

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: TA 04 OF 2013 (OA 473/2011-PB)

THIS 12TH DAY OF SEPTEMBER, 2014

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

Ex Rect. Jitendra Kumar
No. 13627905-K
S/o Shri Shatrughan Singh,
R/o Vill & PO Bagwan
Dist. Bhojpur (Ara)
State Bihar

..... Petitioner

-VS-

1. Indian Army through Chief of
Army Staff, Army Headquarters,
Sena Bhawan, DHQ,
PO New Delhi-110 011
2. Indian Army through Major Senior
Record Officer for OIC Records,
The Parachute Regiment, Bangalore,
PIN 900 493, C/O 56 APO

..... Respondents

For the appellants : Mr. Rakesh Kr. Singh, Advocate

For the respondents: Mr. Anup Kumar Biswas, Advocate

O R D E R

Per Lt. Gen K.P.D.Samanta, Member (A):

This original application u/s 14 of AFT Act, 2007, was originally filed before the Principal Bench of AFT by the applicant challenging his discharge from army service on 21.8.10 as arbitrary, illegal and

contrary to Army Rules. Subsequently, the said OA has been transferred to this Bench of the Tribunal under the order of the Hon'ble Chairman on the ground that the applicant is residing within the territorial jurisdiction of this Bench. Accordingly it has been re-numbered as TA 4 of 2013.

2. The applicant was enrolled in the Parachute Regiment Training Centre, Bangalore on 25.3.2009. At the time of enrolment he was found to be medically fit. After enrolment he was sent for basic military training for 19 weeks at Hazpir Company of PRTC (Parachute Regiment Training Centre), Bangalore, where his basic leg of recruit training commenced. During the course of such basic training in June 2009, while participating in a competitive cross country run for 6 Km, he had developed a pain in his left leg for which he was admitted in the Command Hospital, Bangalore for treatment. After X-ray it was detected that there was fracture in Tibia bone of left leg. After remaining admitted in the hospital for a week, he was discharged with plaster in his leg and on medical advice, he was sent on leave for four weeks. After returning from such medical leave, he was again medically examined and was found to be in low medical category for 12 weeks for the ibid fracture sustained during training. At that time, he was asked to do other light duties. After that he was medically upgraded and declared fit.

3. However, since he was, in the process, absent due to such medical reason for more than 42 days, he was relegated to a junior batch (from 189 to 191 batch) with whom he recommenced his basic training and the applicant duly completed the basic training. Thereafter, as submitted by the applicant, he joined for advance military training for duration of 15 weeks. During such advance training, precisely after completion of 7 weeks of advance training, on 15.2.10, the applicant had participated in a 5 Km run as part of training. Unfortunately, on this occasion also, the applicant fell down while running and was again admitted in the Command Hospital and this time, it was found that his right leg tibia was fractured. He was granted six weeks sick leave on medical ground. Again he was placed in low medical category for 12 weeks during which period he was allotted light duties. He was medically upgraded to A1 category on 17.7.10 and was declared fit to rejoin. However, the applicant was issued with a show

cause notice on 27.7.10 asking him to indicate whether he was willing to serve in the army. The applicant answered in the affirmative. Eventually, the applicant was discharged from service on 21.8.10. According to the applicant, he was not served with the discharge order. He made appeals to different authorities and by a communication dated 29 Dec 2010 (annexure-A6), the Sr. Record Officer of Parachute Regiment informed that during the training the applicant was absent for 279 days and as per recruit training policy, maximum permissible absence on medical ground is 210 days. Therefore, the applicant was discharged from service under Army Rule 13 (3) (IV) as he was unlikely to become an efficient soldier. The applicant made statutory complaint but to no effect. According to the applicant, he has been discriminated against since in similar circumstances, one Anup Singh Punia had been retained although he remained absent from training for 290 days and he is still serving in Rajputana Rifles. Being unable to get any redress, he has filed the instant application praying for a declaration that he was not validly discharged and consequently he should be reinstated to complete balance 8 weeks of advance training as was done in the case of Shri Anup Singh Punia. He has also prayed for quashing of the communication of the OIC Record dated 29.12.10 at annexure-A6.

