

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O A 117 OF 2013

THIS 18TH DAY OF AUGUST, 2014

CORAM: Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

JC 764692N Sub/SKT Tuhin Kanti Biswas
C/O Dr. Shivnarayan Chawdhury,
853 FD Wksp Coy, PIN – 906853
C/o 99 APO
R/o Vill chalk Kanthalia, PO Sewli,
Telinipara, Dist. 24 Parganas (N)
Barrackpor-700 121

..... Petitioner

-VS –

1. Union of India through the Secretary,
Ministry of Defence, Sena Bhavan,
New Delhi-110 105
2. The Chief of Army Staff, Army HQ
Integrated HQ, M/o Defence (Army)
Defence HQ PO New Delhi-110 011
3. The Adjutant General, Integrated HQ
Of M/o Defence (Army) Defence HQ,
PO New Delhi-110 011
4. The Senior Record Officer,
for OIC EME Record,
PIN 900453, C/o 99 APO
5. The Commanding Officer
853 Fd Wksp Coy EME
Pin 906 853 C/o 99 APO
6. The Commanding Officer
617 EME Bn
Pin 906617 C/o 99 APO

..... Respondents

For the petitioner : Miss Manika Roy, Advocate

For the respondents: Mr. Souvik Nady, Advocate

O R D E R

Per Lt. Gen. K.P.D, Samanta, MEMBER (Administrative)

The applicant, Sub/Skt Tuhin Kanti Biswas, has filed this original application u/s 14 of the AFT Act, 2007, being aggrieved by the order dt. 4 Jul 2013 and other consequential orders by which his discharged from service was sought for with effect from 31.12.2013, which is prior to completion of his tenure as per conditions of service.

2. The brief facts as relevant to the case are that the applicant was enrolled in the Indian Army in Store Keeper (Tech) (for short SKT) trade in the Corps of EME on 28.09.1988. During the course of his service he served at various places including field areas to the full satisfaction of the organization and also that of his superiors. He got his regular promotions to higher ranks; and in 1996 he was promoted in the rank of Havildar. In that capacity he served in various forward field areas including at Pakistan border in Rajasthan and also at J & K. In Oct 2008 while posted at Aurgangabad, he was detected to be suffering from Type II Diabetes Mellitus for which he was downgraded to medical category P2 temporarily. Subsequently, he was placed in P2 (permanent) medical category from August 2008, while he was posted at 955 AD Regiment workshop at Jalandhar. Although he was placed in LMC- P2 category, the applicant was performing his normal duties without any employment restrictions, complaint or difficulty. He was also sent for promotion training cadre to EME Centre at Bhopal and on successful completion of his promotion cadre and other qualifications, he was promoted to the rank of Nb

Subedar on 1.4.2010; and thereafter to the next higher rank of Subedar w.e.f. 1.10.2011. As a Subedar, his term of appointment was also extended in accordance with rules till 27.9.16.

3. The applicant, who is presently posted at Gangtok in the State of Sikkim at 853 Fd Wksp Companyy, was all on a sudden referred to the Military Hospital on 13.2.13 and the medical board allowed him to continue in the present medical category, which is P2 (Permanent) with the observation that he was fit in all respects to perform all duties like any other SHAPE-1 personnel. Despite such medical opinion, the authorities issued order (impugned order) dated 4.7.13 conveying approval of his discharge for being in low medical category. His discharge was to take effect from 31.12.2013, even though the applicant had already opted for further retention in service. Being aggrieved by such decision of the authorities, the wife of the applicant, Smt. Maya Biswas made a request to authorities through army wives' welfare association (AWWA), for reconsideration of the decision which was, however, rejected vide letter dt. 22.11.13 (annexure-A1) and the date of discharge of the applicant w.e.f. 31.12.13 stood confirmed. Being dissatisfied, the applicant has filed this application seeking a direction to quash the impugned discharge orders dated 7.10.13 and 22.11.13 with a further prayer to retain him in service till expiry of his existing term i.e up to 27.9.16.

