

AFR
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
REGIONAL BENCH, NAINITAL

ORIGINAL APPLICATION NO 245 of 2014

Tuesday, this the 16th day of May 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Ex Sepoy Bhag Bahadur Tamang (No. 9417859W) C/O Pavni Gurung, DPS Campus, Secor 3, Qr No. 726/2/3 BHEL, Haridwar, Uttarakhand, Pin-247403.

....Applicant

Ld. Counsel for the: **Shri Lalit Kumar**, Advocate
applicant

Verses

1. Union of India, Through Secretary Ministry of Defence, South Block, New Dlehi.
2. Chief of the Army Staff, Integrated HQ of MoD (Army) New Delhi.
3. Deputy Director General, Defence Security Corps, General Staff Branch, HQ of MoD (Army) West Block-III, R.K. Puram, New Delhi-110066.
4. The Officer-in-Charge Records DSC Records, Cannanore, Kerala, PIN-901277, C/O 56 APO.
5. The Officer-in-Charge, DSC and Security Officer Ordnance Factory, Varangaon (Maharashtra)

...Respondents

Ld. Counsel for the : **Shri Bhanu Pratap Singh**, Central
Respondents. Govt Counsel assisted by
Capt Priyank Malviya, OIC, Legal Cell.

ORDER (Oral)

1. Being aggrieved by impugned order of discharge dated 30.09.2014; the applicant has preferred the present Original Application under Section 14 of the Armed Forces Tribunal Act, 2007.

2. We have heard Shri Lalit Kumar, Ld. Counsel for the applicant and Shri Bhanu Pratap Singh, Ld. Counsel for the respondents assisted by Cap Priyank Malviya, OIC Legal Cell.

3. Applicant, Sep Bhag Bahadur Tamang, was enrolled in Indian Army as Sepoy (Combatant) in Regiment of Gorkha Rifles (Infantry) and was discharged with effect from 01.08.2001 after completion of term of engagement in pursuance to provisions contained in Rule 13 (3) III (iv) after rendering 17 years 10 months and 09 days qualifying service for which he was granted service pension for life vide PCDA (P) Allahabad PPO No. S/027332/2001. Thereafter he joined Defence Service Corps (DSC) with term of engagement of 10 years. However, he was not granted further extension, hence being aggrieved he preferred the present O.A. on the ground that the respondents had not granted extension of service in DSC on unfounded grounds.

4. Brief facts as borne out from the record are that after discharge from regular service with the Armed Forces under Rule 13 (3) III (iv) of the Army Rules, 1954, the applicant got himself voluntarily enrolled in the DSC on 28.09.2004 and continued till 27.09.2014 i.e. for ten years. It is admitted that earlier regular services in the Indian Army is not to

be counted towards DSC services in accordance with option exercised by the applicant. Being placed in low medical category P2 with effect from 02.04.2014 for having been diagnosed suffering from KARCINOMA RECTUM LOWER 1/3 (OPTD), the applicant was not granted extension of service beyond the initial term of contractual engagement of ten years. The non extension of service of applicant in the DSC was in accordance with policy issued by Government of India, Ministry of Defence letter No TER/257/MDSC/1747/D (IS) dated 23.03.1956 as amended vide letter dated 05.12.1981 which stipulates that the initial period of engagement for Sepoys in the DSC will be ten years and those who are recommended for selection and retention may, if willing, be given five years extension at a time or till they reach the age of superannuation i.e. 55 years. However after the initial period of ten years extension is subject to fitness. Accordingly on account of low medical category (P2) the applicant was discharged under the provisions of Rule 13 (3) (III) (I) after rendering ten years and 03 days of qualifying service for which the applicant was also paid service gratuity and retirement gratuity to the tune of Rs 2,51,200.00 and Rs 1,25,600.00 respectively. It is not disputed by applicant's counsel as well as counsel for the respondents that the applicant was diagnosed suffering from KARCINOMA RECTUM LOWER 1/3 (OPTD) and placed in medical category P2 and because of low medical category he was discharged from DSC services.

