Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 539 of 2017

Wednesday, this the 06th day of December, 2017

"Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal BBP, Sinha, Member (A)"

Ex-Rifleman Balahang Gurung (Army No. 5250186-K) of 5/3 Gorkha Rifles, C/o 56 APO, S/o Shri Man Bahadur Gurung, R/o Village - Chhina Makhu, Post- Chhina Makhu, District- Bhojpur, Nepal, C/o Shri P.P. Pant, 94 Adarsh Nagar, Post Office- Neelmatha Cantt, Lucknow (U.P.) - 226002

……. Applicant

Ld. Counsel for the Applicant : **Shri K.K.S. Bisht, Advocate** (Counsel for the applicant)

Versus

1. Union of India through Secretary, Ministry of Defence South Block, New Delhi.

2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence, (Army) South Block New Delhi-110011.

3. Officer- in Charge, Record Officer, 39 Gorkha Rifles, PIN-900445, C/o 56 APO.

4. Principal Controller of Defence Accounts (Pensions) Draupadi Ghat, Allahabad- 211014.

…Respondents

Ld. Counsel for the: Respondents. **Mrs Anju Singh, Advocate,** Addl. Central Govt Standing Counsel.

Assisted by : **Maj Salen Xaxa,** OIC Legal Cell.

ORDER (ORAL)

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act, assailing the denial of disability pension.

2. The facts of the case in nutshell are that the Applicant was enrolled in the Indian Army on 01.07.2000 and was discharged from service on 01.12.2003 on account of being in low medical category which was described as "SENSORI NEURAL HEARING LOSS (LT) EAR H 90.3". Before discharge, the Applicant was brought before Release Medical Board on 25.09.2003 which opined his disability as 15-19% for life. The appeal preferred by the Applicant was rejected vide communication contained in letter dated 23/26.08.2004.

3. We have heard learned counsel for the Applicant as also learned counsel for the respondents and have also gone through the material facts on record.

4. The only contention raised by learned counsel for the respondents is that the disability of the Applicant was opined to be neither attributable to nor aggravated by military service and that it was less than 20%, hence he is not eligible for Disability Pension.

5. It may be noted that the delay in filing the O.A. has already been condoned vide order of the Tribunal dated 26.09.2017.

6. Now coming to the disability percentage of the applicant the law on the same is well settled by Hon'ble Supreme Court. At this stage the legal questions which arise are three fold. Firstly, was it right to discharge the applicant through Release Medical Board (RMB) and not Invalidating Medical Board (IMB) when his services were being cut short on medical grounds. Secondly, there is an issue of deciding the attributability of the disability. Thirdly the issue of whether the percentage of disability of 15 to 19% for life is a just & fair percentage or not for a case where the individual is being removed from service prematurely on medical grounds.

7. The law on release through IMB/RMB has been well settled by the Hon'ble Supreme Court vide its judgment in case of ***Rajpal Singh Vs. UOI & Ors*** reported in (2009) 1 SCC 216**.** Relevant extract of the aforesaid judgment is reproduced as under:-

> "18.The afore-extracted Rule 13 (1) clearly *enumerates the authorities competent to discharge from service, the specified person; the grounds of discharge and the manner of discharge. It is manifest that when in terms of this Rule an army personnel is discharged on completion of service or tenure or at the request of the person concerned, no specific manner of discharge is prescribed. Naturally, the Regulations or Army Orders will*

take care of the field not covered by the Rules. 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. 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 or situations can be covered under a residual head, which are not covered under a specific head. It is, therefore, clear 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 and no other.

19. Having reached the said conclusion, we feel that the appellants were bound to follow Rule 13 (3) (I) (ii), more so having placed the respondent in low medical category (permanent) for a period of two years from October, 2001 he was discharged from service on 31st August, 2002, relying on the recommendation of the Re-categorisation Board held on 24th October, 2001. As noted in the show cause notice, extracted above, the said Board had placed the respondent in "permanent low medical category". Be that as it may, the main ground of discharge being medical unfitness for further service, the appellants were bound to follow the prescribed rule.

20. 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. This rule was enunciated by Justice Frankfurter in Viteralli Vs. Saton7, where the learned Judge said:

> *359 U.S. 535 : Law Ed (Second series) 1012 "An executive agency must be rigorously held to the standards by which it professes its action to be judged… Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed…This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."*

8. Thus it is clear that premature release of the applicant on medical grounds through RMB was illegal. He should have been released through IMB because his engagement period was being cut short on Medical grounds. Thus, his release on date 01.12.2003 is to be deemed to be an **INVALIDMENT OUT OF SERVICE** and not a routine release.

9. The next question is attributability of his disability ("SENSORI NEURAL HEARING LOSS (LT) EAR H 90.3"). It is well known that basic check up on recruitment involves check up of basic hearing of both ears which apparently was checked by the respondents and there after the Applicant was cleared for enrollment. Hence for the medical board to say, that hearing loss three years after recruitment is constitutional in nature, doesn't sound convincing & logical. In any case the law on the issue of attributability has been well settled by Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*:**

"29.1. Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).

29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service [Rule 5 read with Rule 14(b)].

29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally (Rule 9).

29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service [Rule 14(c)]. [pic]

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [Rule 14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons [Rule 14(b)]; and 29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 - "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

10. Hence in the light of the law established on attributability, the disability of the applicant is to be treated as '**ATTRIBUTABLE TO MILITARY SERVICE.'**

11. The law on the rounding off of Disability percentage is again well settled by the Hon'ble Supreme Court. Hence, we would like to refer to a decision of the Apex Court in ***Sukhvinder Singh Vs UOI & Ors*****,** reported in (2014) STPL (WEF) 468 SC, in which the Apex Court clearly held that whenever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty percent and further as per the extant Rules/Regulations, a disability leading to invaliding out of service, would attract the grant of fifty per cent disability pension.

12. There is no denying of the fact that the Petitioner was prematurely discharged from service on the ground of being in low medical category. This discharge as mentioned was illegal and therefore is to be deemed as **INVALIDATION OUT OF SERVICE.** In the circumstances, regard being had to the decision of the Apex Court in ***Sukhvinder Singh vs Union of India*** (supra), we converge to the conclusion that even if it be assumed that the assessment of disability by the Medical Board was Nil, **IT WOULD PERFORCE BE ASSUMED TO BE 20% AND ABOVE FOR CASES OF**

INVALIDATION OUT OF SERVICE and once, it is assumed to be 20%, it has to be rounded off to 50% for life.

ORDER

13. Thus as a result of foregoing discussion, the O.A is allowed and the impugned order dated 23/26.09.2004 is set aside. The Applicant is held entitled to disability pension to the extent of 20% for life which is to be rounded off to 50% for life. The Respondents are also directed to pay arrears of aforesaid disability pension which is restricted to a period of three years prior to filing of the O.A. till the date of actual payment. The date of filing of the O.A. is 22.02.2017. The Respondents are further directed to give effect to the order within four months from the date of receipt of a certified copy of this order failing which the Petitioner shall be entitled to interest at the rate of 9% per annum.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: 06 December, 2017
MH/-