4. At the time of admission of this OA, by an order dt. 20.12.13, this Tribunal passed an interim order for a limited period restraining the respondents from giving effect or further effect to the discharge instruction dt. 4th Jul 2013 and consequential orders passed in that regard. In compliance with this interim order, the respondent authority cancelled the discharge order and the applicant is still is continuing in service.

5. The respondents have contested the application by filing a reply affidavit in which it is admitted that the applicant was enrolled in the Army on 28 Sep 1998 as SKT in the Corps of EME. He was placed in LMC P2 (permanent) w.e.f. 11.2.13 as a case of Type II diabetes Mellitus by 178 Hospital vide board proceedings dated 13.2.13 (Exh-1). The applicant was, however, not recommended for sheltered appointment due to non-availability of alternative appointment in the present medical category by the Commanding Officer of 617 EME Battalion and consented by the Brigadier of EME (Brig EME) HQ 33 corps. Due to non-availability of sheltered or alternative appointment in the unit, approval of EME records was obtained to discharge the applicant from service in accordance with rule 13(3)(ii)(a) of Army Rules (Exh IV). The respondents have referred to the policy letters dt. 30.9.10 and 7.2.11 issued by MoD(Army) wherein it is stipulated that under the amended rule 13 of Army Rules, if no sheltered appointment is available in the unit for the individual or he is considered as surplus, then he may be discharged by the CO after following the stipulated procedure vide Exh VI. Accordingly, discharge order was issued on 04 Jul 2013 for discharge of the applicant w.e.f. 31 Dec 2013 (annexure-VII). Subsequently, the applicant was asked by letter dt. 29 Nov 13 to proceed for discharge drill at EME Centre Secunderabad. His wife made an appeal for reconsideration of the decision but the same was also rejected by the competent authority. At this stage, the applicant has filed the instant OA and the Tribunal has been pleased to pass an interim order in compliance of which the impugned discharge order has been cancelled vide order dated 30 Dec 2013.

6. We have heard Miss Manika Roy, Id. adv. for the applicant and Mr. Souvik Nandy, Id. adv. for the respondents at length. Mr. Nandy has also produced the original medical board proceedings before us for our perusal.

7. Appearing for the applicant, Miss Roy Id. adv. has very strenuously contended that the respondents have acted whimsically and arbitrarily in discharging the applicant from service before completion of his entitled period as per existing terms and conditions of service. She points out that the applicant was in low medical category P2 since 2008 but he was retained in service all along and the applicant has been performing his duties without any complaint. He has also been posted in forward field areas and there was no problem in performance of his duties despite suffering from Type II diabetes Mellitus for quite some years. She further submits that not only was the applicant retained in service in that low medical category, but also granted two promotions i.e. Nb Subedar and Subedar. Moreover, the applicant has been discharging his duties without any difficulty in a very satisfactory manner without any complaint from any quarter. Thus, even though he was in P2 category all along since 2008, and granted promotions, the respondents never sought to discharge him from service. Suddenly, it dawned on their wisdom that the applicant is to be discharged in terms of amended rule 13 although the rule was amended in 2010. She has also submitted that the medical board has never put in employability restriction on the applicant. That apart, she has drawn our attention to A3 (EXh II to the reply), which is in the shape of a form ie annex-DE dated 9 May 13. From this annexure, it would be evident that the Officer Commanding (OC) of 853 Field Workshop Company where the applicant is posted has clearly recommended for his retention in service. But surprisingly, the next higher authority the CO of 617 EME Battalion has differed without assigning any

reason and endorsed "not recommended"; thereafter the next higher officer in the departmental channel the Brigadier EME HQ 33 Corps has also endorsed the same by recording mechanically without proper application of mind and without assigning any reason. None of these authorities has given any reason as to why the case of the applicant could not be recommend when the OC of the applicant where he is posted has strongly recommended for his retention. Undoubtedly, the CO of 617 EME Battalion is the next superior officer of OC 853 Field Workshop, but in this case it is the OC and not the CO who remains in daily contact with the applicant and works under his direct supervision. The Brigadier EME sits at Siliguri in the Corps HQ and would have no opportunity even to broadly interact with the applicant who is posted in field area in Sikkim; therefore Miss Roy submits that the Brigadier's endorsement on a JCO is definitely mechanical and without any knowledge. Miss Roy, therefore, has forcefully submitted that the entire actions of the concerned authorities were arbitrary and without any cogent ground and as such, the impugned discharge order should be set aside; the applicant be permitted to complete his present terms till Sep 2016 as per his terms and conditions of service..