5. Subject to these undisputed facts (supra) Ld. Counsel for the applicant submitted that an Army personal placed in medical category

P2 shall be entitled for extension of service in view of policy dated 20.09.2010, a copy of which has been annexed as **Annexure-III** to the supplementary affidavit dated 06.12.2016. The policy dated 20.09.2010 (supra) has been relied upon by Ld. Counsel for the applicant and for convenience sake the same is reproduced hereunder in its entirety:-

“Tele: 36054

Addl Dte Gen Pers Services
Adjutant General's Branch
Integrated HQs of MoD (Army)
New Delhi-110011

B/33098/AG/PS-2(c)

20 Sep 2010

Headquarters
Southern Command, Pune
Eastern Command, Kolkata
Western Command, Chandimandir
Central Command, Lucknow
Northern Command, C/O 56 APO
Army Trg Command, Shimla
South Western Command, Jaipur
A & N Command, Portblair
SFC, New Delhi
IDS

**PROCEDURE AND CRITERIA FOR SCREENING OF
PERSONNEL BELOW OFFICER RANK (PBOR) FOR GRANT OF
EXTENSION OF SERVICE BY TWO YEARS**

1. Reference Govt of India, Min of Def letter No 14 (3)/98/D(AG) dated 30 May 98, No F. 14 (3)/98/D(AG) dated 03 Sep 1998, even number dated 18 Sep 93 and No 14 (4)/98/D(AG) dated 29 Apr 2002.
2. The revised terms of enhanced service/tenure and age limits for retirement in respect of PBOR were issued vide Govt of India, Min of Def letters under reference. These limits are subject to screening board.
3. The procedure and criteria for screening of PBOR will be regulated vide the guidelines as explained in the succeeding paragraphs.
4. **Screening.** All PBOR will be screened for extension by two years by the Screening Board to be held on Unit/Regiment/Corps/Records Office basis, as applicable to assess their suitability for extension. The procedure and criteria for screening is laid down in Appx 'A' to this letter.

5. **Extension of a PBOR during extended Tenure.** *The retention of a PBOR during the extended tenure will be governed by the considerations as per Appx 'B' to this letter.*

6. **Format.** *Format for screening is given in Appendix 'C' to this letter.*

7. **Applicability.** *The revised policy will be made applicable with effect from 01 Apr 2011 to enable the dissemination to all concerned and preparatory work to be carried out by Record Offices and Line Dtes.*

8. *This HQ letter No B/33098/AG/PS-2(c) dated 21 Sep 1998 on the subject as amended from time to time will stand superseded by the instructions/provisions contained in this policy letter.*

Sd/- x x
(Ravin Khosla)
Col
Dir/AG PS-2
For Adjutant General

Copy to
All Records Offices
All Line Dtes
MP-8 (I of R)
MoD/(AG)
MP-3 (PBOR)"

6. A plain reading of the policy shows that a person below officer rank (PBOR) may be given extended period of service in the Indian Army by two years by screening board to be held on Unit/Regiment/Corps/Records Office basis as applicable to assess their suitability for extension. The criteria has been laid down in Appendix 'A' of the policy. A perusal of Appx 'A' shows that a PBOR may be granted extension on willingness of the individual. It further provides that a person may be physically fit and should be in medical category 'AYE' related to job content depending on trade or category. Arms/services will lay down specific standards in this regard. Controverting the arguments advanced by Ld. Counsel for the applicant it has been vehemently argued by Ld. Counsel for the respondents that the policy dated 20.09.2010 is not applicable for

extension of service in DSC. It is confined to regular service of Indian Army. To the arguments advanced by Ld. Counsel for the respondents, Shri Lalit Kumar submitted that there is no exclusion clause in the policy hence it may be made applicable to DSC which is part of regular Army.

