

**Reserved**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**COURT NO. - 3**

**A. F. R.**

**T.A. No. 638 of 2010**

**Friday, this the 31st day of May, 2013**

**“Hon’ble Mr. Justice Virendra Kumar Dixit, Judicial Member  
Hon’ble Lt. Gen. B.S. Sisodia, Administrative Member”**

**Amar Nath Singh Kharwar, son of Baleshwar, Havildar Clerk in the Unit of  
40, Medium Regiment (SP) Army Artillery, R/O Village and Post Pakari,  
Distt – Ghazipur.**

.....Applicant

By Legal Practitioner – **Shri Diwakar Singh**, Advocate

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi-110011.
2. Lieutenant Colonel Commanding Officer, 173 MH, c/o 56 APO.
3. Lieutenant Colonel, Staff Officer, Station Headquarters, Allahabad.

....Respondents

By Legal Practitioner - **Shri A.K. Singh, Central Govt. Counsel**

**ORDER****“Per Justice Virendra Kumar Dixit, Judicial Member ”**

1. This matter has come before us from the High Court of judicature at Allahabad by way of transfer under Section 34 of the Armed Forces Tribunal Act 2007 and has been renumbered as Transferred Application No. 638 of 2010.

2. The applicant was enrolled on 27.08.1984 in the Army (Artillery) as a Soldier Clerk . He was promoted to the rank of Havildar during the tenure of his service and was entitled to serve in the Army for 24 years. The applicant was placed in Low Medical Category S1H1A1P2E1 (Permanent) (BEE Permanent) for **Chronic Obstructive Lung Disease by Release Medical Board (RMB)**. As per RMB, the disability had occurred *due to stress and strain of military duties* and **disability is attributable and aggravated to military service.** The applicant was detained in service for one year three months even he was in low medical category in terms of Army Order 46 of 1980. He was issued with Show Cause Notice on 26.05.2003 calling upon to show cause as to why the applicant should not be discharged from service as he could not be provided sheltered appointment within the Regiment. In reply of the aforesaid Show Cause Notice dated 31.05.2003, the applicant prayed for retention in service and to consider him for sheltered appointment. Thereafter, the respondent No. 2 had issued the impugned

order under Army Rule 13 (3) III (v) read in conjunction with Army Rule 13 (2A), according to which the applicant was to be discharged from service with effect from 01.08.2003 (till then total service was 18 years 11 months and five days).

3. Aggrieved by the said order, the applicant through this Transferred Application prayed for the following reliefs:-

*(a) Issue a writ order or direction in the nature of Certiorari to quash the order of discharge from service of the petitioner dated 01.08.2003 which has been done simply by making entry in the service Records. Respondents may also be directed to pay all consequential benefits of salary and allowances from 1.8.2003 to the date of reinstatement in service.*

*(b) Issue any suitable writ order or direction in the nature of mandamus or any other writ or order to the opposite parties to appoint the petitioner on the post of Civil Services in the Defence Department with continuity of his previous services or to give him appointment on any other civilian post or Central Govt. with continuity of the service.*

*(c) To direct the respondents to produce records of the case before this Hon'ble Court.*

*(d) To issue any suitable writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.*

*(e) To award the cost of the litigation to the petitioner against the Respondents.*

4. Heard, Ld. Counsel for the applicant Shri Diwakar Singh, Ld. Central Govt. Counsel Shri A.K. Singh for the respondents and perused the impugned order dated 01.08.2003, of discharge from service of the applicant and policy letters including other relevant records.

