

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: OA 32 OF 2014

THIS DAY OF SEPTEMBER, 2014

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

Chhathu Lal Yadav
S/o Sri Kailash Yadav
R/o 59, Deben Babu Road,
PO Kanchrapara, PS Bijpur
Dist 24 Parganas North, PIN : 743145

.....Applicant

-Vs-

1. Union of India, Service through the Secretary,
Ministry of Defence, South Block,
New Delhi-110 011
2. The Chief of Army Staff,
Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO: New Delhi – 110 011
3. Adjutant General, Adjutant General's Branch
Integrated HQ of MOD (Army), L Block,
Defence Headquarters, PO New Delhi- 110 011
4. The Addl. Director General (discipline & Vigilance),
Indian Army, Integrated HQ of MOD (Army),
L Block, DHQ, New Delhi-110 011
5. The Officer-in-Charge, Army Medical Corps,
Records, Lucknow, PIN 900450 C/o 56 APO
6. The Commanding Officer,
161 Military Hospital,
PIN 903161, C/O 56 APO

.....Respondents

For the petitioner: Mr. Aniruddha Datta, Advocate

For the respondents: Mr. D.K.Mukherjee, Advocate
(1 to 6)

ORDER

Per Hon'ble Lt. Gen. K.P.D.Samanta, Member (A)

Being aggrieved by his pre-mature discharge from service the applicant has filed this original application u/s. 14 of the Armed Forces Tribunal Act, 2007 praying for quashing of the impugned discharge order dated 22.10.2013 as also the rejection order dated 15.03.2014 by which his prayer for cancellation of the premature discharge order was not accepted. He has also prayed for re-instatement in service from the date of his discharge with all consequential benefits.

2. Briefly stated the facts of the case are that the applicant was enrolled in the Army Medical Corp in the trade of Nursing Assistant on 11.07.2000. He was posted in various military hospitals at Kirki, Jammu, Barrackpore etc. On 31.08.2007 the applicant was placed in low medical category P-3 temporarily for hyper tension and obesity. However, he was upgraded to category P-2 (Permanent) for the ibid diseases with effect from 01.08.2010. In view of such low medical category the applicant prayed for a posting in or around Barrackpore. However, without considering his prayer for such posting on medical ground, the applicant was transferred to 161 Military Hospital at Pithorgarh (Uttarakhand). The applicant joined there but he made representations before the Commanding Officer complaining that because of extreme cold weather his medical condition was being deteriorated. He was thereafter sent to Bareilly for check up and was discharged from the hospital on 18.02.2013 without any abnormality in his health condition. On 18.02.2013 the applicant made a request for his posting in plain area near his home on compassionate as also on medical

ground. However, his prayer for such posting on compassionate ground was not acceded to. The applicant continued to make same prayer but to no effect. On 22.10.2013 the applicant came to know that a signal was received in the office for his release from Army service on compassionate ground. Knowing this the applicant was shocked and surprised because he never asked for discharge from service on compassionate ground. He met various superior officers who suggested him to make application for cancellation of the discharge order. Accordingly, he made such prayer. His wife also made similar request through AWWA on 31.10.2013. In the mean time, the applicant was granted annual leave on 11.01.2014 and he left for home. While on leave the applicant received a letter date 22.01.2014 informing him that his prayer for cancellation of premature retirement was not accepted by the competent authority and his absence will be treated as AWL. The applicant reported to his unit on 12.02.2014 and had to face a Court of Inquiry for AWL. He was awarded a punishment of fine. According to the applicant, even though he went on leave on proper authority, he was unnecessarily treated as on AWL and had to pay fine for the same. Ultimately the applicant was handed over a movement order dated 05.03.2014 for his discharge from service on compassionate ground and he was sent from his unit on 06.03.2014. Being aggrieved, the applicant submitted representation for cancellation of the discharge order but by an order dated 15.03.2014 he was informed that his request could not be agreed to in terms of the existing policy. Finding no other alternative the applicant filed this application for relief stated above.

