the writ-petitioner cannot be benefited for the inability of the government to furnish answer for want of record when it is not his case made in the application that he was ever arrested or convicted in any case. It is pointed out that mere involvement in freedom fight or in a criminal case relating to freedom struggle will not entitle a person to get pension unless the conditions mentioned in the scheme are satisfied. Even if a person is imprisoned for less than the required period mentioned in the scheme for freedom struggle, viz. six months for general category and three months for women and Scheduled Castes and Scheduled Tribes, he will not be entitled to get pension. Para-34

The learned Single Judge erred in law in passing a direction for grant of pension not withstanding with the fact that the writ-petitioner could not prove that he had complied with the requirements of the SSS Scheme for getting such pension. Para-35

CASE CITED:

1) Gurdial Singh vs. Union of India and others (2001) 8 SCC 8

For the Union of India/Appellant:

Mr. Farook M. Razack,
(Addl. Solicitor General)
Mrs. Chandrima Bhattacharya,
Mr. Bhaskar Prasad Vaisya,
Ms. Priyanka Bhotoria.

For the Writ-Petitioner/Respondent:

Mr. Prasanta Mukherjee,
Mr. Milan Kumar Maity,
Mr. Basudeb Bag.

For the State-Respondents:

Mrs. Amrita Sinha.

THE COURT:

1) This Mandamus-Appeal is at the instance of the Union of India and is directed against an order dated August 21, 2009 passed by a learned Single Judge of this Court by which His Lordship disposed of a writ-application filed by the respondents by setting aside the order passed by the appellant No.2 and directing the appellants to grant freedom-fighter-pension to the writ-petitioner under the provisions of Swatantrata Sainik Samman Pension Scheme, 1980 (hereinafter referred to as the SSS Scheme) with effect from the date of his application for obtaining pension *i.e.* 10th July, 1981 with interest on the arrears amount @10% per annum. The learned Single Judge further awarded costs of Rs.10,000/- in favour of the writ-petitioner.

2) Being dissatisfied, the Union of India and the Under Secretary, Government of India, Ministry of Home Affairs, Freedom Fighters' Division have come up with the present appeal.

3) The facts giving rise to filing of the writ-application out of which the present Mandamus-Appeal arises may be summed up thus:

(a) The writ-petitioner applied for pension under SSS Scheme on December 14, 1981 alleging that he remained underground from October, 1942 to December, 1943 while taking active part during the freedom movement for liberation of India and, thus, was entitled to get an order of pension under the Scheme as an order of detention was issued against him due to his subversive activities.

- (b) The writ-petitioner, in support of his claim, relied upon a Personal-Knowledge-Certificate from one Jyotish Chandra Bera, a freedom-fighter, who certified that the writ-petitioner remained underground for the period from October, 1942 to December, 1943 as he had to avoid arrest to work underground.
- (c) The State Government recommended the case of the writ-petitioner vide letter dated 9th September, 1985 for pension on the basis of “underground suffering” certified by the said Jyotish Chandra Bera as an eligible certifier of the District- Midnapore.
- (d) Pursuant to such recommendation, the appellant No.2 issued a Memo to the Deputy Secretary to the Government of West Bengal with request to intimate whether the warrant of arrest was issued against the writ-petitioner and if issued, a copy of the same or a non-availability record might be furnished to the Ministry at an early date to finalise the case.
- (e) The Assistant Secretary, Government of West Bengal issued a Memo to the writ-petitioner by which the writ-petitioner was requested to inform the department as to whether any warrant of arrest was issued against the writ-petitioner, and if issued, to give particulars thereof as required by the Government of India.
- (f) According to the writ-petitioner, after receiving the said Memo, he made an application for necessary information particularly about Bhagwanpur Police Case being Case No.GR549/42 and in the remark portion of the said information slip, it was stated that due to constant handling during the period when series of applications were received from the freedom-fighters for copies, those had been torn out and it was impossible to trace whether he was accused or not in the Bhagawanpur Police Station Case No.549/42.

(g) After receiving the said information from the concerned department, the writ-petitioner submitted the same along with an application dated August 3, 1987 to the Ministry of Home Affairs, Government of India.

(h) After waiting for a quite longtime, the writ-petitioner made a prayer to the Government of India by different applications in the year 1997, 1998, 2003 and lastly in the year 2006, but no reply had been given to those applications. Hence the writ-application was filed for a direction upon the Union of India to pass necessary order granting pension.

4) The writ-application was opposed by filing affidavit-in-opposition and the defence taken by the Union of India, the appellant before us, may be summed up thus:

(1) The writ-petitioner in support of this claim relied upon a Personal- Knowledge-Certificate from one Jyotish Chandra Bera who certified that the writ-petitioner remained underground from October, 1942 to December, 1943 but the certifier himself was in jail during the said time for which he had issued certificate to the writ-petitioner.