5. Learned Counsel for the applicant had submitted that the respondent in gross violation of mandatory procedure of Rule 13 of the Army Rules prescribed for discharge from service on the medical grounds and without conducting Invalidating Medical Board (IMB), wholly ignoring the applicant's request and also without considering the applicant case for sheltered appointment under Army Order 46 of 1980, had passed the impugned order of discharge on 01.08.2003. The discharge order had been passed by an incompetent authority even without mentioning any ground (annexed as Annexure No. 1 to this T.A). He had further submitted that during the pendency of the instant application Hon'ble Delhi High Court in the case of Subedar (SKT) Puttan Lal and Others Versus Union of India and Others in W.P. (C) No 5946 of 2007 on 20.11.2008 held that the '***general directions are applicable only to such of the persons who have been discharged earlier or proposed to be discharged on similar ground prior to 12.04.2007 or who had approached the competent court by filing the petition***'. He further submits that during the aforesaid period, the applicant had challenged the impugned order of termination through this instant application and reinstatement

into service. Ld. Counsel for the applicant vehemently argued that Army Order cannot override the provision of Army Rules and impugned order is liable to be quashed on this ground alone. Therefore the discharge of the applicant was illegal and he could have been given employment either in the civil post or in the Army. In support of the argument, Ld. Counsel for the applicant has relied upon the law laid down by the Hon'ble Delhi High Court in the case of Subedar (SKT) Puttan Lal and Others (Supra) and by the Hon'ble Apex Court in the case of Union of India vs. *Rajpal Singh reported in 2009 (1) SCC 216*.

6. Learned Central Government Counsel for the respondent had argued that the Hon'ble Apex Court in the case of Union of India & Others Versus Rajpal Singh (Supra) had never quashed the Army Order 46 of 1980 but approved the said Army Order at Paragraph 26 of the judgement in following terms

***“If a person is to be retained service despite his low medical category for a particular period as stipulated in the Army Order 46 of 1980, the question of subjecting him to Invalidating Board may not arise”.***

It is also argued that accordingly, Release Medical Board (now herein after referred as RMB) of the applicant was carried out before his discharge and on the recommendations of the RMB, he was discharged from service with effect from 01.08.2003. Hence, action taken by the respondents in the instant case is correct,

legal and as per the ruling/policy. He also submitted that the applicant was from clerical category and this category was surplus during the year 2003. The 'OPERATION PARAKRAM' was continue where only medically fit personnel were necessitated to be retained in service due to operational requirement. Respondents were compelled to discharge those personnel who was unable to take part in operation due to disability etc. The applicant was discharged from service due to non availability of shelter appointment in the unit and not solely on medical grounds as claimed by the applicant.

Ld. Central Govt. Counsel further argued that the judgment of Hon'ble Delhi High Court in the case of Subedar (SKT) Puttan Lal (Supra) cannot be made applicable automatically in other cases, since facts and circumstance of the cases do differs from each others. The applicant had filed this application before Hon'ble Allahabad High Court for reinstatement alongwith suitable civil employment. He has further submitted that only in 2012, he took a plea of applicability of Subedar (SKT) Puttan Lal's case (Supra). Thus, in view of the facts and circumstances elaborated above, the present application is lacking in substance and being devoid of merit and this transferred application deserves to be dismissed with costs. However, Ld. Counsel for the respondent conceded in all fairness that the discharge of the applicant in this case was made on the basis of

recommendation of the Release Medical Board and not of the Invaliding Medical Board.

7. In the instant case the applicant was placed in Low Medical Category S1H1A1P2E1 (P-2) Permanent for **Chronic Obstructive Lung Disease** by **Release Medical Board (RMB)**. As per RMB, the disability had occurred *due to stress and strain of military duties* and **disability is attributable and aggravated to military service.** It was held by the Hon'ble Delhi High Court in the case of Subedar (SKT) Puttan Lal Others Vs. Union of India and Others (Supra), in para 7 (iv) of the judgment, it was also held "*general directions are applicable only to such of the persons who have been discharged or those who may have been discharged earlier but have already approached the competent court by filing a petition*". It was held by the Hon'ble High Court that "*We may add here that this principle would actually apply not only to the JCOs alone, but also to all the Personnel Below Officers Rank (PBORs). The conclusion of the Supreme Court is that the High Court was correct in holding that the PBORs could not be discharged from service without holding an IMB*". It was also held that "*personnel discharged in low medical category after 12.04.2007 without holding Invaliding Medical Board and those personnel discharged on similar ground prior to 12.04.2007 who had approached the competent court against the*