4. The respondents have contested the application by filing a reply affidavit wherein it is stated that the applicant was enrolled on 25 Mar 2009 through Unit HQ Quota in Parachute Regiment Training Centre, Bangalore. He was detailed in Course Ser No. 189 for basic military training. He had completed 11 weeks training when he was admitted in Command Hospital (Air Force) on 17 Jun 2009 as a case of "Stress Fracture Tibia Lt" and placed in LMC A-3 (T-12) w.e.f. 3 Aug 09 to 26 Oct 09. Upon medical up-gradation of category to A1, he was allowed to continue further training. As per recruit training policy, if an individual is physically absent from training for more than 42 days on medical grounds, he should be relegated and accordingly, the applicant was relegated to Course Ser No. 191.

5. He completed 15 weeks of total recruit training with the relegated batch of 191. During his training with Course 191 upon relegation he was again admitted in Command Hospital at Bangalore on

19 Feb 2010 as a case of "Stress Fracture Tibia Rt" and placed in low medical category (LMC) A-3 (T12) w.e.f. 22 Apr 2010 to 15 Jul 2010. As per Army HQ letter dt. 28 Feb 1986, any recruit who misses training for more than 180 days (210 days in case he does not avail recruit leave) is liable to be discharged from service. It is stated that the applicant was discharged on medical ground only making him "unlikely to become an efficient soldier" under item IV to Army Rule 13(3).

6. As regards the case of Recruit Anup Singh Punia, it is stated that a show cause notice was served upon him on 7 Sep 2010 as he also missed training on medical ground for more than 210 days but he requested to be transferred to his parent regiment. However, no further detail has been indicated. So far as non-issue of discharge certificate is concerned, it is stated that the applicant refused to sign the discharge papers which is essential and, therefore, it could not be issued.

7. The applicant has filed a rejoinder contending that the Army HQ policy letter dated 28.2.86, based on which the applicant was discharged, is misconstrued and such policy cannot be made applicable to the case of the applicant. It is also contended that discharge of the applicant under Army Rule 13 (3) (IV) is not in order and therefore cannot be sustained in law. It is also stated that the discharge is invalid being contrary to Sec. 23 of Army Act read with Army Rule 12. By filing a supplementary affidavit, the applicant has submitted that Rect Anup Singh Punia remained absent on medical ground for 301 days; whereas the applicant missed training on medical grounds once for 130 days and once again for 146 days making it is a total of 276 days. Yet Anup Singh Punia was retained while the applicant was thrown out; thus, it is a clear case of discrimination.

8. Mr. Rakesh Kumar Singh, the Id. counsel for the applicant, emphasized during his oral submissions by contending that in another case of recruit Anup Singh Punia missed training for more than 210 days (total absence 301 days) due to medical ground but in his case he was sent to his allotted parent infantry regiment i.e. Rajputana Rifles and he is still serving. But the respondents took a different stand in the case of the applicant and he has been straightway discharged from service. The learned

counsel has contended that such discriminatory treatment towards the applicant is in violation of Arts 14 and 16 of the Constitution. He has therefore prayed that the impugned order should be set aside and the applicant should be re-instated in service.

9. According to the learned advocate for the applicant, the respondents have miscalculated the period of absence of the applicant and wrongly applied the policy decision dated 28-2-1986 (Annexure-III to Supplementary Affidavit by the respondents filed on 26.08.2014). According to the learned counsel on the first occasion he missed training for the period from 17th Jun 2009 till 3rd Aug 2009 i.e. about 47 days, but thereafter he was placed in LMC from 3rd Aug to 26th Oct 2009 when he was very much at the Training Centre and was doing other duties. This period cannot be taken as absence. Subsequently he was declared fit and was also allowed to join his training and he completed the Basic training. During advance training he again sustained injury on 19.2.10 while undergoing training and on this occasion he missed his training i.e. from 22 Apr to 15 July, 2010. Therefore, it cannot be said that he missed the training for more than 180 days.