(2) The scheme does not make a freedom fighter eligible for pension if he remained underground for more than six months for mere joining or involving in the Quit India Movement unless (a) he was either declared a proclaimed offender or (b) on whom an award for arrest/head was announced, or (c) whose detention order was issued but could not be served. Therefore, if a freedom fighter under the guidance of the certifier remained underground for years for joining Quit India Movement but it was not preceded by the aforesaid three circumstances, he was not entitled to get pension.

- (3) The certificate issued by Jyotish Chandra Bera merely stated that the writ-petitioner remained underground for the period from October, 1942 to December, 1943 so as to avoid arrest to work underground for running the movement secretly and as such, the writ-petitioner was not eligible for pension under the SSS Scheme.
 - (4) The State Government recommended the case of the writ-petitioner for pension on the basis of the certificate granted by Jyotish Chandra Bera as an eligible certifier of the District-Midnapore, but the writ-petitioner did not produce any supporting document to prove that he was a proclaimed offender or on him an award for arrest was announced or any detention order was issued against him.
 - (5) The writ-petitioner should have submitted the documentary proof or evidence in support of his claim of suffering based on official record of the State Government which was not done. The secondary evidence like Personal-Knowledge-Certificate is not acceptable unless a certificate of non-availability of record from all the sources of the State Government is produced and as such, the writ-petitioner is not entitled to get the pension under the SSS Scheme.
- 5) As pointed out earlier, the learned Single Judge allowed the application by passing direction for grant of pension with arrears and interest.
- 6) Being dissatisfied, the Union of India and the Under Secretary, Ministry of Home Affairs, Government of India have come up with the present Mandamus-Appeal.

7) Mr. Razack, the learned Additional Solicitor General appearing on the behalf of the appellants, has vehemently criticized the order passed by the learned Single Judge passing direction for grant of pension with interest and costs.

8) Mr. Razack in this connection placed before us the original application for grant of pension and points out that in the application itself the writ-petitioner admitted that he did not suffer any period of imprisonment, that he had no evidence of any court-judgment, jail certificate or co-prisoner certificate and that he remained underground from 28th October, 1942 to 30th December, 1943. In paragraph 13 of the application, he stated that he was an actual freedom fighter and took active part in Quit India Movement, 1942 and he suffered a great loss. He further stated that he did many subversive works *i.e.* burning of Khejuri Police Station at 28th September, 1942 Monday, 11 P.M to 2 A.M. at night, Sub-Registry Office, Duck Banglow under the leadership of Sri Amritalal Das, Sri Brajagopal Das, Sri Mrityunjuoy Panda, Sri Abanti Kumar Das. He further stated that he submitted a certificate from a freedom fighter, namely, Sri Jyotish Chandra Bera.

9) The certificate given by Jyotish Chandra Bera, Mr. Razack points out, shows that the certifier actually suffered imprisonment for more than five years and that during the alleged period of underground by the writ-petitioner he was himself in jail.

10) He certified that the writ-petitioner was a *bona fide* freedom fighter who remained underground for more than 6 months for the period from October, 1942 to December, 1943 to avoid arrest to work underground to run movement secretly. He further stated that to the best of my knowledge and belief he did not secure reprieve on account of any written apology tendered by him and he did not go underground voluntarily or from fear or arrest on account of his patriotic activities. Sri Bera

further certified that he was a bold and sincere freedom fighter and had suffered and was tortured very much by the police during the British Rule.

11) By referring to the aforesaid certificate, Mr. Razack contends that none of the ingredients which enables a freedom fighter to get pension under the SSS Scheme has been satisfied. Mr. Razack points out that no certificate has even given by asserting that the writ-petitioner was a proclaimed offender. He, therefore, prays for setting aside the order passed by the learned Single Judge.

12) Mr. Mukherjee, the learned senior advocate appearing on behalf of the writ-petitioner, on the other hand, has opposed the aforesaid contentions of Mr. Razack and has contended that in the absence of any record available for the relevant period and in view of the certificate granted by an eligible freedom fighter, his client is entitled to get pension and there was no just ground for refusal of the benefit. Mr. Mukherjee contends that his client applied for information regarding a particular case of Bhagbwanpur Police Station but the information slip indicated that the records were not available. According to Mr. Mukherjee, in such circumstances, it is the duty of the appellants to grant pension without disputing the veracity of the statements contained in the certificate by taking a liberal approach and not the strict rule of evidence. He, therefore, prays for dismissal of the appeal.

13) In support of such contention Mr. Mukherjee relied upon the decision of the Supreme Court in the case of Gurdial Singh vs. Union of India and others reported in (2001) 8 SCC 8.