8. Mr. Souvik Nandy, Id. adv. for the respondents has raised the question of territorial jurisdiction of this Bench to adjudicate the matter. According to him, the applicant is posted in Sikkim which is not within the territorial jurisdiction of this Bench. Therefore, the application is liable to rejected for lack of jurisdiction.

9. On merit, Mr. Nandy has submitted that there is no dispute that the applicant was in LMC i.e. P2 (Permanent) and latest Govt. policy is that P2 medical category personnel may be

retained only if sheltered appointment is available in the unit and if not, such a person is to be discharged in terms of amended provision of rule 13 of Army Rules on the recommendation of Release Medical Board which has been done in this case. Therefore, there was no illegality in the action taken by the respondents; because as per rule 13, it is the Commanding Officer who is authorized and competent to discharge such LMC personnel by following the procedure. According to Mr. Nandy, since all procedures were followed properly as per rules, the applicant cannot harbour any grievance and further that, there being no merit, the application is also liable to be dismissed.

10. We have given our anxious consideration to the contentions so advanced by both sides with reference to the rule position. We have also gone through original documents that have been produced before us.

11. At the outset, we may state that although Mr. Nandy has raised the question of maintainability of the application before this Tribunal on jurisdiction issue, we find from the record, that this issue was earlier raised by Mr. Nandy at the time of admission, and in our order dt. 20.12.13, this question was elaborately dealt with bringing out that partial cause of action was at HQ 33 Corps Siliguri which is within our jurisdiction. It was thus held that the application was within the territorial jurisdiction of this Tribunal. Under such circumstances, we need not reopen the issue again, since no new facts have been brought before us.

12. There is no dispute that the applicant was enrolled on 28.9.1988 in SKT trade in the Corps of EME. It is pertinent to mention that the job content of SKT is maintenance of inventory of stock and purchase and accounting i.e. mainly clerical nature of job. In the year

1996 the applicant was promoted to the rank of Havildar. On 1.10.2008 he became P2 medical category temporarily on account of Type-II diabetes Mellitus. He was made permanent in that P2 category after 24 weeks i.e. in Apr 2009. Since then he has been in that P2 category. But the concerned authority never considered his discharge on medical ground although Govt. policy as relied upon by the respondents now already existed for disposal of LMC personnel. On the contrary, the applicant was not only retained in service but was granted two successive promotions to JCO rank of Nb Sub and Sub. It is only in 2013 that the respondents have initiated action to discharge him from service with effect from 31.12.13. At that point of time, the applicant was posted in 853 Field Workshop Company which was located in high altitude field area of Sikkim. Though there was no complaint in respect of his performance for being LMC, the authorities thought it fit to discharge him by taking recourse to amended Army Rule 13. It is also very pertinent to mention that the Officer Commanding of the unit of the applicant, who was a Lt. Col. And his immediate superior officer under whose direct supervision the applicant worked; he strongly recommended the applicant's retention in his present trade. That means, there was no question of any alternative or sheltered appointment. But the concerned CO, who is the competent authority, located at Gangtok without any frequent supervision over the applicant's work, has differed and recommended for his discharge differing with the OC without assigning any reasons. The Brigadier EME sitting at Corps HQ in Siliguri, for some unspecified reasons endorsed the remarks of the CO. For proper appreciation of the position, it will be appropriate to reproduce the relevant recommendations as under, which is available at annexure- A-3:-