7. With regard to applicability of the policy dated 20.09.2010 we have considered the rival arguments of both the sides. On the face of the record the policy seems to be applicable to regular service of Indian Army subject to clause (c) of Appendix 'A' (supra) dealing with physical fitness. For convenience sake clause (c) of Appendix 'A' is reproduced hereunder:-

*“(c) **Physical Fitness.** PBOR should be physically fit, related to job content depending on trade or category. Arms/Services will lay down specific standards in this regards.”*

8. A plain reading of clause (c) (supra) at the face of record provides that for the extension of service physical fitness shall be subject to provision made by respective class/category/trade. The policy does not lay down any criteria of fitness for the purpose of extension of service with regard to members of the Indian Army. Accordingly even if it is applied for DSC respondents have right to lay down criteria for medical fitness.

9. As is evident from the factual matrix on record, the applicant attained the age of superannuation from the regular Army under Rule 13 (3) (iii) (iv). For convenience sake aforesaid rule is reproduced as under:-

“13. Authorities empowered to authorise discharge —
(1) Each of the authorities specified in column 3 of the Table below shall be the competent authority to discharge from service person subject to the Act specified in column 1 thereof on the grounds specified in column 2.

(2)

Category	Grounds of discharge	Competent authority to authorize discharge	Manner of discharge
1	2	3	4
	(iii) Having been found medically unfit for further service.	Commanding Officer	To be carried out only on the recommendation of an invaliding Board.

10. The aforesaid provision shows that an individual who attained the age of superannuation after serving in the Indian Army from the rank which he/she held shall be discharged under the aforesaid provision distinguishes services of Army with other trade or branch which are incidental to Armed forces or the Army itself.

11. The applicant was discharged after ten years of contractual service in pursuance to provisions contained in Army Rule 13 (3) III (i) (supra). From the aforesaid provision which has been enforced to discharge the applicant by the respondents itself indicates that the regular service of Army and DSC services have been treated to be two different trade/classes and unless rule itself provides that it shall deal with the service conditions of both simultaneously no inference may be drawn that the provision made for the purpose of the Army personnel shall be applicable to the DSC. The exclusion of the service of the

DSC in the policy relied upon by the applicant's counsel seems to deliberate and intentional for the reason that the respondents themselves treated the DSC services and services in the Army as two different categories laying down different service conditions to deal with the subject matter. It is not for the Tribunal to read something which is not provided in the policy. Accordingly we are not in agreement with applicant's counsel that policy of 20.09.2010 applies to the members of DSC services.

12. Attention has been invited to the amendment done in the Record Office Instructions (ROI) 3/2003, a copy of which has been filed as **Annexure-6** to the affidavit dated 02.03.2017 filed by the respondents. The amended ROI provides that with effect from 01.01.2004 no extension shall be granted to persons placed in permanent low medical categories irrespective of disease/disability excluding Battle Casualty. However willingness/unwillingness certificate will be submitted to DSC records through DSC channels. For convenience sake the entire amended ROI as contained in Annexure-6 is reproduced as under:-

*“TERMS AND CONDITIONS OF SERVICE
DEFENCE SECURITY CORPS JCOS/OR*

1. *Refer to ROI 14/92 as amended from time to time.*
2. *Para 5 (e) of ROI (re-constructed vide ROI 01/94) is deleted and reconstructed as under:-*

Para 5 (e) Medical Category

- (i) *Should be in medical category S1H1A1P1E1, willing and recommended by OC Unit. Extension of service commencing with effect from 01 Jan 2004 will not be granted to LMC personnel placed in*

permanent categories irrespective of disease/disability excluding Battle Casualty. However, willingness/unwillingness certificate will be submitted to DSC Records through DSC channel as hitherto fore as per time frame given in ROI 14/92. Cases of personnel whose willingness certificates have already been received in DSC Records through DSC channel and granted further extension of service commencing from 01 Jan 2004 onwards, vide Records Part II orders, will be reviewed and their discharge orders issued. Simultaneously, discharge orders on completion of terms of their initial/extended period of engagement in the aforesaid cases will be issued by DSC Records, immediately without waiting for their willingness/unwillingness certificates, irrespective of option exercised by them.