14) Therefore, the question that falls for determination in this appeal is whether the learned Single Judge was justified in passing the direction for payment of pension under the SSS Scheme in the facts of the present case.

15) In our opinion, in a case of this nature, even after passing of an order sanctioning pension, if it is detected that the previous decision was erroneous for the fraud practised by the applicant or that the claim of the applicant was an inherently impossible one or that the previous decision was taken by the appropriate authority overlooking any of the essential requirements of the scheme, the Government is entitled to revoke the pension granted earlier through mistake. If there was genuine error on the part of the Government, an applicant cannot take advantage of the fault of the Government and insist on continuance of misuse of public money simply because a mistake was committed by the Government in the past.

16) In our view, if a person comes forward with an absurd case supported by an evasive certificate not in conformity with the scheme authorising the grant of pension and such defect in the application or the certificate escaped the notice of the Government at the earlier stage, the applicant cannot take advantage of the mistake of the Government by raising the plea of estoppel by earlier erroneous decision or the principle of *res judicata*. An applicant for the freedom-fighter's pension should at all material times be answerable to any legitimate query of the Government justifying his claim, if occasion so arises.

17) The underground suffering for a period of six months which is recognised as a ground for grant of the pension provides that the person should have gone underground only after he was wanted by the police for his activities relating to National Freedom Struggle. In other words, as the scheme

specifically provides, the freedom-fighter should either be a proclaimed offender or a person on whom an award for arrest/head was announced or on whom detention order was issued but was not served; but voluntary abscondence for the causes other than the ones mentioned above will not make a person eligible for pension. Furthermore, it must be shown that the applicant did not secure reprieve on account of any oral or written apology tendered by him. The liberalised pension scheme, however, provides that with effect from August 1, 1980, in the absence of official records because of their non-availability, the certificate issued by a certifier who had undergone a minimum imprisonment for two years in connection with the National Freedom Struggle may be accepted as a proof of the fact of abscondence for the purpose of the said scheme.

18) Therefore, by taking aid of the liberalised scheme, an applicant can insist on acceptance of a certificate by a freedom-fighter having the requisite eligibility as secondary evidence in support of his claim if the official records are not available. But in a given circumstance, the Central Government is entitled to reject such certificate if other contrary evidence is available falsifying the claim of the applicant or the contents of the certificate. Similarly, there may be cases where on the basis of the averment made in the application itself, the claim of the applicant may be shown to be apparently an absurd claim and in such cases, those applications deserve outright rejection notwithstanding the fact that those are supported by the certificates of co-freedom-fighters.

19) In the case before us, the writ-petitioner stated in his application that he remained underground due to the “movement of Quit India” from October 28, 1942 to December 30, 1943 but he did not mention in his application **whether he was a proclaimed offender or one on whom an award for arrest/head was announced or whether he was one for whose detention order was issued but**

not served as required under the scheme in order to get the benefit of underground for more than six months.

20) A person is declared as a proclaimed offender by a Court in accordance with the provisions contained in the Code of Criminal Procedure and is preceded by issue of a warrant and is consequent to abscondence or concealment of such person with an intention that such warrant cannot be executed. Such proclamation continues so long such person is not arrested. Such proclamation may, however, cease to have any effect if the criminal case in which such warrant was issued is ultimately dropped in the absence of any material against such person or reprieve is given to such person after acceptance of apology.

21) Thus, the writ-petitioner himself having admitted in his application that he did not abscond any further from December 31, 1943 nor was he ever arrested, even if we accept such case to be true for the sake of argument, the only conclusion that emerges out is that from December 31, 1943 there was neither any warrant nor any valid order of proclamation against him as the said case was dropped either because he was wrongly impleaded or due to tender of apology by the petitioner, he was given reprieve. In either of the circumstances, the applicant was not entitled to get the pension. If the abscondence continued till August 15, 1947, the petitioner could successfully contend that due to independence of the country, the case was not proceeded with after August 15, 1947.

22) Thus, the assertion of the writ-petitioner that for involvement in the “movement of Quit-India” he remained underground and he ceased to remain in underground from December 31, 1943 but was never arrested is an absurd story unless he was mistakenly involved in the criminal case or he was pardoned after acceptance of his apology. The averments of the writ-petitioner in the

application itself make him ineligible for the grant of pension as he never claimed to be a proclaimed offender nor did he assert that he was one on whom an award for arrest/head was announced or upon him any detention order was issued but not served.

23) The next question is whether the application of the writ-petitioner was accompanied by a valid certificate given by a co-freedom-fighter in accordance with the scheme.