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PART-II

- | | |
|--|--|
| (a) Date of Enrolment | 28 Sep 1988 |
| (b) Terms of Engagement | Regular |
| (c) Date of promotion to the present rank | 01 Oct 2011 |
| (d) Present Medical category (SHAPE factor to be indicated invariably in accordance with AO 146/77) | SIHIAIP2(PERMT)E1 |
| (e) Date of downgraded (Auth Part II Order and Date to be quoted) | 11 Feb 2013
Pt II Order No. 0/0126/002/201
dt. 03 Apr 2013
Type-2 Diabetes Mellitus |
| (f) Whether low med cat due to | |
| i) War wounded | No |
| ii) Attributable to Mil service | Attributable to service |
| iii) Non attributable service
(Delete whichever is not applicable) | No |
| (g) Whether considered suitable and recommended for retention in the present trade | Yes, Recommended to be in service. |
| (h) If not fit for reemployment in own trade whether he is suitable for alternative employment and details of such employment | NA |
| (i) If further retention is not recommended detailed reasons for non recommendation | NA |
| (j) In case not recommended for sheltered appt due to disciplinary case or indifferent attitude to work, please state if sanction of area/Div HQ has been obtained to discharge him. | NA |

9 May 2013

Sd/- Lt. Col.
Officer Commanding
853 Fd Wksp Coy

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RECOMMENDATION OF COMMANDING OFFICER, 617 EME BN
FOR RETENTION IN SERVICE

Recommended/Not Recommended

Not Recommended

16 May 2013

Sd/ Akhil Kumar Singh
Col
Commanding Officer
617 EME Battalion

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RECOMMENDATION OF BRIG EME HQ 33 CORPS AS PER APPX DE TO PARA 1228(C) & 1230 OF EME ROI
2006 IN RESPECT OF JC-764692n SUB SKT TK BISWAS OF 853 FD WKSP COY (617 EME BN)

Recommended/Not Recommended

Not 'R'

23 May 2013

Sd-
Brigadier
Brig EME HQ 33 Corps"

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13. It is thus clear that although the Officer Commanding, 853 Fd Wksp Coy where the applicant was working, strongly recommended for his retention and no sheltered appointment was necessary. Thus, it is evident that he has recommended for his retention without any condition. But the next superior authorities i.e. CO of 617 Battalion and Brigadier EME of HQ 33 Corps have not recommended such retention; without, however, assigning any reason as to why they did not agree with the view of the OC of 853 Field Workshop Company where the applicant was posted.

14. The respondents in support of their action to discharge the applicant have mainly relied on the amended Army Rule 13 introduced in 2010 and latest policy decision dt. 30 Sep 2010 and clarificatory letter dt. 7 Feb 2011. For ease of understanding, we may reproduce the aforesaid amendment, as relevant for our purpose (in respect of JCOs) as also above policy

letters. However, before that we would also like to reproduce extract of AO 46/80 which was governing the field in respect of disposal of LMC personnel.

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Policy dt. 30 Sep 2010 (Exh V)

“DISPOSALS OF PERMANENT LOW MEDICAL CATEGORY PERSONNEL BELOW OFFICER RANK

2. In the recent past, the aspect of management of permanent Low Medical Category (LMC) personnel has been under consideration at all levels, in the light of the directions given by the Hon’ble Delhi High Court on 20 Nov 2008 in the case of **Sub (SKT) Puttan Lal –vs- UOI and Others** wherein permanent LMC personnel in SHAPE 5 only could be discharged from service on the recommendation of the Invaliding Medical board. In compliance with ibid orders of the Hon’ble Delhi High Court, permanent LMC personnel in SHAPE 2/3 could not be discharged from service on the recommendation of Release Medical Board. The implementation of the Hon’ble High court directions have resulted in significant increase in the number of permanent LMC personnel in the Army including those reinstated, thereby, adversely affecting its operational efficiency and man management.
3. The existing provisions of army Rule 13 have since been amended by the Central Government by the Gazette Notification published vide SRO 22 dated 13 May 2010 under the powers conferred by Section 191 of the Army Act, 1950 (XLVI of 1950) and all other powers enabling in this regard....