10. Mr. Biswas, the learned counsel for the respondents, has however refuted the ibid submissions and during his oral submissions submitted that the authorities considered all aspects of the matter and as per policy the applicant was discharged by following the procedure because he missed the training for more than 180 days. He has also submitted that so far as Anup Singh Punia is concerned, the facts are different because he asked for repatriation to his allotted parent regiment which was accepted but in the case of the applicant he was enrolled under Unit HQ quota and was not allotted to any parent regiment since he did not complete basic military training as yet. Allotment of parent regiment to paratroopers is normally done during advanced training phase.

11. We have heard Mr. Rakesh Kr. Singh, learned Advocate for the applicant and Mr. Anup Kr. Biswas, learned advocate for the respondents and have gone through all affidavits and averments in detail. In this case, the facts are not in dispute. It is an admitted position that the applicant was enrolled

in the Parachute Regiment Training Centre on 25th March, 2009 under Unit HQ quota. He was detailed to undergo the Basic Military Training (BMT) in Course SI No.189. After completion of 11 weeks' training he sustained an injury, i.e. "Stress Fracture Tibia LT" on 17-6-2009 and was hospitalized. He was subsequently placed in LMC A-3 for 12 weeks with effect from 3rd August to 26th October 2009. Thus, according to the respondents, he missed the training for 135 days on medical ground; we however note that the absence works out to 130 days {17.06.09 to 02.08.09 (46 days) and 03.08.09 to 26.10.09 (84 days)}. As per the applicant, however, he actually remained absent from training on medical ground from the date when he sustained the injury i.e. on 17.6.09 till he presented himself before Medical Board again on 3rd Aug 2009, when he was placed in LMC, A-3, for the period from 3rd Aug to 26 Oct 2009. During this period (03.08.09 to 26.10.09) he was present in the Training Centre and was allotted light duty. After he was declared fit i.e. SHAPE-1, he was relegated to Course No. 191 since he missed training on medical ground for more than 42 days.

12. He completed total of 15 weeks Recruit training with Batch 191 upon relegation, when unfortunately, he again sustained an injury, this time on his right leg, on 19.2.10 for "Stress Fracture Tibia RT" and placed in LMC from 22 April 2010 to 15 July 2010. According to the respondents he again remained absent for 144 days on this occasion. Thus, considering his total cumulative absence for more than 180 days, the authorities issued him a show cause notice on 27.7.10 and ultimately discharged him on 21.8.10 under Rule 13(3)(IV) i.e. not likely to become an efficient soldier.

13. In order to clear doubts regarding the action taken by the respondents in discharging the applicant, we asked for certain clarifications in terms of our order dated 23rd June 2014. In compliance, the respondents have submitted a supplementary affidavit annexing the policy circulars dated 7-3-2013 (Annexure-'F') and 25-2-04 (Annexure-'E') as also policy circular dated 28-2-1986 (Annexure-'C'). We have gone through the same. As per the circular of 25-2-2004 (Annexure- 'E') to the Supplementary Affidavit it appears that recruits can be discharged on different grounds including medical disablement