24) In the instance case, the certificate has been given by one Jyotish Chandra Bera whose eligibility to grant of certificate has not been disputed. The certificate runs as follows:

“I hereby certify that Shri Haripada Das son of late Thakur Chandra Das of vill. And P.O. Pankhai, P.S. Khejuri District- Midnapore, West Bengal is a bonafide freedom fighter who-

a) remained underground for more than six months for the period from October, 1942 to Dec. 1943 as he:-

i) to avoid arrest to work underground to run the movement secretly on account of his participation in the Historic quit India in 1942 movement during the freedom struggle. To the best of my knowledge and belief he did not secure reprieve on account of any written apology tendered by him. He also did not go/ went underground voluntarily or from fear of arrest on account of his patriotic activities.

He was a bold and sincere freedom fighter and was suffered and tortured very much by the police during British Rules. He deserves political pension from the central government.”

25) It appears from the bio-data of Sri Jyotish Chandra Bera that he himself was in the jail during the alleged period of underground by the writ-petitioner *i.e.* from October, 1942 to 1943. Therefore, it is impossible for the said certifier to certify that during the said period whether a person was really underground outside the jail as he cannot have any direct knowledge of such fact.

26) A certificate is the testimony given in writing to declare or verify the truth of something. Such element is thus absent in respect of the above statements mentioned in the certificate.

27) Moreover, the certificate did not take the responsibility of the assertion that the applicant did not secure reprieve on account of any oral or written apology by not certifying the statement as true to his knowledge. To qualify the certificate as “to the best of my knowledge and belief he did not secure reprieve” means that the certifier was not prepared to vouch for the veracity of such statement.

28) Therefore, we find that the said certificate was not really a certificate in support of the entitlement of the writ-petitioner for getting pension.

29) We, therefore, find that the applicant not having explained why from 31st December, 1943 he did not remain underground, it is apparent that his case is an absurd one unless he was involved in a wrong case and was acquitted or was given reprieve on tendering unconditional apology.

30) We now propose to deal with the decisions cited by Mr. Mukherjee.

31) In the case of Gurdial Singh vs. Union of India & Ors. (supra), the Supreme Court in dealing with the question of standard of proof required for getting a pension under the SSS Scheme held that the standard of proof required in such cases is not such standard which is required in a criminal case or in a case adjudicated upon rival contentions or evidence of the parties. According to the Supreme Court, as the object of the scheme is to honour and to mitigate the sufferings of those who had given their all for the country, a liberal and not technical approach is required to be applied while determining the merit of the case of the person seeking pension under the scheme. It was further pointed out that it should not be forgotten that the person intended to be covered by the scheme had suffered for the country about half a century back and had not expected to be rewarded

for the imprisonment suffered by them. The Supreme Court further held that once the country had decided to honour such freedom fighters, the bureaucrats entrusted with the job of the examining the cases of such freedom fighters are expected to keep in mind the purpose and object of the scheme. It was further held that the cases of the scheme under the scheme was required to be determined on the basis of probabilities and not on touchstone of the test of beyond reasonable doubt. In the said case, it was further held that on the basis of evidence it was probable that the claimant had suffered imprisonment for the cause of the country and during the freedom struggle, a presumption is required to be drawn in his favour unless the same is rebutted by cogent, reasonable and reliable evidence.

32) In the case before us, the writ-petitioner himself admitted that no proclamation was issued for his arrest and the certificate that was produced was not really a certificate in the real sense of the term as the certifier himself was in jail at the relevant time of alleged underground sufferings and as such, he cannot have any direct knowledge as to whether a person was underground outside the jail unless he heard such a thing from somebody.

33) Thus, the said decision cannot have any application to the fact of the present case.

34) Although the Mr. Mukherjee tried to impress upon us that subsequently he applied for information as to a particular case but such information was not available, we are not impressed by such submission for the simple reason that in his application, the writ-petitioner did not refer to any such case *viz.* Bhagawanpur P.S. Case No.549 of 1942. Therefore, by making an application for information as to whether he was involved in that case, or whether he was arrested in that case, and what was the result of that case, the writ-petitioner cannot be benefitted for the inability of the

government to furnish answer for want of record when it is not his case made in the application that he was ever arrested or convicted in any case. We have already pointed out that mere involvement in freedom fight or in a criminal case relating to freedom struggle will not entitle a person to get pension unless the conditions mentioned in the scheme are satisfied. Even if a person is imprisoned for less than the required period mentioned in the scheme for freedom struggle, *viz.* six months for general category and three months for women and Scheduled Castes and Scheduled Tribes, he will not be entitled to get pension.

35) On consideration of the entire materials on record, we, therefore, find that the learned Single Judge erred in law in passing a direction for grant of pension notwithstanding with the fact that the writ-petitioner could not prove that he had complied with the requirements of the SSS Scheme for getting such pension. We, therefore, set aside the order passed by the learned Single Judge and dismiss the writ-application.

36) The appeal is, therefore, allowed.

37) In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

39) I agree.

(Prasenjit Mandal, J.)

