

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No. 86 of 2022**Thursday, this the 05th day of May, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)No. 5053193-F Rfn Ansul Thapa of 2/1 Gorkha Rifles C/o 99
APO, S/o Shri (Late) Khadak Bahadur Thapa, R/o Misserwala,
Po- Misserwala, Dehradun PIN-245140.

..... Applicant

Learned counsel for the : **Shri K.K. Singh Bisht**, Advocate
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence,
South Block, Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarter of the
Ministry of Defence (Army), South Block, New Delhi-
110011.
3. Officer-in-Charge Records, 14 Gorkha Rifles, PIN-
900295, C/o 99 APO.
4. Commanding Officer, 2/1 Gorkha Rifles, PIN -910002.

.....Respondents

Learned counsel for the: **Dr. Shailendra Sharma Atal**, Advocate
Respondents. Central Govt Standing Counsel

ORDER

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

- (a) *Issue/pass an order or direction to the respondents to summon and quash/set aside the Show Cause Notice dated 23 Nov 2020 being arbitrary and illegal.*
- (b) *Issue/pass an order or direction to the respondents to quash /set aside the order passed by Records, respondent No.3 vide letter No. 0624/LMC/Jan 22/Shlt/RA-1 dated 07 Aug 2021 {Annexure No.A-1} approving the applicant's discharge from service under Rule 13(3) item III (iii) (a) (i) of Army rules, 1954 slated with effect from 31 Jan 2021 (AN) being arbitrary and illegal.*
- (c) *Issue/pass an order or direction of appropriate nature to the respondents to allow him to continue his service with all consequential benefit.*
- (d) *Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.*
- (e) *Allow this application with costs.*

2. Brief facts of the case giving rise to this application are that the applicant was enrolled in the Indian Army on 28.03.2017 and was discharged from service on 31.01.2022 under Rule 13 (3) III (a) (i) of Army Rules, 1954 being placed in low medical category and non availability of sheltered appointment. On 08.10.2018 while posted with 2/1 Gorkha Rifles (GR), the applicant was admitted to 150 General Hospital (GH). On investigation he was found to be suffering from 'Ostium Secundum ASD (Device Closure Done) (Q 21.1)' and was placed in low medical category P3 (Temp). This medical category was reviewed from time to time as scheduled. Later, he was placed on low medical category P2 (Permt) by a re-categorization medical board held on 14.09.2019. He was provided sheltered appointment for the period

14.09.2019 to 13.09.2021, the casualty of which was notified vide Part II Order dated 31.01.2020. In subsequent review medical board he was placed in medical category P2 (permt) for the period 09.12.2021 to 08.12.2023. Since the unit was deployed in High altitude area and no sheltered appointment was available in the unit, a show cause notice dated 23.11.2020 was issued to the applicant and after receipt of reply he was discharged from service. Applicant has filed this O.A. for his reinstatement in service.

3. Learned council for the applicant submitted that the applicant was serving in low medical category in sheltered appointment which was provided by the unit. He further submitted that he was not served a copy of show cause notice. He was called to Adjutant's office informing that he is not going to be provided sheltered appointment and his services may be terminated. He also submitted that he was provided no opportunity to defend his cause which is a flagrant violation of principals of natural justice. His other submission is that the applicant wishes to serve in the army but he has been forcibly discharged from service, which is illegal and arbitrary. In support of his contention relying upon ***Union of India Vs Rajpal Singh (2009) 1SCC (L&S) SCT 230 (SC) 1992***, learned counsel for the applicant submitted that the applicant being placed in low medical category should not have been discharged from service in view of aforesaid pronouncement. In regard to aforesaid contention he further submitted that as per Army Order 03 of 2001 an individual cannot be discharged from service being placed in SHAPE 2 or 3 medical category. He pleaded for applicant's reinstatement in service.

4. Per contra, learned council for the respondent submitted that as per Army Order 46/80 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 but provided 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 considered not necessary in the interest of the service or it exceeds the sanctioned strength of the Regiment/Corps they will be discharged from Army, irrespective of the service put in by them. He further submitted that the applicant was discharged from service in terms of IHQ of MoD (Army) letter dated 27.07.2018 when no suitable sheltered appointment was available in the unit, as the unit was relocated to High Altitude Area. He pleaded for dismissal of O.A.