(ii) Cases of LMC personnel upgraded to medical category S1H1A1P1E1 after issue of discharge orders, will be intimated to DSC Records through fastest means i.e. FAX/Telegrams by the units immediately on receipt of intimation from hospital authorities at least two months prior to date of discharge for review and necessary action as deemed fit. Attention in such cases may be granted subject to approval of medical board by competent authority and individual remaining in acceptable medical category i.e. S1H1A1P1E1 on the date of expiry of previous terms of engagement. Representations received after the above time frame (2 months) will not be entertained.

(iii) Special Provisions. Permanent low medical category personnel whose service fall short for earning minimum service pension may be considered for condoning such short fall of service as per provisions contained in para 125 of Pension Regulations 1961, Part-I.

(iv) The above provisions are not applicable to TB/Leprosy personnel for whom separate orders are being issued.

(Authority: Army HQ letter No A/00585/Extn/DSC-1 dated 02 May 2003)".

Clause 3 of ROI 03 of 2003 has been deleted and reconstructed vide ROI 5 of 2003 but the ROI 03 of 2003 is applicable since attention has not been invited by Ld. Counsel for the applicant to any other ROI issued at later stage.

13. Ld. Counsel for the applicant and Ld. Counsel for the respondents have not invited attention of the Tribunal to any policy, circular or order placed on record to the effect that any further ROI has been issued relating to service conditions/extension of service of DSC personnel superseding above one.

14. Accordingly we are of the considered opinion, keeping in view the ROI No 3/2003 (supra) that when the applicant was appointed and granted extension of 10 years of service in DSC, admittedly he was in SHAPE-I category which was dropped to P2 (permanent) category as stated by the applicant himself. Accordingly in view of the ROI (supra) the respondents do not seem to have committed any error or illegality in declining to grant extension to the applicant in DSC. Unless and until the aforesaid policy is set aside by appropriate forum or modified, whether it is good or bad it cannot be looked into during course of judicial review. Of course in case the policy is declared unconstitutional or it is set aside by appropriate forum or it is repealed, the ROI (supra) shall have binding effect in view of the proposition of law laid down by the Allahabad High Court in the case of ***Tuples Educational Society vs. State of U.P. & Anr*** reported in 2008 (3) AWC 2499: 2008 (2) UPLBEC 1611.

15. Now coming to the second limb of arguments Ld. Counsel for the applicant has relied upon the judgment of Armed Forces Tribunal Regional Bench, Lucknow in O.A. No. 275 of 2011 decided on 23.09.2011. A perusal of the impugned order of the Tribunal shows that the applicant in the said O.A. was granted extension of service in DSC and brought before RMB on 12.06.2008 and was found to be suffering from the disability NARROW ANGLE GLUCOMA BOTH EYES LEFT EYE (OPTD) and the disability was assessed at 15-19 percent. Accordingly he was discharged. The Bench had relied upon the decision of Apex Court in **Union of India vs. Rajpal Singh** decided on 07.11.2008 (Civil Appeal No. 6587 of 2008) arising out of SLP (Civil) Appeal No. 6073 of 2007) reported in 2008 (5) ESC 718 and **SKT Puttan Lal vs. Union of India & Ors** (Writ Petition (c) No. 5946 of 2007 decided by Delhi High Court on 20.11.2008 where similar discharge on medical ground (P2 category) has been held to be not correct. The Bench held that the discharge of the applicant of said case on medical ground under Rule 13 (3) (III) (iii) on medical ground was ordered on the basis of recommendation of Invaliding Medical Board and not Release Medical Board as provided under the rules. The facts and circumstances do not seem to be applicable in the present case. The case relied upon by Ld. Counsel for the applicant seems to deal with different facts and circumstances and does not seem to be applicable in the present case. It is not the applicant's case that he was discharged from Army services on medical category rather medical disability was caused to the applicant during the

extended period of service in the DSC. It is trite law that the judgment may have binding effect in case it fits into the facts and circumstances of the case and question of law raised before the Court/Tribunal/authority.