3. The application has been contested by the respondents by filing a reply affidavit. It is stated that the applicant was enrolled in the Army Medical Corps on 11.07.2000 and finally struck off from the strength of the Corps with effect from 01.04.2014 on compassionate ground at his own request before completion of terms

of engagement under Army Rule 13(3)(III)(iv). It is further stated that while serving at 161 MH the applicant applied for compassionate ground posting with choice at Kanchrapara, Barrackpore and Kolkata on 22.04.2013. However, his request could not be acceded to because the applicant was earlier posted at Barrackpore Base Hospital from July, 2009 to November, 2012. The applicant was accordingly informed on 11.07.2013. The applicant thereafter made a prayer for premature retirement on compassionate ground due to domestic problem as also on medical ground through proper channel on 23.09.2013 (Annex-R3) which was duly recommended by his controlling authority. He also gave undertaking certificate date 23.09.2013 that he would not withdraw the application at later date (Annex. R5). His prayer for premature retirement was thoroughly examined and approved by the competent authority on 22.10.2013 with direction to strike off his name from the strength of the Corps from 01.04.2014. Accordingly, action was taken. Subsequently, the applicant prayed for cancellation of his premature discharge on 09.11.2013 which was also considered but was not agreed to by the competent authority. The applicant made further prayer for cancellation of the said discharge order on 13.03.2014 while performing the discharge drill. However, the authorities did not agree in view of the policy decision dated 13/2014 read with Army HQ letter dated 17.02.2000 (Annex.R13). The respondents have, however, not disputed that the applicant was in low medical category (P-2) and was suffering from primary hyper tension, obesity etc. His places of posting have also been indicated at page-2 of the reply.

4. The applicant has filed a rejoinder reiterating his contentions made in the OA.

5. Mr. Datta, Id. adv. for the applicant has urged before us that the applicant has never asked for premature discharge. What he had asked is for a posting in a plain area near his home because of his health condition as he was in P2 category which is

an acceptable low medical category. He has submitted that the applicant always submitted representations in Hindi because he was not conversant with English language well and the compassionate ground discharge application as referred to by the respondents is in English but he admitted that it was signed by the applicant. Contention of Mr. Datta is that without knowing what has been written there the applicant signed the same in good faith. But he had no intention for early discharge because he had already served about 13 years and was nearing completion of pensionable service. Therefore, at that stage no one with minimum intelligence would agree for early discharge without getting any pension. Ld. counsel has relied on some decisions of the Hon'ble Supreme Court as annexed to the rejoinder and contended that even a prayer for premature discharge can be withdrawn at subsequent stage and according to the law settled by Hon'ble Supreme Court, such prayer has to be accepted by the respondents. He has, therefore, prayed that the applicant be granted relief as prayed for and he may be allowed to re-join his service so that he may not be deprived of his pensionary benefits after serving so many years in the Army.

6. Mr. Mukherjee, ld. counsel for the respondents has submitted that the applicant himself had asked for premature retirement which was considered by the authorities and accepted the same on compassionate ground as the applicant cited domestic problems as also his health ground. Therefore, once the premature discharge was accepted by the authorities the applicant is estopped from withdrawing the same subsequently in accordance with policy. He has produced the relevant records for our perusal.

7. We have carefully considered the submissions made by both sides and have gone through the documents as produced before us.

8. The only question that arises for decision in this case is whether after acceptance of prayer for early discharge on compassionate ground, the applicant can seek withdrawal of the same and whether the authorities are bound to accept such prayer for cancellation of discharge order already sanctioned.

9. We may first consider the legal position as propounded by the Hon'ble Supreme Court and relied upon by the ld. adv. for the applicant.

10. In **Balaram Gupta –vs- UOI & Ors**, 1987 AIR 2354, the applicant, a civilian applied for voluntary resignation by letter dt. 24 Dec 1980 w.e.f. 31 Mar 1981 i.e. three months notice, in terms of rule 48A of CCA(Pension) Rules. He was allowed to retire from 31.3.81 by order dt. 20.1981. However, subsequently, the appellant due to personal reasons and change of mind prayed for withdrawal of his notice for voluntary retirement by letter dt. 31.1.81. This prayer was not acceded to against which he filed a writ petition which too was dismissed. On appeal, the matter came up before the Hon'ble Supreme Court. It was held by the Hon'ble Apex Court as under :-

“On the principle of general law that in the absence of a legal, contractual or constitutional bar an intimation in writing sent to the appropriate authority by an incumbent, of his intention or proposal to resign his office/post from a future specified date, can be withdrawn by him at any time before it effects termination of the tenure of the office/post or employment, the offer of relinquishment in the instant case, could have been withdrawn by the appellant before the date it became effective if sub-rule (4) of Rule 48-A was not there. (Union of India v. Shri Gopal Chandra Misra and others, [1978] 3 S.C.R. 12, referred to.)