5. Heard Shri KKS Bisht, learned counsel for the applicant and Dr. Shailendra Sharma Atal, learned counsel for the respondents and perused the material placed on record.

6. There is no dispute of the facts that the applicant was enrolled in the Army on 28.03.2017 and was discharged from service w.e.f. 31.01.2022 (AN) in terms of Rule 13 (3) III (a) (i) of Army Rules, 1954. It is also not disputed that the applicant was suffering from 'Ostium Secundum ASD (Device Closure Done) (Q 21.1)' w.e.f. October, 2018 and was placed in low medical category which was reviewed to permanent medical category P2 (permt) w.e.f. 09.12.2021 to 08.12.2023. The applicant was provided sheltered appointment w.e.f. the date he was placed in low medical category but consequent to shift of the unit to field/high altitude area, sheltered appointment was no longer available in

the unit. As such he was issued a Show Cause Notice dated 23.11.2020 and after receipt of reply he was discharged from service w.e.f. 31.01.2022 (AN). Medical record of the applicant shows that he is suffering from Ostium Secundum ASD (Device Closure Done). This disability, in medical terminology, is a hole in the septum, which is the muscular wall that separates the heart's two upper chambers. An ASD is a congenital defect and is commonly called a "hole in the heart."

7. In reply to Show Cause Notice dated 23.11.2020 the applicant expressed his willingness to continue his service but the competent authority informed the applicant that the unit was facing issues in management of low medical category (LMC) personnel in the unit and due to increase in number of LMC personnel in the unit and their employment restrictions in field/high altitude area, sheltered appointment could not be provided. In regard to this, Army Order 46/1980 stipulates that the employment of permanent low medical category personnel, at all times is subject to the availability of suitable alternative appointment 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 from service irrespective of the service put in by them.

8. Thus, in view of aforesaid Army Order, respondents' contention that discharge of the applicant was recommended by the Commanding Officer due to non availability of suitable sheltered appointment commensurate with his disability, seems to be in order as the unit in

which the applicant was serving was ordered to be deployed to field/high altitude area where adequate medically fit manpower was of paramount importance, keeping in view of the present security scenario of our country.

9. The learned counsel for the applicant has quoted the applicability of the Hon'ble Apex Court judgment in ***Union of India vs. Rajpal Singh***, 2009(2) RSJ 233. Let us now analyze the applicability of the aforesaid judgment. In this case the Hon'ble Apex Court found the discharge as invalid in the case of ***Rajpal Singh*** (supra) on the ground that the petitioner was not brought before the Invaliding Medical Board and was discharged on the recommendations of the Release Medical Board as per the rules applicable at that time. That position has now been changed due to amendment vide gazette notification dated 13.05.2010, in exercise of the power confirmed by section 191 of the Army Act, 1950. The requirement to bring in low medical category Shape 2/3 Army personnel before an Invaliding Medical Board, before discharge, has now been done away with. An individual may be discharged, as per the amended Rule (ii)(a) in the Table to Rule 13, on the recommendation of the Release Medical Board. This amendment to Rule 13 of the Army Rules and its validity has further been upheld by a Full Bench judgment of the Principal Bench of the Armed Forces Tribunal in ***Sub Lakshmi Kant Mishra vs. Union of India & others***, O.A. No. 228 of 2012 decided on 11.02.2016. This issue has thus achieved finality.

10. Further, having examined Army Order 46 of 1980, as amended by Gazette Notification of 13.05.2010, order dated 11.02.2016 passed by Hon'ble AFT (PB), New Delhi as also the Hon'ble Apex Court judgment

in **Rajpal Singh** (supra), we do not find any illegality insofar as the discharge of the applicant from the Army is concerned. Consequently the O.A. is liable to be dismissed.

11. In view of the above, O.A. is **dismissed** being devoid of merit.

12. No order as to costs.

13. Miscellaneous application(s), pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 05.05.2022

rathore