*contemplated discharge will be reinstated with all back wages and consequential benefits.”*

8. It was held by Hon’ble Apex Court in the case of Union of India versus Rajpal Singh (Supra) that **Rule 13 (1) of Army Act is the pivotal provision which clearly enumerates the authorities competent to discharge from service, specified person, the grounds of discharge and the manner of discharge. It is manifest that that when in terms of this Rule an Army personnel is discharge on completion of service or tenure or at the request of the person concerned, no specific manner of discharge is prescribed. However, for discharge on other grounds, specified in Column (2) of the Table, appended to the Rule, the manner of discharge is clearly laid out.**

In para 18 of the judgement, it was held “ *It is plain that a discharge on the ground of having been found “medically unfit for further service” is specifically dealt with in Column (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 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 .*

In para 20 of the judgement, it was held by the Hon'ble Apex Court “ *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.*”

In para 26 of the judgement, it was held by the Hon'ble Apex Court “. . . . .  
*. . . . . If a person is to be retained in service despite his low medical category for a particular period as stipulated in the Army Order 46 of 1980, the question of subjecting him to Invalidating Board may not arise. However, if a person is to be discharged on the ground of medical unfitness, at that stage of his tenure of service or extended service within the meaning of the Army Order, he has to be discharged as per the procedure laid down in Clause I (ii) in Column 2 of the said Table. Similarly, Sub rule (2A) of Rule 13, heavily relied upon by the appellants does not carry the case of the appellants any further. It is only an enabling provision to authorize the commanding Officer to discharge from service a person or a class of persons in respect whereof a decision has been taken by the Central Government or the Chief of Army Staff to discharge him*

*from service either unconditionally or on the fulfillment of certain specified conditions. The said provision is no in any way in conflict with the scope of the remaining part of Rule 13, so as to give it an overriding effect, being a non obstante provision.*

9. Admittedly, in the instant case the discharge of the applicant was made on the basis of the Release Medical Board and not on the basis of Invaliding Medical Board.

10. From a perusal of relevant document on record, it appears that respondents passed the impugned order dated 01.08.2003 without considering the facts, rules and regulations in its entirety and thus the said order is not sustainable in the eyes of law.

11. In view of the aforesaid facts, in terms of the ratio of above noted Judgments and also in the interest of justice we are of the considered view that the Rule 13 of the Army Rules, 1954 is prescribed for a particular procedure for discharge on account of medical unfitness, which must be followed and, therefore, any order of discharge without recommendation of Invalidating Medical Board would fall in violation of the said statutory rule. The impugned order dated 01.08.2003 discharging the applicant from service on medical grounds without conducting an Invalidating Medical Board is illegal, unjust and against the

Principle of natural justice and is to be quashed. Since normal terms of engagement of the applicant would have over in the year 2008 and reinstatement in service cannot be granted to the applicant at this stage, hence, the applicant is entitled to get arrear of salary and other consequential benefits.

12. Thus, in the result, the T.A. succeeds and is partly allowed. The impugned order dated 01.08.2003 passed by the respondents to discharge the applicant is set aside. Respondents are directed to pay all the consequential benefits including salary and allowances from the date of discharge to the date of completion of service upto the rank of Havildar in the Army, in accordance with the Regulations for the Army 1987. As regards relief prayed in Para 3 (b) and (c) by the applicant is rejected. We also direct respondents to ensure compliance of the order within a period of three months from the date of service of a certified copy of this order.

13. There is no order as to costs.

**(Lt. Gen. B.S. Sisodia)**  
**Administrative Member**

**(Justice V.K. Dixit)**  
**Judicial Member**