“Approval under r. 48A(4) is not ipse dixit of the approving authority. The approving authority who has the statutory authority must act reasonably and rationally. The guidelines laid down by O.M. No. 24(57)-E-V-32 dated 24.12.1952 for considering and deciding in the matter of accepting or refusing the withdrawal of notices of voluntary retirement are that ordinarily permission should not be granted unless the officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. There has been compliance with these guidelines in the instant case, because the appellant has indicated that there was a change in the circumstances. In the notice for resignation he had not given any reason. There was nothing wrong in this. He has stated that the persistent and personal requests from the staff members and relations had changed his attitude towards continuing in Government service and induced him to withdraw the notice. This was not an unreasonable reason.”

In the modern age the Court should not put embargo upon people's choice or freedom. **If the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would have been another matter** but the appellant's offer to retire and withdrawal of the same happened in so quick succession that it cannot be said that any administrative set up or arrangement was affected. [Raj Kumar v. Union of India, [1968] 3 SCR, 857, referred to.]

“ There should not be arbitrariness and hostile discrimination in Government's approach to its employees. The Court cannot but condemn circuitous ways to ease out uncomfortable employees. As a model employer the Government must conduct itself with high probity and candour with its employees. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude. [Air India etc. etc. v. Nergesh Meerza & Ors. etc. etc., [1982] 1 S.C.R. 438, referred to.]

Similar view was taken in **J.N.Srivastava –vs- uoi & Ors**, AIR 1999 SC 1571 by placing reliance on **Balaram Gupta** (supra).

In **Sambhu Murari Sinha –vs- Project & Development India, Ltd.** Civil Appeal No. 2639 of 2000 decided on 13 March 2002, the Hon'ble Apex Court held that “ it is now settled legal position that unless the employee is relieved of the duty, after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end.” Finally it was held –

“We, therefore, hold that respondent could not have refused to accept the resignation of the appellant as it was sent before the jural relationship of employee and employer came to an end. Consequently, the impugned judgement is liable to be set aside, which we hereby do. The appellant shall be entitled to rejoin his duty and he shall be paid all his salaries and other benefits during the period he was out from service.”

In **UOI & Anr –vs- Wing Commander T.Parthasarathy, (2001) 1 SCC 158** the Hon'ble Supreme Court again considered this issue. In that case the respondent Wing Commander sought premature retirement on 21.7.85 w.e.f. 31.8.86. Subsequently he amended his prayer to consider his date of retirement as 31.8.86 so that he could get the benefits of IV Pay commission. Thereafter he preferred another

application on 19.2.86 seeking withdrawal of his prayer for voluntary retirement under changed circumstances. He was informed that his prayer was already accepted his original prayer for voluntary retirement and therefore his subsequent prayer for withdrawal was not accepted. Aggrieved by this order, he preferred a writ petition in the Hon'ble Karnataka High Court which decided the application in favour of the employee. UOI thereafter preferred an appeal before Division Bench where also they failed and thereafter appeal was filed before the Hon'ble Supreme Court. The Hon'ble Apex court upheld the decision of the High Court holding inter alia as under :-

“.....This Court had again an occasion to consider the question as to the principle of law to be applied to a case of resignation made to become effective on the expiry of a particular period or from a future date as desired by the employee in **Punjab National Bank vs P.K. Mittal** (AIR 1989 SC 1083). It was held therein that resignation being a voluntary act of employee, he may choose to resign with immediate effect or with a notice of less than 3 months if the employer agrees to the same or he may also resign at a future date on the expiry or beyond the period of 3 months as envisaged under the governing regulation in that case, even though there is no such consent from the employer, and that, it was always open to the employee to withdraw the same before the date on which the resignation could have become effective.

So far as the case in hand is concerned, nothing in the form of any statutory rules or any provision of any Act has been brought to our notice which could be said to impede or deny this right of the appellants. On the other hand, not only the acceptance of the request by the Headquarters, the appropriate Authority was said to have been made only on 20.2.86, a day after the respondent withdrew his request for pre-mature retirement but even such acceptance in this case was to be effective from a future date namely 31.8.86.

Consequently, it could not be legitimately contended by the appellants that there was any cessation of the relationship of master and servant between the Department and the respondent at any rate before 31.8.86. While that be the position inevitably the respondent had a right and was entitled to withdraw or revoke his request earlier made before it ever really and effectively became effective.