due to injuries sustained during training. In the instant case the respondents have categorically stated that the applicant was discharged on medical ground (though his medical category at the time of discharge was SHAPE-1) since he missed the training for more than 180 days which is not permissible in terms of circular of 28-2-1986 (Annexure 'C' to S/A). As it appears from the supplementary affidavit, it is stated that every recruit enrolled in the category of Infantry Soldier (General Duty) has to undergo 34 weeks military training which includes 19 weeks Basic Military Training and 15 weeks advance training. In the instant case the applicant in the first instance completed 11 weeks basic training and thereafter sustained the injuries on 17-6-2009 and he was declared fit on 26-10-2009 and thereafter he was relegated to 191 Course and the applicant completed 15 more weeks of training; and as such he completed a total of 26 weeks basic training instead of 19 weeks BMT. Actually he should have been considered to have completed 19 weeks of basic training and 7 weeks of advance training. He again sustained injury on 19.2.10 and remained absent on medical ground from 22nd April to 15th July 2010 during which period he was in LMC Thus, the applicant had in all completed 26 weeks of training, but is considered by the respondents as not completed the basic military training of 19 weeks with relegated batch of 191. Therefore, he was discharged as he was unlikely to become efficient soldier. As per Army HQ letter No.7/3/13 (Annexure-'F' to S/A), on completion of 19 weeks training a recruit is allotted a parent Infantry Regiment. Since the applicant did not complete basic military training for 19 weeks with his relegated batch 191, he was not allotted any parent unit and hence the question of his transfer on medical ground to his parent regiment did not arise.

14. It appears the sole ground on which the respondents discharged the applicant is that he missed training more than 180 as has been made out by the respondents. It appears to be totally misconceived because during the period when the applicant was in LMC on two separate spells, he was present in the Training Centre and was doing other duties. This averment of the applicant has not been disputed by the respondents in their reply affidavit. Further, on the first occasion he remained out from training due to

injury is 135 days including the period when he was on LMC ie, from 3rd Aug 2009 to 26 Oct 2009. Thereafter he was declared fit and also allowed to join training. That being the position, the absence in the first spell cannot be counted since he was declared fit and allowed to join training. In the second spell he remained absent for 144 days which is less than 180 days. The respondents have counted both these spells together to calculate 180 days. This cannot, perhaps, be logical because admittedly in the first spell the applicant joined and continued with the training for 15 long weeks. Moreover, in an identical case (Anup Singh Punia) the respondents have taken a different stand which was not extended to the applicant; thus, there was clear violation of the provisions of Articles 14 & 16 of the Constitution.

15. We may reproduce here the relevant portion of policy circular dated 28.2.86 (Annexure-‘C’ to S/A) based on which the applicant was discharged:

“Relegation on Medical Ground:

5. The maximum period for which a recruit can be relegated on medical grounds will be six months. A recruit falling ill due to disease or injury during training whether attributable to or aggravated by service, on discharge from hosp may be placed in a temporary medical category for not more than three months provided there is a reasonable prospect in the opinion of medical specialist that the individual is likely to be fit for training and the total absence from training including hospitalization period is not likely to be more than six months. If on the other hand he is unlikely to be fit for training within six months of first absence from duty due to illness, the individual will not be discharged from hospital in temporary medical category but will be invalidated out of service.

6. However, if a recruit is being discharged for being absent from training for more than 180 days purely on medical grounds the period of absence may be extended to 210 days provided the recruit forgoes his annual leave of 30 days which he is entitled during recruit training. This period of annual leave will be utilized for carrying out important aspects of training misused (missed) during his absence on medical grounds.

7. These instructions will be incorporated in the GS publication on Basic Military Training for Recruits which is under revision at this Headquarters”.

16. We have also gone through the Medical Reports as produced by the respondents. We find that on the first occasion the applicant met with an injury while undertaking running as a part of training programme on 17-6-2009. It was diagnosed as fracture of lower leg including ankle. According to the report of the Commanding Officer, the injury was sustained during training. No Court of Inquiry was however held but report was made on the basis of two eye witnesses. Subsequently, the applicant again

