

**AFR****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 145 of 2020**Tuesday this the 12<sup>th</sup> Day of October, 2021**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**

No. 9512337L Havidar Dev Prakash Shukla S/o Sri Janardan Prasad Shukla, R/o Vill-Pure Birbal, Post Dhingwas, Dist-Pratapgarh, Pin 230128 (UP)

..... Applicant

Ld. Counsel for the : **Shri K.P. Datta, Advocate.**  
Applicant

Versus

1. Union of India through its Secretary, Ministry of Defence, New Delhi -110011.
2. The Chief of the Army Staff, COAS Sectt. Integrated HQ of MoD (Army), South Block, New Delhi -110001.
3. Officer-In-Charge Army Educational Corps Records, Pin 908777, C/o 56 APO.
4. Commander, HQ 7 Inf Bde, Pin 908007, C/o 56 APO
5. PAO (OR) AEC, Panchmarhi, Pin -461881(MP).

.....Respondents

Ld. Counsel for the  
Respondents.**Shri Rajiv Pandey,**  
**Central Govt. Counsel**

## **ORDER**

**“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

*(A). To issue / pass an order or direction to Set-aside / quash the illegal rejection order passed by Army Education Corps Records, C/o 56 APO vide letter No. 00283 / LMC/CA1 dated 29.02.2020, in which the Respondent No.3 has been unjustly denied him for continuation in service and cancellation of his discharge order No.CA1/MRO/07/2019 dated 24.12.2019 with the date of discharge wef 31.05.2020 on medical ground.*

*(B). To pass an order/ directions to the respondents to reinstate the applicant in Army Service Notionally from the date of discharge wef 31.05.2020 till completion of extension period upto 31.03.2021 along with all consequential benefits and pay and allowances.*

*(C). To issue /pass an order or directions to the respondents for fixation of his correct Basic Pay and allowances as per 7<sup>th</sup> CPC award wef 14.05.2016, subsequently to the rank of ACP Nb subedar wef 14.04.2016 as per revised MACP Scheme of Govt of India, under the similar facts and circumstances of this Hon’ble Tribunal was pleased to allow OA No 156 of 2016, O.A. 194 of 2018, O.A. No 368 of 2019 and O.A. No 37 of 2020 with all consequential financial benefits and arrears and interest on arrears @ 18% per annum.*

*(D). To issue / pass any other order or directions as this Hon’ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*

*(E). To allow this original application with costs.*

2. Brief facts of the case giving rise to this application are that the applicant was enrolled in the Army on 06.03.1995. He was granted 1<sup>st</sup> Financial Up gradation for ACP Nb Subedar wef 14.05.2016 but pay and allowances for ACP Nb Subedar was not implemented. Applicant submitted various representations but his pay was not fixed correctly. Applicant was placed in low medical category A3 Permanent from 19.07.2010 to 11.07.2021 for two years for disability **'FRACTURE FEMUR LT (OPTD)'** in the left leg. A show cause notice was issued and applicant was discharged from service vide letter dated 24.12.2019. Applicant preferred representation against discharge order which was rejected. By means of instant O.A., applicant has prayed for notionally reinstate him in service till completion of his tenure and grant ACP Nb Sub wef 14.05.2016.

3. Learned counsel for the applicant submitted that applicant was enrolled in the army on 06.03.1995. He was promoted to the rank of Havildar on 14.05.2008. Thereafter he was granted 1<sup>st</sup> financial upgradation for ACP Nb Sub wef 14.05.2016 and granted Rs 39,900/- Basic Pay. Learned counsel for the applicant further submitted that Hav (Clk) Shyamal Giri was upgraded for ACP Nb Sub wef 01.10.2008 but his basic pay

was fixed Rs. 41,600 and Hav Clk Shiv Bhagwan was upgraded for ACP Nb sub wef 07.07.2008 and his basic pay was also fixed Rs. 41,600/-. Applicant made representation against the anomaly but the same was rejected.

