

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW  
(CIRCUIT BENCH, NAINITAL)**

**ORIGINAL APPLICATION NO 490 OF 2018**

Thursday, this the 2<sup>nd</sup> day of May, 2019

**“Hon’ble Mr. Justice V.K. Shali, Member (J)  
Hon’ble Air Marshal BBP Sinha, Member (A)”**

No. 18016888M Ex Rect Kamlesh Rawat  
Son of Hony Naib Subedar Bharat Singh (Retd)  
Resident of Village – Koylakh  
Post Office – Panchali  
Tehsil – Gairsain  
District – Chamoli (Uttarakhand)

...Applicant

Learned Counsel for the applicant: **Shri Kishore Rai, Advocate  
holding brief of Shri Lalit Kumar,  
Advocate**

Versus

1. Union of India, through Secretary, Ministry of Defence South Block, New Delhi, Pin - 110011.
2. The Chief of the Army Staff, Sena Bhawan, New Delhi – 110011.
3. Commandant, Bengal Engineer Group & Centre, Roorkee (Uttarakhand) Pin : 247667.
4. The Commanding Officer, No. 1 Training Battalion Bengal Engineer Group & Centre, Roorkee (Uttarakhand) Pin : 247667.
5. Major Ravinder Rana, Company Commander, 'M' Company, No. 1 Training Battalion Bengal Engineer Group & Centre, Roorkee (Uttarakhand) Pin : 247667

.... Respondents

**Counsel for the Respondents : Shri Neeraj Upreti,  
Central Government Counsel**

**ORDER (Oral)**

1. This Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 claiming the following reliefs:

*“(i) to quash the impugned order dated 22.11.2017.*

*(ii) to direct Respondent Nos. 3 and 4 jointly and severally to provide the copies of the policy letters to the applicant on the basis of which the Warning Orders and the SCN had been issued to the applicant for his contemplated discharge from service.*

*(iii) To direct Respondent No. 3 to convene a fresh testing board, preferable comprising of the officers only, in which Respondent No. 5 should not be included in any capacity, for testing the swimming proficiency of the applicant as per the policy being applied to other recruits.*

*(iv) to direct Respondent No. 3 to permit the applicant's father to be present during the conduct of the swimming test of the applicant.*

*(v) to reinstate the applicant with all consequential benefits in case the applicant passes the swimming test as per policy, and*

*(vi) to grant any other relief or reliefs which the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice.”*

2. Briefly stated facts of the case are that the applicant was enrolled in the Bengal Engineer Group as Sepoy in the trade of Electrician on 12<sup>th</sup> April 2016. The respondents have taken the stand that he was only a recruit and not a Sepoy because a person is considered to be a Sepoy only after he has successfully undergone the training and is attested in the Army. Be that as it may, it is the case of the applicant that on 27<sup>th</sup> of August 2016, the applicant has successfully completed his Basic Military Training (BMT). On 26<sup>th</sup> of February 2017 he completed the second phase of training as a Combat Engineer Training. In May 2017, he was required

to qualify the test of swimming of 100 meters. However, being from a hill state, where swimming is not a part of ordinary civil life, he failed in the swimming test. It is alleged by him that no training for swimming was given to him. On 20<sup>th</sup> of May 2017, 1<sup>st</sup> warning letter was issued that he must improve his skill of swimming in which he had failed. The applicant was given sufficient time to improve his deficiencies as far as swimming is concerned and the second test was done on 03<sup>rd</sup> of August 2017. It is alleged by the applicant that instead of 50 meters, he was asked to complete 100 meters of swimming by the respondent no.5, who was inimically disposed towards the applicant due to certain reasons, though those reasons have not been disclosed. The applicant failed in passing the 100 meters test, consequently on 09<sup>th</sup> August 2017, he was issued second warning letter. On 11<sup>th</sup> of September of 2017 third chance was given to the applicant for completing 100 meters of swimming which he could not complete and was again declared as 'failed' as against the recruits whom he alleges, were asked to complete only 50 meters, by the respondent no.5. Consequently, on 14<sup>th</sup> of September 2017 a third warning letter was issued to him, followed up by a show cause notice dated 18<sup>th</sup> September 2017 and thereafter he was discharged from service on 22<sup>nd</sup> of November 2017. The applicant has stated that he was taken to Military Hospital, Roorkee for medical examination, where he was subjected to medical examination and thereafter he was discharged in Shape-I.