AIM

4. To lay down the guidelines for effective management of permanent MC personnel in the Army as also to ensure that such personnel are not deprived of various benefits offered from time to time by the Central/State Governments, IHQ of MoD (Army), Non-Government Organization and so on.

Sheltered Appointments

5. Army Order 46/80 lays down instructions for disposal of permanent LMC personnel. The retention of such personnel is now subject to the following conditions :-
 - (a) Availability of suitable alternative appointments commensurate with their medical category.
 - (b) Such retention will not exceed the sanctioned strength of the Regiment/Corps.
6. Guiding Principles – The guiding principles that should be considered by the Commanding Officers and OIC Records for retention/discharge of permanent LMC personnel are as under :-

- (a) All endeavour should be made to allow such personnel to complete their minimum pensionable service in their present rank as under :-
- (i) Personnel in SHAPE 5 : the minimum period of qualifying service actually rendered and required for an invalid pension is 10 years.
 - (ii) Personnel in SHAPE 2/3 : The minimum period of qualifying service actually rendered and required for earning service pension will be 15 years.....
- (b) Take into consideration the nature of disability and capability of the individual to look after himself outside the service and the need to continue treatment at services Hospitals which may not be located in the vicinity of the individual's home station.

Sanctioning authorities

7. Under the provisions of Army Rule 13, as amended, based on recommendations of the Release Medical Board/Invalidating Medical Board as applicable, the Commanding Officer is the competent authority to sanction discharge of JCO/OR who are in SHAPE 2/3 or have been found to be unfit for further service i.e. in SHAPE 5 In the existing circumstances, the sanctioning authority would rest with the commanding Officer, who would obtain the approval of following authorities prior to sanction of actual discharge:-
- a) Battle Casualties (Willing to service) - Head of Arm/Service
 - b) Battle Casualties (Unwilling to Service) - OIC Records | Not Below
 - c) Non-Battle Casualties (Willing to Service) -OIC Records | the rank of a
 - d) Non-Battle casualties (Unwilling to service) - OIC Records. | Brigadier “

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Clarificatory letter dt. 7 Feb 2011

DISPOSALS OF PERMANENT LOW MEDICAL CATEGORY PERSONNEL BELOW OFFICER RANK

“3. Invalidment of permt LMC pers in SHAPE 5 – Such Pers shall continue to be discharged from service hithertofore under the provisions of A.O 9/2004/MP. Stipulation of ten years service given in para 6A(i) of ibid letter is of a general guidelines and not a mandatory clause for compliance.

4. Discharge of Permt LMC Pers in SHAPE – 2/3 – Under the provisions contained in AR 13, if no shelter appt. is available in the unit or the indl. Is surplus to the Org., he may be discharged from service by the CO after following the stipulated procedure. However, the Indl. will be put through a medical board before physical discharge contained in para 418(a) of Regulations for the Medical Services of the Armed Forces 1983 which ascertains the degree of

disability for associated pensionary benefit of the indl as applicable. Hence the procedure for discharge of such pers. Remains the same except that the clause for discharge in public interest as was in vogue prior to the judgement of Hon'ble Delhi High Court in case of **Sub (Skt) Puttan Lal and others vs UOI** is no longer a valid ground for discharge of SHAPE 2/3 LMC personnel. “

15. We may now reproduce below the amended rule 13 of Army Rules so far as JCOs are concerned since the applicant before us is a JCO:

Category	Grounds of Discharge	Competent authority to authorise discharge	Manner of discharge
1	2	3	4
Junior Com-missioned Officer	<p>I. (i) (a) On completion of the period of service or tenure specified in the Regulation for his rank or appointment, are on reaching the age limit whichever is earlier, unless trainee on the active list for further specified period with the sanction of the Chief of the Army Staff of on becoming eligible for release under the Regulations.</p> <p>(b) At his own request on transfer to the pension establishment.</p> <p>(ii) Having been found medically unfit for further service.</p> <p>**</p> <p>(ii) (a) Having been found to be in permanent low medical category SHAPE 2/3 by a medical board and when : -</p> <p>(i) No sheltered appointment is available in the unit, or</p> <p>(ii) is surplus to the organization</p> <p>**</p> <p>(iii) All other classes of discharge.</p>	<p>Commanding Officer.</p> <p>Commanding Officer.</p> <p>Commanding Officer.</p> <p>Commanding Officer.</p> <p>(a) In the case of Junior Commissioned Officers granted direct commissions during the first 12 months service Area/ Divisional Commander</p>	<p>To be carried out only on the recommendation of an Invaliding Board.</p> <p><i>The individual will be discharged from service on the recommendations of <u>Release Medical Board.</u></i></p> <p>If the discharge is not at the request of the Junior Commissioned Officer the competent authority before sanctioning the discharge shall if the circumstances of the case permit give the Junior Commissioned Officer concerned an opportunity to show cause against the order of discharge.</p>

		<p>(b) In the case of JCOs, not covered by(a),serving in any Army or Comm- -and the General Officer Commanding -- in- Chief of the Army or command if not below the rank of Lieutenant General.</p> <p>© In case other case the Chief of the Army Staff.</p>	
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16. A careful perusal of the aforesaid policy letter and its clarification, would make it crystal clear that the object of the Govt. to introduce the amended provision of Army Rule 13 is to circumvent the judicial pronouncements of the Hon'ble Delhi High Court in **Puttan Lal** case which was based on the judgement of the Hon'ble Supreme Court in **UOI –vs- Raj Pal Singh**, 2009(1) SCC 216. It may be stated that a large number of LMC personnel were discharged by Army authorities through RMB who approached the Hon'ble Delhi High Court against such large scale discharge. The Hon'ble Delhi High Court in the group case headed by **Subedar (SKT) Puttan Lal** decided on 20.11.2008 (unreported); followed the judgement of the Hon'ble Supreme Court in **UOI –vs- Rajpal Singh, (supra)** where identical question was considered and decided. The question for decision was whether the army authorities could discharge LMC personnel before

completion of term of engagement i.e. resulting in curtailment of service without providing sheltered appointment. It was held that when curtailment of service was there, then the LMC personnel have to be invalidated out through a Invaliding medical board and not to be discharged through a Release medical board. A general direction was issued by the Hon'ble High Court in respect of persons who had already retired and were in receipt of pension after premature discharge, which stood set aside as per above judicial pronouncement. Para 7 (iv) and (v) of the *ibid* judgement are relevant and are quoted below:-

“7. (i)

(ii)

(iii)

iv) The general directions are applicable only to such of the persons who have been discharged or proposed to be discharged under the policy letter dated 12.04.2007 or those who may have been discharged earlier but have already approached the competent court by filing a petition.

v) It is pointed out that there may be certain PBORs, which may also include some petitioner, whose normal date of superannuation has already arrived or would arrive before the aforesaid option is issued. In such cases, the persons would be entitled to only the benefit of pay and allowances for the differential period after adjusting any additional benefit arising from the premature discharge. Needless to say that those who decide not to rejoin after their premature discharge would neither be entitled to any pay and allowances nor would be required to repay the amount, if any, paid to them after their premature discharge.”

17. Obviously, in order to overcome the procedural lacuna, as pointed out by the Hon'ble Delhi High Court and Hon'ble Apex Court including other judicial fora, corrective step was sought to be taken by introducing the *ibid* amendment of rule 13 of Army Rules. It will be clearer from the observation made in the *ibid* policy of Sep 2010 reproduced above which is as under:-

“.....The implementation of the Hon’ble High court directions have resulted in significant increase in the number of permanent LMC personnel in the Army including those reinstated, thereby, adversely affecting its operational efficiency and man management.”

18. Here we may quote the earlier policy as enunciated in AO 46/80 hereunder :-

AO 46/80 : Disposal of Permanent Low Medical category personnel other than officers

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Retention :

2. General principles

- (c) The employment of permanent low medical category personnel, at all times, is subject to the available of suitable alternative appointments 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 discharge irrespective of the service put in by them.
- (d) Ordinarily, permanent low medical category personnel 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 down in sub-para (a) above.