The reliance placed upon the so-called policy decision which obligated the respondent to furnish a certificate to the extent that he was fully aware of the fact that he cannot later seek for cancellation of the application once made for pre-mature retirement cannot, in our view, be destructive of the right of the respondent, in law, to withdraw his request for pre-mature retirement before it ever became operative and effective and effected termination of his status and relation with the Department. When the legal position is that much clear it would be futile for the appellants to base their rights on some policy decision of the Department or a mere certificate of the respondent being aware of a particular position which has no sanctity or basis in law to destroy such rights which otherwise inhered in him and available in law. No such deprivation of a substantive right of a person can be denied except on the basis of any statutory provision or rule or regulation.”

In **Gopi Kishan –vs- State of Rajasthan & Ors**, (2000) III LLJ 935 Raj, the Hon'ble Rajasthan High Court also took same view relying on the above decisions of the Hon'ble Apex Court.

12. The ratio of the above decisions is that an employee can withdraw his earlier application for voluntary retirement before such retirement comes into effect since master and servant relationship does not cease till one actually retires or stands discharge. We may now consider the case of the applicant based on the above principle. Here we find that the applicant was enrolled on 11 July 2000 and he became a LMC, Shape-2 due to certain diseases. He first prayed for a suitable posting in or around his own home place which was not granted on ground that he had recently been posted near his home town for considerable period of time. He, therefore, applied for premature retirement on health as well as compassionate ground on 7 Oct 13 citing family problems. The prayer of the applicant was accepted by the competent authority on 22 Oct 13 and he was to be discharged from 1 Apr 1014. The applicant prayed for cancellation of his premature retirement on compassionate ground on 31 Dec 13 which was rejected on 16 Jan 14. The applicant was sent for discharge drill on 6th Mar. 14. He again submitted a prayer for cancellation of voluntary retirement order on 13 Mar 14 which was also rejected on 15 Mar 14. Thus the applicant was discharged and his name was struck off from strength (SOS) w.e.f. 1.4.2014.

13. The policy of premature retirement vide ROI No.13/2009 is at annexure-R12 to the reply. It is inter alia stated at para 418 that discharge/release order once sanctioned will not be cancelled. However, in exceptional cases OIC Records may review individual cases purely on the merit of each case.” Policy letter dt. 17 Feb 2000 (annexure-R13) on the subject of cancellation of discharge order issued on compassionate grounds in respect of PBOR has been perused by us. It reiterates that

premature retirement order should be cancelled only on exceptional and justified grounds and not as a routine and time stipulation of minimum 3 months prior to the date of retirement at the discretion of OIC Records.

14. In this case we find that the applicant twice made prayer for cancellation of his discharge order which the authorities considered but did not accept. In the Army unlike in Civil Departments, prayer for premature discharge on compassionate ground does not automatically take effect after notice period. The authorities consider such request keeping in view the normal wastage, new enrolment, strength of the corps etc and only then they allow such prayer for premature discharge. However, reconsideration of such discharge order is not barred at all because the policy letter states that OIC Record may consider each such case on merit. Therefore, reconsideration is a right for the employee but it is entirely for the authorities whether to accept such prayer or not keeping in view the interest of the organization. Here, as we have indicated above, the prayer for cancellation of premature discharge as made by the applicant was considered twice but rejected. We, therefore, find that it is not a case where no such consideration has at all been given. When the authorities have considered the matter twice and did not accede to the prayer, there is little scope for intervention by this Tribunal.

15. However, we find that the applicant has rendered almost 14 years of service (date of enrolment 11.7.2000 and date of discharge 1.4.2014) and, therefore, in normal course he will not be entitled to any pension as the minimum pensionable service is 15 years. It will be too harsh if the applicant is denied pensionary benefits after serving for so long in the Army. His conduct is also unsatisfactory. He is also in a low medical category and in such a situation, unless some monetary benefit on regular basis is made available to him, he may suffer financially in the near future

after serving the army faithfully and sincerely for long 14 years. Such a situation is not at all desirable.

16. Considering all these, we are of the considered opinion that even if the decision of the authorities in not accepting his prayer for cancellation of premature discharge is not liable to be interfered with, but at the same time, we feel inclined to observe that the authorities should take into account the fact that he has rendered about 14 years of qualifying service and therefore, he should not be deprived of pensionary benefits at all. The shortfall period should, therefore, be condoned by the competent authority in the facts and circumstances of the case in exercise of his executive power.

17. In the result, the application stands dismissed on contest but without cost. However, the respondent authorities are directed to consider condoning the shortfall period to complete minimum pensionable service so that the applicant is not deprived of his pensionary benefits for his survival. Appropriate decision be taken and communicated to the applicant within a period of 90 days from the date of communication of this order.

18. Let original records be returned to the respondents on proper receipt.

19. 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)