4. Applicant was granted 5 days casual leave from 12.05.2018 to 16.05.2018. While on leave at 0630 hrs on 12.05.2018 applicant fell down in bath room and sustained injury. Medical Board was held wherein he was diagnosed a case of '**FRACTURE SHAFT FEMUR LT**' and placed in low medical category A3 permanent for two years upto 11.07.2021 vide Medical Board held on 19.07.2019 at 7 Air Force Hospital, Kanpur. Injury sustained to the applicant was considered as attributable to military service. A Show Cause Notice was issued and applicant was willing to serve in the army till extension period of service but he was issued discharge order dated 04.12.2019. He preferred representation against illegal discharge which was rejected. Learned counsel for the applicant prayed that applicant be granted correct ACP of Nb Sub and grant extension of service upto completion of tenure of service.

5. On the other hand, learned counsel for the respondents submitted that applicant was enrolled in the army on

06.03.1995 and discharged from service on 31.05.2020 under the provisions of Army Rule 13 (3) III (iii) i.e. medically unfit for further service. Applicant sustained injury while on leave. On 18.07.2019, Medical Board of the applicant was held and applicant was placed in low medical category A3 (permanent) for 2 years from 11.07.2019 to 10.27.2021.

6. Learned counsel for the respondents further submitted that as per Govt of India, Min of Def letter dated 03.09.1998, the terms of engagement of Hav is of 24 years only. 2 years of extension of service is granted to those personnel who are in medical category SHAPE-1. The applicant was downgraded to Medical Category SHAPE-3 on 11.07.2019, thus became ineligible for 02 years of extension of service and he was discharged from service. As far as grant of ACP of Nb Sub is concerned, applicant not opted OPTCPC and his juniors opted OPTCPC hence his pay is less than his juniors. Learned counsel for the respondents prayed that in view of the facts, Original Application filed by the applicant is devoid of merit and is liable to be dismissed.

7. Heard learned counsel for the parties and perused the relevant records leading to the decision of discharge from

service. The existing provisions in Army permits a Low Medical Category soldier in SHAPE 2/3 (permanent) to be promoted right up to the rank of Subedar Major, however, parallelly it also has a provision to discharge soldiers in SHAPE 2/3 (permanent) on grounds of not having sheltered appointments. Having parallel provisions of promotion as well as discharge for same medical category i.e. SHAPE 2/3 increases the scope of arbitrariness and subjectivity.

8. The question before us to decide is 'Is the present system of denying sheltered appointment to a SHAPE 2/3 (permanent) before expiry of his terms of engagement for that rank, fair and just?'

9. After hearing the counsels and perusing the records, we find that the applicant was initially placed in a Low Medical Category A3 on 16.07.2018 and thereafter he remained in permanent Low Medical Category until his discharge from service.

10. Hon'ble Apex Court judgment in the case of ***Union of India & Others Vs Rajpal Singh, {(2009) 1 SCC 216}*** the

provisions of Army Rule 13- 1 (ii) (a) were modified and the new provision is reproduced as under:-

<b>Grounds of discharge</b>	<b>Competent Authority to authorise discharge</b>	<b>Manner of discharge</b>
1	2	3
“1.(ii)(a) Having been found to be in permanent low medical category SHAPE 2/3 by a medical board and when:- (i) No sheltered appointment is available in the unit, or (ii) Is surplus to the organization.	Commanding Officer	The individual will be discharged from service on the recommendation of Release Medical Board.”

11. We find that as per AO 46/80 disposal of permanent Low Medical Category personnel is very clearly defined. Sub Para (a) and (b) of para 2 of AO 46/80 reads as under:-

*(a) The employment of permanent low medical category personnel, at all times, is subject to the availability of suitable alternative appointments commensurate with their medical category and also to the proviso that this can be justified in the public interest, and that their retention will not exceed the sanctioned strength of the regiment/corps. When such an appointment is not available or when their retention is either not considered necessary in the interest of the service or it exceeds the sanctioned strength of the regiment/corps, they will be discharged irrespective of the service put in by them.*

*(b) Ordinarily, permanent low medical category personnel will be retained in service till completion of 15 years service in the case of JCOs and 10 years in the case of OR (including NCOs). However, such personnel may continue to be retained in service beyond the above period until they become due for discharge in the normal manner subject to their willingness and the fulfillment of the stipulation laid in Sub Para (a) above.”*

12. Procedure for disposal of permanent LMC personnel has been given at Para 10 to 13 of IHQ of MoD (Army) letter No B/10201/06- 08/Vol-VI/MP-3(PBOR) dt 30 Sep 2010 and as per Para 5 of ibid letter the retention in service.

