

**Court No. 2**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**ORIGINAL APPLICATION No. 145 of 2012**

Tuesday, this the 9<sup>th</sup> day of Aug 2016

**Hon'ble Mr. Justice D.P. Singh, Member (J)**

**Hon'ble Air Marshal Anil Chopra, Member (A)**

Ex-Naik Om Prakash Tiwari (No. 14352597X) of 302 Light Regiment C/o 56 APO, son of late Brij Kishore Tiwari, resident of village Gadamar, Post Office Bharwar, police station Shankargarh, Tehsil Bara, district Allahabad (U.P.)

...Applicant

Ld. Counsel for the: **Shri P.N. Chaturvedi, Advocate**  
Applicant

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi 110011.
2. Officer-in-Charge, Artillery Records, Nasik Road Camp, APS Pin – 908802.
3. Commanding Officer, 302 Light Regiment, Pin – 926302, C/o 56 APO.
4. Principal Controller Defence Accounts (Pension) Draupadi Ghat, Allahabad.

.....Respondents

Ld. Counsel for the : **Shri Asheesh Agnihotri,**  
Respondents **Central Govt Counsel, assisted by**  
**Maj Soma John, OIC Legal Cell.**

**ORDER (ORAL)**

1. This present Application under Section 14 of the Armed Forces Tribunal, 2007 has been preferred being aggrieved by impugned order of voluntary discharge from Army Service on 01.09.2002. Further prayer has been made to grant the applicant pay and allowances of the post of Havildar from 01.09.2002 to 01.09.2006.

2. We have heard Ld. Counsel for the parties and perused the record.

3. The applicant joined Indian Army on 06.09.1980 in the Corps of Artillery as Gunner (Sepoy MT). While serving in the Army he was promoted on the post of Acting Naik on 01.04.1989 and was promoted substantively on said post on 13.12.1992. While performing duties of the post of Naik, applicant had given unwilling certificate on 16.02.2002 according to which he was unwilling to continue in alternative employment in Low Medical Category and the same was recommended by the Commanding Officer of the Unit in terms of IHQ of Mod (Amy) MP-3 Letter No. B/10/122/LMC/MP-3 (PBOR) dated 15.03.2000. This fact has not been denied by Ld. Counsel for the applicant that unwillingness certificate was given by the applicant to leave the Army without seeking any alternative employment.

4. Submission of Ld. Counsel for the applicant is that consent given by the applicant not to continue in alternative employment itself could not be given weightage since it was given under Army

Order 46 of 1980 which is not applicable. However, the fact remains that the applicant had given unwillingness certificate to continue in alternative employment. Ld. Counsel for the respondents relied upon para 20 (a) (iv) of Army Order 03 of 2001. Ld. Counsel for the respondents invited attention of the Tribunal to para-7 of the counter affidavit according to which the applicant was downgraded to Low Medical Category BEE (Temporary) with effect from 11.10.2000 for the diagnosis of 'OBESITY 278' and on review by Medical Board he was placed in Category P2 (temporary) for six months with effect from 11.04.2001 and thereafter he was placed in Low Medical Category (P2) permanent for two years with effect from 25.09.2001 by the Medical Board. According to para a (iv) of Army Order No 3 of 2001 a person placed in Permanent Low Medical Category on account of OBESITY may not be allowed to continue in service and his case is not to be recommended for further retention in service. It has further been submitted by Ld. Counsel for the respondents that since the applicant had submitted unwillingness certificate for alternative employment in Low Medical Category and the same was recommended by the Commanding Officer of the unit in terms of IHQ of MoD (Army) MP-3 letter No B/10122/LMC/MP-3 (PBOR) dated 15.03.2000 there was no option except to accept the prayer made by the applicant. It is further submitted that after approval of the OIC Records Artillery Record issued discharge order under item (III)(v) of the table annexed to Army Rule 13 (3) read in conjunction with Army Rule 13 (2A) and the applicant was struck of strength from the Army with effect from 01.09.2000. It is also submitted that the

applicant has been granted service pension with effect from 03.09.2002 which the applicant getting from the appropriate source. Sum and substance of arguments advanced by Ld. Counsel for the respondents is that once the applicant waived his right for alternative appointment he has no right to prefer the present O.A. Para 20 of the Army Order 03 of 2001 for convenience sake is reproduced as under:-

*“20. During ME of JCOs, NCOs and OR the body weight will be checked as per the age, height and weight chart published at Appendix ‘A’ to this order and disposal will be as under :-*

*(a) (i) If weight is more than 10 per cent but less than 20 per cent over and above the ideal body weight (IBW), the individual has no symptoms/signs of any disease and no abnormality is detected even after investigations, the individual will be advised in writing in the sick report book to reduce his weight within 12 weeks by strict dieting and physical exercises.*

*(ii) After 12 weeks, if the individual has not brought down his body weight to less than 10 per cent over and above his IBW, he will be placed in medical category P2 (T-24).*

*(iii) At the end of one year, if the individual continues to be overweight by more than 10 per cent over his IBW, he will be downgraded to category P2 (perm) and will be debarred from promotion to the next higher rank.*

*(iv) After the individual is placed in permanent LMC for obesity, no sheltered employment will be given. After contractual period of service*

*individuals may be released from service as per AR-13.*

*(b) If the body weight is in excess of IBW by more than 20 per cent, investigations will be carried out with a view to exclude any metabolic abnormality and he will be placed in medical category P-2 (T-24). Rest is as per Para 20 (a) (iii) above”.*

5. In view of above since para 20 (supra) confers power to the effect that person suffering from OBESITY may not be granted sheltered employment and in the present case the applicant himself had not prayed for sheltered employment rather had declined to accept the same, the respondents do not seem to be at fault.

6. So far as arguments advanced by Ld. Counsel for the applicant that in Army Order 46 of 1980 there is no provision to accept voluntary discharge on the basis of unwillingness certificate is concerned, in case the authority has got power under any provision, then merely because incorrect provision has been quoted by the authority, the same shall not vitiate, is the well settled proposition of law. A plain reading of Army Order 03 of 2001, para 20 provides that a person suffering from OBESITY and placed under Medical Category P2 (T-24) shall not be permitted to continue in Army service, and it is enough to discharge such a person. Submission of Ld. Counsel for the applicant that the applicant is suffering from HYPERTENSION and OBESITY does not make any difference since admittedly the applicant is suffering from OBESITY and he himself gave certificate showing his intention to be discharged from Army on the ground that he was not willing to continue in Army Service.

Merely because certain provision was wrongly quoted in the order or decision has been taken under incorrect provision, it shall not make any difference. A person who himself disowns the Army should not be permitted to continue in Army services and in consequence thereof discharge order does not suffer from any illegality or impropriety.

7. In view of our observations made hereinabove, we are of the considered opinion that the O.A. lacks merit and is accordingly **dismissed**.

No orders as to costs.

**(Air Marshal Anil Chopra)**  
**Member (A)**

anb

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