3. All personnel retained in service in terms of para 2 above will, under all circumstances, be discharged on completion of their engagement periods/retiring service limits. For this purpose, NCOs and JCOs will be treated as under :-

- (a) NCOs will be discharged on completion of the retiring service limits appropriate to their ranks as opposed to the extended limits laid down in AO 13/77. However, their retention beyond the contractual period of engagement will be regulated under the provisions of para 144 to 147 of Regulations for the Army 1962.
- (b) JCOs will be discharged on completion of the normal retiring service limits as opposed to the extended limits laid down in AO 13/77.

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19. A comparison between the two policies i.e. old and amended, would make it evident that by the amended policy even LMC person with med category P2/3 can also be discharged through a RMB before completion of their stipulated term by way of curtailment of their service span. According to earlier policy, such persons were to be given sheltered appointment to allow them to complete pensionable service and even existing terms of engagement. This benefit is now taken away by the ibid amendment by virtue of which an LMC personal, even with med cat P2, need not be invalidated out but discharged through RMB, of course in the absence of any sheltered appointment in the unit. Invalidment and simple discharge are of different connotations. While invalidment from service (med cat P/5, who are unfit for further service) fetches the individual certain additional monetary benefits, whereas in case of simple discharge such benefit are not available and thus, if discharged under amended rule, a LMC-P2/3 personnel will be in disadvantageous position in comparison to a person who is invalidated out. Since the amended rule 13 has not been challenged before us, we are not inclined to delve on this question any longer. However, we have our reservations as to how long the amended rule can be applicable to the existing LMC P/2 category personnel who have a vested right in terms of earlier policy to complete their existing term in sheltered appointment. Of course, amended provision can always be made applicable to personnel enrolled after the amendment because they will be aware that they can be discharged in LMC any time in the absence of sheltered appointment.

20. Be that as it may, we may examine the case before us in terms of the amended rule 13, according to which Commanding Officer is the competent authority to discharge even a LMC p/2 cat person in the absence of any sheltered appointment. In the case of the applicant, his own officer commanding has clearly stated that no sheltered appointment is necessary and the

applicant can be accommodated in his present post. But the Commanding Officer has not accepted this recommendation and simply stated “not recommended”. Similarly, the Brigadier EME of HQ 33 Corps also endorsed this observation without assigning any reasons. Moreover the medical board lays down no restrictions in employability. Therefore where is the question of sheltered appointment? Can the authorities force a LMC person to a sheltered appointment without supporting medical advice? In fact, this applicant, since 2008, when he was first placed in low medical category P-2 for diabetes, has been posted and employed in places at par with Shape-1 persons that were in accordance with medical advice. Therefore we are of the view that an imaginary ‘sheltered appointment’ was perhaps invented by CO 617 EME Battalion to justify his non-recommendation for retention and the Brig EME blindly followed the CO and so did the OC Records; all these authorities appear to have ignored what is advised by the medical board that categorized him to a LMC.

21. Now, as per policy letter dt. 30 Sep 2010 (para 7), it is clearly stipulated that “based on recommendations of the Release Medical Board/Invalidating Medical Board as applicable, the Commanding Officer is the competent authority to sanction discharge of JCO/OR who are in SHAPE 2/3...”

22. Obviously, the recommendation of the medical board – be it RMB or IMB is to be there and only then necessary decision has to be taken either to retain the individual in sheltered appointment, if available or to discharge him. We have gone through the RMB held for the applicant on 12 Oct 2013 at 178MH. In part II of the proceedings, against ‘remarks’ column it is opined as under:-

“Individual suffering from Diabetes Mellitus Type II. Medical Classification SHAPE2 –(P). TO BE BROUGHT BEFORE RELEASE BOARD”.