*(a) Availability of suitable alternative appt commensurate with their med cat.*

*(b) Such retention will not exceed the sanctioned str of the Corps.*

*3. One of guiding principles that should be considered by the CO and OIC Records for retention/disch of permit LMC pers SHAPE 2/3 factor is that he should have completed min 15 yrs pensionable service. In the case of above indl he has already completed 19 ½ yrs service (DOE-27 Sep 1991).*

*4. As per Para 7 and 12 of IHQ of MOD (Army letter under ref, permt LMC pers (Non Battle Case) willing to serve may be disch from service after approval of OIC Records. The indls will however be brought before an Invaliding/Release Med Bd as applicable and disch will be carried out as per laid down instrs.*



5. *As the OC Tps has also not provided sheltered appt to the NCO, it is recommended that approval of OIC Records to disch him from service be accorded.*

6. *In case, his discharge is approved, he will be SOS from the Army within six months from the date of approval as per the existing policy.*

13. Now we turn to the Guiding Principles for Disposal of Permanent Low Medical Category Personnel issued, vide ADGMP, No.b/10201/Vol-VI/MP-3(PBOR), dated 30th September 2010. The relevant extracts are,

6. **Guiding Principles:** *The guiding principles that should be considered by the Commanding Officers and OIC Records for retention/discharge of permanent LMC personnel are as under:-*

(a) *All endeavour should be made to allow such personnel to complete their minimum pensionable service in their present rank as under.*

(i) *Personnel in SHAPE 5: The minimum period of qualifying service actually rendered and required for an invalid pension is 10 years.*

(ii) *Personnel in SHAPE 2/3: The minimum period of qualifying service actually rendered and required for earning service pension will be 15 years (Auth-Para 5.1.2 of MoD, Department of Ex Servicemen welfare letter No 17(4)/2008(2)/U(Pen/Pol) dated 12 November 2008).*

(b) *Take into consideration the nature of disability and capability of the individual to look after himself outside the service and the need to continue treatment at Services*

*Hospitals which may not be located in the vicinity of the individuals home station.*

**Sanctioning Authorities**

*7. Under the provisions of Army Rule 13, as amended based on recommendations of the Release Medical Board/Invaliding Medical Board as applicable, the Commanding Officer is the competent authority to sanction discharge of JCO/OR who are in SHAPE 2/3 or have been found to be unfit for further service ie in SHAPE 5. In the existing circumstances the sanctioning authority would rest with the Commanding Officer, who would obtain the approval of following authorities prior to sanction of actual discharge:-*

*(a) Battle Casualties (Willing to Serve) - Head of Arm/Service*

*(b) Battle Casualties (Unwilling to Serve) - OIC Records*

*(c) Non-Battle Casualties (Willing to Serve - OIC Records*

*(d) Non-Battle Casualties (Unwilling to Serve) - OIC Records.*

14. We also find that the army permits promotion of Low Medical Category SHAPE 2/3 (permanent) up to the rank of Subedar Major, thus we have a situation wherein a person in Low Medical Category SHAPE 2/3 can either be promoted or can also be discharged on the grounds of non availability of sheltered appointment. We are aware that the army is a fighting force and physical fitness is of paramount importance for high operational efficiency of the Army. It is precisely for this reason that soldiers in Armed Forces are not protected by “THE PERSONS WITH DISABILITIES ACT 1995”. We find that

SHAPE 2/3 (permanent) medical category is a category which has minimum limitations and a soldier can by and large discharge his duty reasonably well in this medical category as compared to other categories which are lower than SHAPE 2/3 (permanent). We are also aware that minor injuries or non threatening diseases of a soldier can also result into a permanent Low Medical Category of SHAPE 2/3 for him. We understand that if a soldier is always in fear of losing his job, he cannot put in his best hence to bring a balance between the interests of the organization and the motivational requirements of a soldier AO 03/2001 and AO 46/80 have been issued. However if the Army as a organization has decided not only to keep permanent Low Medical Category personnel of SHAPE 2/3 (permanent) in service but also to promote them up to the rank of Subdear Major, then the question arises as to what should be the checks and balances against arbitrariness and subjectivity against the misuse of another parallel provision in Army wherein soldier in permanent Low Medical Category of SHAPE 2/3 (permanent) can be discharged on the ground of non availability of sheltered appointment.