sustained injury on 19-2-2010 and on this occasion also Commanding Officer opined that the individual sustained injury while doing BPET (Battle Physical Efficiency Test) as per training programme. Therefore, on both the occasions the applicant sustained injuries while on training and as such it is attributable to military service. From the Medical Boards proceedings we find that the percentage of disablement has not been indicated and it is only stated that it will be decided later on. From the original file we find that no Release Medical Board or Invalidating Medical Board was held, even though the respondents have categorically stated in their reply that the applicant was discharged on medical ground, though the rule quoted by them is Army Rule 13(3) (IV) i.e. he was not likely to become an efficient soldier. It is obvious that since the applicant was a recruit and was not yet attested, this rule was applied even though it is a case of discharge on medical ground due to injury during training. It is equally strange to find that the applicant's medical category at the time of discharge was SHAPE-1; how then could he be discharged on medical grounds? As per the ibid policy letter of 1986, the medical board made him A-3 temporarily for 12 weeks i.e. 3 months, assessing in their wisdom that he would be fit; and in fact he was indeed declared fit after this period on both occasions. On the second occasion he was declared fit by the medical board held on 15.7.10. It is astonishing that within a week of him being declared fit on 22.7.10 after the second injury, he was issued with show cause notice and thereafter discharged in fit condition taking aid of policy of 28 Feb 1986 holding that his total absence was more than 180 days. If he was not likely to become an efficient soldier and the authorities had already decided to discharge him on this ground, then in that case he ought to have been invalidated out for injuries that were attributable to service sustained during training. In that case, he would have at least got disability pension. By discharging him under the policy of 28 Feb 1986, the respondents have denied him disability pension which is not in order. We also take note that on the second occasion on review, he was upgraded to SHAPE-1 by the medical board held on 15.7.10 yet he was discharged even though his absence in the second spell of injury was less than 180 days. For all these reasons, we are of the opinion that the

discharge of the applicant was irregular and not in accordance with the policy on three grounds as under and therefore the same is liable to be set aside:-

a) The applicant did not absent from training on medical ground/hospitalization continuously for more than 180 days. They were in two spurts. On the first occasion the absence was for 130 days (17.06. 2009 to 02.08.2009 for hospitalization/sick leave and from 03.08.2009 to 26.10.2009 for being in LMC performing light duties in Unit); on the second occasion he was absent from training for another injury for 144 days (19.02.2010 to 21.04.2010 for hospitalization and from 22.04.2010 to 15.07.2010 being in LMC). The policy letter dated 28 Feb 1986 (Annexure-'C') quoted above does not clearly stipulate that a recruit's absence will be treated in a cumulative manner as has been done in this case. He was relegated once for missing training due to the injury the first time. We observe that after he rejoined in the new batch upon relegation, he again attended training from 27.10.2009 to 19.02.2010 (15 weeks) before he was injured the second time on his right leg and hospitalized for 'stress fracture'. It is also undisputed that on the first occasion he completed 11 weeks of basic training before injuring his left leg with a stress fracture requiring hospitalization. Therefore, physically he completed a total of 26 weeks of basic training, although, technically 15 weeks with the relegated batch (191). As per policy on recruit training one is required to undergo 19 weeks of basic and 15 weeks of advanced training. The rules are silent on the point whether the 19 weeks of basic training is required to be done in continuity or breaks are permissible. A plain interpretation of the policy indicates that legitimate interruptions up to 42 days are permissible. We are of the view that a cumulative absence amounting to 276 days (130+146 days) to become a disqualifying condition for retention is not clearly supported by rules. If that was so then a total basic training of 26 weeks with an interruption cannot be weighed in a different yardstick. He could have been relegated a second time having considered him to be in advance training on

completion of 19 weeks of basic training in a cumulative manner and after putting him through required tests for him to qualify basic leg.

b) The second point is with regard to non-consideration to a parent infantry regiment as is done for paratroopers in advanced leg by considering him as deemed to have cleared basic leg of training, since he completed a total of 26 weeks of training in the basic leg against laid down 19 weeks. Since rules are silent on this issue the applicant could have been given the benefit; more so, when the authorities had condoned a longer absence of more than 300 days on medical ground for another paratrooper recruit as admitted by the respondents (Recruit Anup Singh). The applicant has legitimately felt discriminated.

