ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Reserved.
(Court No. 3)

Transferred Application No. 1352 of 2010

Tuesday the 26th day of May, 2015

"Hon'ble Mr. Justice Abdul Mateen, Member (J)
Hon'ble Lt. Gen. A.M. Verma, Member (A)"

Ashok Kumar Shukla, son of Sri Kailash Shukla, resident of village Dhani-Dhara, Post Office-Deruarbari, District Ballia.

..... Petitioner

By Col(Retd.) Y.R. Sharma (Retd.), counsel for the petitioner.

Versus

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

2. The Commanding Officer, 267 STATA BTY, C/o. 56 A.P.O.

..... Respondents

By Shri Prakhar Kankan along with Capt. Ridhishri Shrma, Departmental Representative.

ORDER

1. By means of this petition, filed before the Hon'ble Allahabad High Court being Civil Misc. Writ Petition No. 22999 of 2003 and subsequently transferred to this Tribunal and renumbered as T.A. No. 1352 of 2010, the petitioner has prayed the following reliefs :

> *"(i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 1.12.2002 (Annexure No. 1 to the writ petition), as mentioned in the Certificate issued by the respondents.*
>
> *(b) issue a writ, order or direction in the nature of mandamus commanding the respondents to retain the petitioner in service as Naib Subedar (Clerk) in 267 SATA BTY, C/o. 56, A.P.O.*
>
> *(c) issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*
>
> *(d) award cost of the petition to the petitioner."*

2. The facts of the case, in brief, are that the petitioner was enrolled in the Indian Army on 14.12.1979 as a Soldier (GD). On 5.10.1997 when service with 267 SATA BTY. His medical category was lowered to 'B' (permanent) due to Stricture Urthera N-35. His discharge order, in terms of Army Order 46 of 1980, was issued vide letter dated 1.7.2002 by Records, the Artillery Regiment, along with other permanent low medical category personnel. Show-cause notice was served on him, to which he replied and thereafter he was discharged from service on the ground of being low medical category (permanent) and not being upto the prescribed military physical standard under the provisions of Army Rule 13(3)I(iii). Aggrieved by this order he filed the aforementioned writ petition before the Hon'ble Allahabad High Court and on being transferred before this Tribunal it has been renumbered as above. The petitioner is in receipt of his pension and disability pension.

3. Learned counsel for the petitioner submitted that Army Order 46 of 1980 lays down implementation instructions for disposal of permanent low medical category personnel who are to be employed subject to availability of suitable alternate appointment which can be justified in public interest and their retention will not exceed the sanctioned strength of their Regiment. It has further been submitted that though the petitioner was placed in low medical category on 5.10.1997 he was retained in service till 30.11.2002 in public interest. He was, however, served with a show-cause notice dated 20.9.2002 by which he was intimated that since he was in low medical category why his services not be terminated as strength of the Regiment had exceeded the sanctioned strength. The petitioner replied to this show-cause notice vide his letter dated 27.8.2002 in which he gave out detailed reasons as to why should he be retained in service. Despite this, without assigning any reason he was discharged from service under the provisions of Army Rule 13(3)I(iii).

4. Learned counsel for the petitioner argued that under the said provision, which is for all other classes of discharge, the sanctioning authority is GOC-in-C of a Command not below the rank of Lt. Gen. According to the discharge book, learned counsel for the petitioner submits that the discharge was ordered by the CO, 267 SATA Bty and not GOC-in-C of a Command and, therefore, this discharge of the petitioner is illegal. The petitioner also states that in terms of the judgment and order of the Hon'ble Supreme Court in the case of **Union of India and others v.**

Rajpal Singh, reported in *2008 (5) ESC 718 (SC)*, the petitioner should have been examined by an Invaliding Medical Board and only then discharged which was not done in this case. Therefore, the petitioner says that the order of discharge is illegal and without application of mind.

5. The respondents admitted the date of enrolment and down-gradation of medical category to 'B' permanent. The petitioner had rendered a willingness certificate to continue in service and sheltered appointment had been provided to him. Since strength of the clerks exceeded the sanctioned strength, the discharge order of not only the category of clerks but of other categories where the strength had become surplus except those personnel who were battle casualties, war wounded and below 10 years of service was issued by the Records, the Regiment of Artillery after obtaining due sanction of Directorate General of Artillery. The petitioner fell in the category of clerks and hence his discharge order was issued.

6. Heard both the sides and examined the documents.

7. The relevant part of Army Order 36 of 1050 reads as follows :

> *"General principles :*
>
> *(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 the provisions 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 irrespectively of the service put in by them.

(b) Ordinarily, permanent low medical category 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."

8. Accordingly, the petitioner was retained in service since, as admitted by the respondents, a sheltered appointment was available. The discharge order, according to the respondents, was issued when the strength exceeded the sanctioned strength. The discharge book of the petitioner reads *"Released/Retired from Service on 01 DEC 2002 by the order of CO 267 SATA BTY."* The discharge further goes on to say the reason for release as Army Rule 13(3) Item I(iii). This particular sanction of the Army Rules lays down authorities empowered to authorize discharge. The Army Rule, quoted above, i.e. Army Rule 13(3) Item I(iii) is for all other classes of discharge and the competent authority is GOC-in-C of a Command, not below the rank of Lt. Gen. The respondents have not produced any evidence to substantiate the fact that the discharge of the petitioner was sanctioned by the GOC-in-C of a Command. In the light of the above, the discharge is considered to be illegal.

9. In the case of **Union of India and others v. Rajpal Singh** *(supra)* the Hon'ble Supreme Court has held that *"Now question is whether holding*

of an "Invalidating Board", is a condition precedent for discharge of a Junior Commissioned Officer (J.C.O.), on account of low medical category – High Court held that discharge of respondent without holding an "Invalidating Board" was illegal and directed appellant to reinstate respondent in service – Held, appellants were bound to follow Rule 13(3)(I)(III) – Thus, discharge of respondent, was not in accordance with prescribed procedure, hence, illegal."

10. Against the backdrop of the aforementioned order of the Hon'ble Supreme Court, the order of discharge from service in respect of the petitioner is held to be not inconformity with the law laid down by the Hon'ble Supreme Court as the petitioner was not examined by an Invaliding Medical Board and hence is illegal.

11. Accordingly, this Transferred Application is allowed and the discharge order of the petitioner in terms of Army Rule 13(3)(I)(iii) is hereby quashed, being illegal. The petitioner will be considered to be notionally in service till he completes his normal tenure in the rank of Nb. Sub, and will be paid his salary for the period he is notionally in service. The pension already paid to him for this period of notional service will be adjusted from the arrears of pay for this period. The respondents are also directed to consider the petitioner for promotion, if found fit for the same. No order as to costs.

(Lt. Gen. A.M. Verma)
Member (A)

(Justice Abdul Mateen)
Member(J)

PG.