15. Annual Confidential Reports are written for all personnel including Low Medical Category personnel. If a Low Medical Category person in SHAPE 2/3 (permanent) is not upto mark and is not discharging his duties properly, the same should find reflection through his Annual Report in the DPC. In such a situation if the person has to be discharged on grounds of non availability of sheltered appointment, he should be discharged only due to very unavoidable and specific circumstances like, 'surplus to organization', or unit deployed or likely to be deployed in HAA/CI Ops area etc so that the relationship between employment restriction in SHAPE 2/3 (Permanent) and the nature of duty become clear. Hence we feel that if Army as a fighting force feels that personnel in SHAPE 2/3 (Permanent) should not be promoted in general and specifically they should not be promoted to Subedar Major rank, then it should say so unambiguously and clearly. But having cleared them as per present policies for promotion upto Subedar Major and thereafter having a parallel provision to discharge them due to non availability of sheltered appointment is an avoidable situation, which has full potential for arbitrariness/subjectivity particularly so because there are no clear guidelines to Commanding Officers in this matter. It is therefore desirable for

Army authorities to fine tune their rules and to find ways and means of reducing the scope of arbitrariness and subjectivity in grant of sheltered appointments.

16. Considering all the issues involved in this particular case we feel that the only restriction relevant to applicant is the restriction on his HAA deployment. Since it is not the claim of respondents that the unit of the applicant in the present or in immediate future was likely to deploy in an High Altitude Area or CI Ops Area or that he was surplus to organization, hence in these circumstances denial of sheltered appointment merely on the ground that he is not in SHAPE-I and cannot lead in war like situations amounts to totally contradicting the stated organizational policy of giving promotion to SHAPE-2/3 (Permanent) soldiers in Army upto Subedar Major rank. Thus such a decision is prima facie hit by arbitrariness and subjectivity particularly so when the applicant is alleging that he has been unfairly eased out to create a vacancy for somebody else to get promotion. If a Low Medical Category person is not performing well then his Commanding Officer can always reflect the same in his Annual Confidential Report to block his promotion. However, if a low medical category person in

SHAPE 2/3 is promoted to the rank of JCO then in normal circumstances he should be allowed to complete his terms of engagement for his given rank.

17. In the case of, ***Kameshwar Prasad and others, vs. State of Bihar*** reported in AIR 1962 Supreme Court 1166, the Hon'ble Supreme Court had considered the rights conferred by Article 33 read with para 3 of the Constitution for the Govt servants with regard to extent of exclusion of prospects of the fundamental rights under para 3. The relevant portion is reproduced as under :-

*“(a) In our opinion, this argument even if otherwise possible, has to be repelled in view of the terms of Art 33. That article selects two of the services under the state members of the armed forces and forces charged with the maintenance of public order and saves the rules prescribing the conditions of service in regard to them from invalidity on the ground of violation of any of the fundamental rights guaranteed by Part III and also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and the maintenance of discipline among them. The Article having thus selected the services members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, we consider that other classes of servants of government in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being govt servants and the nature and incidents of the duties which they*

*have to discharge in that capacity might necessarily involve restrictions of certain freedoms as we have pointed out in relation to Art. 19 (1) (e) & (g)".*

18. We are of the considered opinion that the denial of sheltered appointment to the applicant is hit by Article 21 of the Constitution of India because his continuity in the rank has been denied due to an arbitrary exercise of power. The impugned order suffers from substantial arbitrariness and is not sustainable being not in consonance with the procedure prescribed by law.

19. As a result of discussions made hereinabove, the O.A. deserves to be partly allowed; hence **partly allowed**. Impugned order of discharge passed by the respondents is quashed. The applicant shall be re-instated in service notionally in his last rank held till he completes his terms of engagement in that rank i.e. 26 years of total service. He shall be entitled to 50% of salary (Basic + MSP = DA + Rank Pay) for the notional period of service. His other retiral benefits are accordingly required to be worked out by the respondents. No other relief is admissible to the applicant. Respondents are further directed to remove the anomaly of the applicant in MACP. It is a general principle

that junior cannot get more pay than the senior. This order is to be implemented within four months from the date of presentation of a certified copy of order, default will result in payment of interest @ 8%.

20. No order as to costs.

21. Pending applications, if any, stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)  
**Member (A)** **Member (J)**

Dated: 12<sup>th</sup> October, 2021

UKT/-