16. Accordingly the cases of ***Union of India vs. Rajpal Singh*** (supra) and ***SKT Puttan Lal*** (supra) relied upon by the applicant's counsel do not seem to be applicable in the facts and circumstances of the present case.

17. Ld. Counsel for the applicant half heartedly placed reliance on the decision rendered by the Armed Forces Tribunal, Regional Bench, Kochi in O.A. No. 191 of 2013 ***Hari Haran P. vs. Union of India & Ors.*** A perusal of the decision in aforesaid case shows that ROI with regard to DSC service laying down certain conditions has not been considered by the Kochi Bench of the Tribunal (supra). In no judgment of any Court of the country the ROI 03 of 2003 has been considered, set aside or declared ultra vires. Accordingly as held (supra) it has binding effect. The Kochi Bench of the Armed Forces Tribunal has not considered the binding effect of ROI in view of law settled by the Allahabad High Court (supra) based on Apex Court judgment hence seem to be per incuriam to the law settled by Hon'ble Apex Court the ROI, hence lacks binding effect.

18. On the other hand Ld. Counsel for the respondents has invited attention of the Tribunal to the judgment of Armed Forces Tribunal, Principal Bench, New Delhi in O.A. No. 690 of 2010 Ex Sep Vidya Sagar vs Union of India & Ors wherein in almost in identical case the

Principal Bench of the Armed Forces Tribunal at Delhi had held that in the event of drop out of medical category the order of discharge may be passed, that too after completion of contractual period of ten years. Ld. Counsel for the respondents have relied upon para 37 of the decision in aforesaid O.A. No. 690 of 2010 (supra) which is reproduced as under:-

“37. We are, therefore, of the considered opinion that the applicant was discharged from DSC Service before completion of terms of employment and his tenure got cut due to Low Medical Category. His re-employment in DSC was not on contractual and casual basis for a fixed term of tenure. On the contrary, the applicant’s service limit was till the attainment of age of superannuation, i.e. 57 years subject to fulfillment of eligibility criteria before the screening committee. In such view of the matter, it is crystal clear that his service tenure was curtailed at least by two years. The curtailment of applicant’s service tenure has thus been well established.”

19. It is well settled proposition of law that equals cannot be treated unequally and unequals equally and if is done it shall amount to discrimination and be hit by Article 14 of the Constitution of India. The Government has right to provide reasonable classification/categories and lay down service conditions accordingly. It is the prerogative of the Government to provide service conditions and proceed with reasonable classification (vide 1990 (2) SCC 715, **Direct Recruit Class II Engineers vs. State of Maharashtra** (para-13), 1997 (1) SCC 701, **SC & ST Officers Welfare Association vs. State of U.P.** (paras 4 and 10), 1995 Supp (2) SCC 246, **K. Ravindranath vs. State of Karnataka** (paras 10 and 12) and 1999 (4) SCC 756l, **Kamlakar & ors vs. Union of India** (para-12). We feel that in the present case the power to retire Army personnel with different classification is not hit by

Article 14 of the Constitution of India and seems to be reasonable one. Though the applicant has not raised this issue nor challenged the circular with regard to service conditions of DSC in the O.A. but since he has argued this legal point before us, we have considered this issue with final verdict.

20. In view of above we are of the considered opinion that the present O.A. lacks merit and the impugned order does not seem to suffer from any irregularity or illegality hence deserves to be dismissed. So far as submission of Ld. Counsel for the applicant with regard to disability pension and other service benefits is concerned, we give liberty to the applicant to approach appropriate forum.

21. The O.A. is **dismissed** accordingly.

No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

anb

(Justice D.P. Singh)
Member (J)

Dated: 16.05.2017