c) The third issue is with regard to exercising the option of invalidating the applicant with benefits as would accrue for one who suffered a disability attributable to service; in this case the applicant's injury on both occasions was attributable to military service as admitted by the respondents since he was injured during organized training. Para 5 of the policy letter of 28 Feb 1986, quoted earlier, clearly stipulates that in case the medical authorities felt that the recruit was not likely to recover within 180 days, then they would invalidate him from service after providing due treatment. The intention of this paragraph in the rules is quite clear as interpreted by us; all efforts will be to send back the recruit for training as soon as possible except when the medical authorities felt that he would need more than 180 days to recover. It was not to give an opportunity to the executive authorities to discharge the recruit for missing more than 180 days of training. They could only relegate him once or twice depending on his progress of training. In the instant case we find that the applicant was discharge as 'fit' case in SHAPE-1, thereby closing any option to invalidate him but to accept him on training. It was definitely not case where the authorities could use the provisions of under AR 13 (3) (IV), "unlikely to become efficient soldier" to discharge him, when he was in SHAPE-1 and had completed a total training of 26

weeks on the day of such discharge. There is neither record nor any averments by the respondents to suggest that the applicant failed in his tests even after 26 weeks of training to justify that he could be branded as one who would be *unlikely to become an efficient soldier*. Therefore the discharge appears to be absolutely irregular.

17. in view of the considerations made above we are incline to set aside the discharge order as irregular and grant the applicant consequential benefits. There are few practical problems and organizational constraints, as explained by the respondents that may limit consequential benefits which would include reinstatement for which the applicant has prayed for. Four years have passed since the applicant was discharged and this day. At this point in time the applicant's age and physical/medical fitness may come in the way of reinstatement especially in the Parachute Regiment that is for Special Forces. We may have to mould the relief accordingly. At the time of hearing the applicant was present in Court and on our query he stated that he was 25 years of age and he was under-graduate. Thus his is a case of Matriculate Level Entry. Therefore the respondent No-1 (COAS) has to be given liberty and discretion to reinstate him subject to physical/medical fitness and in any arm or service and in any trade as is deemed appropriate. He should therefore be reinstated first as a SHAPE-1 recruit, which was his medical category at the time of discharge; thereafter he should be placed before a specially constituted medical board to ascertain whether he is fit to continue in SHAPE-1. In case he is found unfit, he must be down graded to LMC with advice for invalidment in terms of Para 5 of policy letter dated 28 Feb 1986 (Annexure-'C' to S/A). While considering attributability/aggravation aspect, his injuries (stress fracture both legs) during organized training must be taken note of by the medical board.

19. In view of the above discussion we dispose of this application with the following directions:

- a) The letter dated 29.12.10 at annexure-A6, written by the Parachute Regiment Records communicating the applicant about his discharge be quashed since the discharge is considered irregular and illegal.

- b) The applicant shall be reinstated in the Army as a recruit in any arm or service and in any trade as deemed appropriate by the COAS (Respondent No-1). The entire period, ie, from the date he was discharged (21.08.2010) till he rejoins will be considered as 'in service' notionally without any pay and allowances, but he shall retain his seniority from the date he was initially enrolled.
- c) Immediately after reinstatement, he shall be placed before a special medical board to ascertain his present medical category and also assess the physical/medical fitness to continue training as a recruit. In case he is found unfit by the said board, he shall be suitably downgraded and invalidated out of service in a proper manner after considering his earlier injuries (stress fracture in both legs) as attributable to and aggravated by military service since sustained during organized training activities.
- d) This order shall be implemented within 60 days from the date of communication of this order to the Respondent No-1.
- e) O I/C Legal Cell HQ Bengal Area shall ensure that a copy of this order is communicated to the COAS, AG, OC Records of Parachute Training Center and DG Infantry directly by fastest possible means.
- f) No costs.
20. Let the original records be returned to the respondents on proper receipt.
21. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

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

(JUSTICE RAGHUNATH RAY)
JUDICIAL MEMBER