3. It is under these circumstances that the applicant has now prayed for setting aside the order of discharge and grant of another opportunity to complete the swimming test after directing the respondent no.3 to convene the same and that too in presence of his father.

4. The applicant is represented by Mr Lalit Kumar and Dr Ashish Asthana, learned Advocates. Mr Lalit Kumar, learned Advocate did not appear despite three calls and waiting for him till about 1:30 PM. Yesterday also the learned counsel appeared and practically sought adjournment in almost all matters. In one of the matters, adjournment was sought on the ground that name of Dr shish Asthana is shown only and his name is not reflected and therefore he did not get the file.

5. Both the learned counsel have signed one Vakalatnama and filed the same. If there are few names appearing in the Vakatanama, all the names will not be reflected in the cause list.

6. Today again adjournment is sought in almost all the matters through proxy counsel. After seeing the record and reading the case file, we feel that the Tribunal cannot be party in giving frivolous adjournments. Consequently, we are left with no other option but to proceed ahead with the matter. Further as the Circuit Bench at Nainital has assembled after about five months. We cannot permit mounting pendencies without valid reasons.

7. We have gone through the averments made in the O.A. It is not in dispute that there is a set of procedure prescribed by the Army authorities vide policy no. DGMT, IHQ of MoD (Army), New Delhi letter No.A/20314/MT-03 dt 28 Feb 1986 as to how a recruit has to undergo training through various phases of tests before he is attested as a Sepoy. Training is carried out in different area but also includes various other tests of physical endurance like swimming, running, rope climbing, hurdle crossing tests, which have to be passed before a recruit is attested. All these tests are mandatory.

8. On the contrary, the applicant has taken the plea that he was asked to do 100 meters of swimming, which, of course, is also required to be

done by the applicant. However, it is alleged by him that he was asked to do 100 meters in comparison to other recruits, who were asked to complete 50 meters of swimming, because of inimical attitude of the respondent no.5, meaning thereby he is alleging bias against the respondent no.5 i.e. the Commanding Officer. The applicant has not given a single cogent reason as to why the respondent no.5 would ask him to do something over and above, which others have not been asked to do. Simply by saying that the applicant is inimically disposed of towards him without any evidence on record is an allegation made in the air.

9. Hon'ble Supreme Court in the case of **State of Bihar vs P.P.Sharma & another** (AIR 1991 SC 1260) has held that allegation of bias or malafide are very easy to make, but very difficult to prove against an individual and further before such an officer is called upon to file his individual affidavit, the petitioner or the applicant must discharge his initial onus of showing as to how the respondent is biased or inimical by placing some documentary evidence on record. This onus has not been discharged by the applicant and has simply made a spacious plea that the respondent no.5 has inimically disposed of towards him. This is out rightly rejected.

10. Moreover, no recruit can be given more chance than permissible under the policy for undergoing training to remove the deficiency with which he is suffering. In the instant case the applicant is not only wanting training to be done on his terms and conditions, but also wants respondent no.5 to be removed from process of selection and the test of swimming to be taken in the presence of his father, which is totally unheard of.

11. We feel that no right of the applicant has been violated nor the action of the respondent is arbitrary and discriminatory. The said order of discharge has complied with the principle of natural justice and a show cause notice had been issued to him before discharging him.

12. For the reasons mentioned above, we feel that the O.A. of the applicant is without any merit and is accordingly **dismissed** *in limine*.

**(Air Marshal B.B.P. Sinha)**  
**Member (A)**

**(Justice V.K. Shali)**  
**Member (J)**

Dated : 02<sup>nd</sup> May, 2019  
PKG