

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****Transferred Application No. 943 of 2010**Thursday, this the 05th day of November 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)****Hon'ble Air Marshal Anil Chopra, Member (A)**

Devendra Singh Bhadauria, s/o Ram Bahadur Singh Bhadauria,
permanent resident of Village Kumbare, PO Pachhayan Gaon,
District Etawah, at present r/o Krishna Nagar Wardhana Road,
New Mandi, Etawah.

.....Petitioner

Ld. Counsel for the : Petitioner in person.
Petitioner

Versus

1. Union of India, Through Secretary Ministry of Defence,
New Delhi.

2. Commanding Officer, Northern Command, Signal
Regiment c/o 56 A.P.O.

3. Chief Records Officer, Signal Records Jabalpur-482001.

...Respondents

Ld. Counsel for the : **Lt Col Subodh Verma, OIC, Legal Cell.**
Respondents.

ORDER (ORAL)

1. Heard Shri Devendra Singh Bhadauria, the petitioner and Lt Col Subodh Verma, OIC Legal Cell and perused the records.
2. Petitioner being aggrieved with order of discharge dated 25.08.1993 and during pendency of statutory complaint against adverse entry in confidential report and being discharged from service had approached High Court of Judicature at Jabalpur (M.P.) by filing writ petition No 13345 of 2004 (S) which has been transferred to this Tribunal in pursuance to provisions contained in Section 34 of Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 943 of 2010.
3. The undisputed facts are that the petitioner was enrolled on 28.01.1972 and later he was promoted to the rank of Naib Subedar on 09.04.1990. A Show Cause Notice dated 17.09.1993 was served on the petitioner that since he belongs to Low Medical Category BEE (P) on 31.05.1993 and has also shown unwillingness to continue in service, why he may not be discharged in pursuance to provisions contained in Army Rule 13 (3) Item (I) (iii).
4. It is not disputed that the applicant had submitted letter of unwillingness on 07.07.1993. However, while submitting reply to Show Cause Notice dated 17.09.1993 he stated that he is willing to serve in the Army, hence be retained in service. Copy of reply submitted by the petitioner dated 18.09.1993 is **Annexure 4** to the Writ Petition.

5. Ld. Counsel for the respondents submits that once the petitioner has submitted unwillingness he was not entitled to change his stand. However, fact remains that order of discharge was passed on 25.08.1993 and Show Cause Notice was submitted on the petitioner on 17.09.1993. The order of discharge was to become effective from 01.01.1994.

6. We fail to understand why Show Cause Notice was served after the order of discharge dated 17.09.1993. This is against provisions of Article 14 of the Constitution of India and against the principles of natural justice. Accordingly we are of the view that order of discharge should have been passed after serving Show Cause Notice. In case this would have been done matter would have been decided otherwise.

7. Applicant in person submits that even in Category BEE (P) he is entitled to be retained in service with sheltered appointment during the extended period of service in view of relevant procedure. Further submission of the petitioner is that no Invalidating Medical Board (IMB) was held before the impugned order of discharge was passed. This fact has not been disputed by the respondents. However, it is submitted on behalf of the respondents that at the time the order of discharge was passed, rules were otherwise and it was not necessary to seek recommendations of the Invalidating Medical Board.

8. Arguments advanced on behalf of the respondents seems to be misconceived. Since question with regard to convening invalidating medical board before discharging army personnel on Low Medical Category is no more res intriga in the case of ***Union of India & Ors vs. Rajpal Singh*** [2008 (5) ESC 718 (SC)]. Hon'ble Supreme Court was seized with identical matter whereby Army Order 46 and Army Rule 13 have been interpreted and their Lordships while approving the judgment of Delhi High Court has held that without holding Invalidating Medical Board army personnel cannot be discharged from service. Relevant portion contained in the judgment of Rajpal Singh's case (supra) is reproduced as under :-

"It is manifest that the said Army Order has been issued for disposal of permanent low medical category personnel and merely contemplates that the employment of permanent low medical category personnel at all times, is subject to the availability of suitable alternative appointments commensurate with their medical categories and also subject to the conditions that such a sheltered appointment can be justified in the public interest. A plain reading of the Army Order shows that it comes into operation after an opinion has been formed as to whether a particular personnel is to be retained in service or not, if so for what period. If a person is to be retained in service despite his low medical category for a particular period as stipulated in the

Army Order 46 of 1980, the question of subjecting him to invalidating Board may not arise. However, if a person is to be discharged on the ground of medical unfitness, at that stage of his tenure of service or extender service within the meaning of the Army Order, he has to be discharged as per the procedure laid down in Clause 1 (ii) in Column 2 of the said Table. Similarly, Sub-rule (2A) of Rule 13, heavily relied upon by the appellants does not carry the case of the appellants any further. It is only an enabling provision to authorize the commanding officer to discharge from service a person or a class of persons in respect whereof a decision has been taken by the Central Government or the Chief of the Army Staff to discharge him from service either unconditionally or on the fulfillment of certain specified conditions. The said provision is not in any way in conflict with the scope of the remaining part of Rule 13, so as to give it an overriding effect, being a non obstante provision.

27. For the foregoing reasons, we wholly agree with the reasoning and the conclusion of the High Court that the discharge of the respondent was not in accordance with the prescribed procedure and was, therefore, illegal. We do not find any illegality or infirmity in the impugned judgment/order, warranting our interference. The appeal, being devoid of any merit, is dismissed accordingly with costs”.

9. In view of said provision of law, it is not necessary to enter into the matter, but the fact remains that petitioner's Invalidating Medical Board was not held. The discharge of the petitioner is an instance of abuse of power. The petitioner was entitled to continue till completion of twenty eight years of service. However, the petitioner was discharged after completing twenty two years service.

10. Otherwise also, right to livelihood being constitutional mandate, no person can be discharged from employment without following due procedure of law. Discharge from service without Invalidating Medical Board suffers from vice of arbitrariness.

11. Our view is fortified by the policy dated 02.12.2008 wherein after taking into consideration the case of Sub SKT Puttan Lal and other connected cases followed by the Hon'ble Supreme Court decision in the case of **Rajpal Singh** (supra), in paragraphs 9 and 10 of the policy, it has been laid down as under :-

“9. In respect of such personnel the Record Office should approach the Legal Cell concerned to have the case listed at the earliest and decided in terms of Delhi High Court order dated 20 Nov 08”.

“10. The cases of personnel stated at Para 7 to 9 would be governed by the respective court order and if decided in terms of Delhi High Court Order dt 20 Nov 08, then the instructions of this letter shall apply mutatis mutandis to those cases. In case of any doubt the matter

should be referred to this Directorate through the Line Directorates”.

12. The provision contained in paras 9 and 10 of the aforesaid policy of 02.12.2008 (supra) seems to be applicable in the present case. Writ Petition was filed by the petitioner in the High Court of Jabalpur (Madhya Pradesh) before delivery of judgments by Delhi High Court and Hon'ble Supreme Court.

13. In view of above, the T.A. deserves to be allowed, hence allowed. Order of discharge from service dated 25.08.1993 is set aside. The petitioner is entitled to notional continuance in service up to the pensionable age or on completion of 28 years of service with all consequential benefits of the rank of Naib Subedar. However, payment of back wages is confined to 50% payable to the petitioner. Payment of salary and re-fixation of pension and allowance shall be made available to the petitioner within four months from the date of presentation of a certified copy of this order.

No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

anb

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