23. No where it is recommended that he is to be released in that med category or unsuitable for service. We also find from earlier re-categorisation board held on 13.2.13 that no employment restriction was imposed; he was just advised to be on low salt/low fat diet and daily 30 minutes of brisk walking. Unfit for HAA. But the applicant has been working in HAA in his present posting.

24. Therefore, it is seen that there was no employment restriction on the applicant even though he was in P2 med cat. Despite all such, the CO has overruled the recommendation of the immediate higher authority of the applicant and not recommended his retention. We also do not find any document to show that any effort was ever made to locate a sheltered appointment for him as required under the rule, but necessary in case of the applicant. Simply by stating ‘not recommended’ is surely not a reasoned decision, more so when the recommendation of the immediate lower authority is overruled by the CO.

25. It is well settled now that reasoned order is the basic criteria for clarity and transparency. Absence of reasonableness in an administrative order results in arbitrariness in decision making, which is not desirable. In this connection we may refer to the recent decision of the Hon’ble Apex court reported in AIR 2007 SC 1363 (**UOI & Ors –vs- Jai Prakash Singh & Anr**) where it has been observed as under :

“7. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court’s judgement not sustainable.

8. Even in respect of administrative orders, Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* (1971 (1) All E.R. 1148) observed "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. –vs- Crabtree* (1974 LCR 120), it was observed : "Failure to give reasons amounts to denial of justice." Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx". It can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The inscrutable face of sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. "

26. That apart, as held in the decision of the Hon'ble Apex Court in **Nazir Ahmad –v- King Emperor**, AIR 1936 PC 253(2) followed in **State of UP –vs- Singhara Singh**, AIR 1964 SC 358 that where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

27. In this context, the observations of the Hon'ble Apex Court in **UOI –vs- Raj Pal Singh**, (supra) is also relevant :-

"26. 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 where the learned Judge said:

7 359 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."

27. The afore-extracted observations were approved and **Sardar Singh Raghuvanshi & Anr.**(1975(1) SCC 421 and then again in **Amarjit Singh Ahluwalia (Dr.) v State of Punjab & Ors.**(1975) 3 SCC 503 wherein, speaking for a three-Judge Bench, P.N. Bhagwati, J. had observed that though the above view was not based on the equality clause of the United States Constitution and it was evolved as a rule of administrative law but the principle remains the same, namely, that arbitrariness should be eliminated in a State action. (Also see **Ramana Dayaram Shetty –vs- International Airport Authority of India & Ors.**(1979) 3 SCC 489."

Also in **Tata Cellula –vs- UOI, (1994) 6 SCC 651**, it has been observed by the Hon'ble Apex Court in para 80 relying on The Supreme Court Practice, 1993, Vol 1, pp 849-850 which is quoted :-

“ 4. Wednesbury principle – A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it (associated Provincial Picture Houses Ltd –v- Wednesbury Corp, (1947) 2 All ER 680, p Lord Green, MR)”

28. In view of what has been discussed above, we are of the clear opinion that the decision to discharge the applicant without any express recommendation of the RMB and without even making any effort to provide him a sheltered appointment, although no medical board placed any employment restriction upon him; despite recommendation of his immediate superior to retain him in regular post, is arbitrary and against the rules, more so when sheltered appointment for him was not necessary. Under such circumstances, the impugned discharge is liable to be set aside and the applicant should be allowed to continue in service till completion of his present term, subject to continuance in acceptable medical category.

29. In the result, the application is allowed on contest but without any cost, by issuing the following directions:-

(a) The impugned order of discharge dt. 4 th July 2013 and subsequent orders in that regard be hereby set aside.

(b)The applicant be allowed to continue in service in his present rank and trade till completion of his existing term.

(c) Question of his extension further will depend on the recommendation of the screening board and subject to other conditions as applicable including medical category.

(d) The interim order dt. 20.12.13 is made absolute.

30. The original records be returned to the respondents on proper receipt.

31. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities.

(LT. GEN. K.P.D.SAMANTA)
MEMBER (ADMINISTRATIVE)

(JUSTICE R.N.RAY)
MEMBER (JUDICIAL)