

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O.A. 07 OF 2012

MONDAY, THIS 4TH DAY OF MARCH, 2013

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

Ex-Sep Bhaba Prasanna Panda , (No. 4264247-L)
residing at Vill. Gopinathpur, PO Lendura,
P.S. Salipur, Dist. Cuttack, Orissa

..... Applicant

- Versus -

1. Union of India
Service through the Secretary,
Ministry of Defence, New Delhi.
2. DGAFMS, Ministry of Defence,
New Delhi.
3. Chief Controller of Defence Accounts (P),
Allahabad-14 (UP)
4. Principal Controller of Defence Accounts (P)
Allahabad-14 (UP)
5. OIC Records,
Bihar Regiment Abhilekh Karyalaya,
Record the Bihar Regiment,
Danapore Cantt. 801 503

..... Respondents

For the applicant : Mr. Bisikesan Pradhan, Advocate

For the respondents : Mr. Tapas Kumar Hazra, Advocate

O R D E R**Per Hon'ble Lt. Gen. K. P. D. Samanta, Member (A) :**

This original application has been filed by the applicant, who is an ex serviceman, being aggrieved for non-payment service pension and disability pension.

2. The facts relevant for this case are that the applicant was enrolled in the BIHAR Regiment of the Indian Army on 31.03.1984 as a Sepoy and posted in 15th Battalion of the BIHAR Regiment. It is the case of the applicant that while he was working as such, there was a family tragedy in which his elder brother, who was a Captain in the Indian Army, died in a helicopter accident on 24.04.1990. This sudden death of his brother shocked the applicant very much and he became a patient of Neurotic Depression. To add insult to injury, the wife of the applicant was also brutally killed when the applicant was posted away in Jammu & Kashmir in 1994. This incident further devastated the applicant and he became a mental patient. During this period starting from April 1990 onwards the applicant was charged for various acts of indiscipline primarily relating to absence without leave, overstaying leave, disobedience of orders, using insubordinate language etc, for which he was summarily tried for relevant offences under the Army Act 1950 and punished. As a result he earned in all 6 red ink entries in his service records as given in detail in the reply of the respondents. In the year 1996, the applicant was diagnosed as a patient of *Neurotic Depression* and he was placed in a low medical category wef 16.4.1996 till he till he was discharged on 31.10.1998. However, the applicant was finally discharged from army service on 31.10.1998 under rule 13(3)(iii)(v) of the Army Rules, 1954, on administrative ground being an 'undesirable soldier' having accumulated six red ink entries by then; although the applicant submits in his OA that he was invalidated out of service on medical grounds, a plea that has not been substantiated with documents.

2. Subsequent to his discharge from service, being in low medical category, a Release Medical Board (RMB) was held on 20.08.1998 where the applicant was placed in "BEE (Permanent)". The said RMB held his disability of '*Neurotic Depression*' as *aggravated due to stress and strain of military service and granted 20% disability for two years*. Unfortunately at the time of such discharge he had completed 14 years and 7 months of service and thus, was deprived of his service pension for which 15 years service was required as per rules. The applicant was, however, assured by the Record office that his disability pension for his disability which was assessed as 20% and attributable to military service, would be sanctioned and the case was pending with PCDA(P), Allahabad. However, when the disability pension was not paid to the applicant, he filed a Writ Petition before the Hon'ble Orissa High Court vide OJC No.7549/2001. However the said writ petition was withdrawn by the applicant on the assurance of the authorities that his case for payment of disability pension will be considered. Ultimately, the PCDA(P), Allahabad by communication dated 16.07.2007 (Impugned Order Annexure A-5) intimated that the applicant was not entitled to disability pension because he was discharged on disciplinary ground being an undesirable soldier. Thereafter, the applicant kept quiet and ultimately filed the original instant application in September, 2011 seeking the following main relief(s) :

- (i) To direct the respondents to convert discharge of the applicant to invalidation from service being found unfit for further service being placed in medical category BEE (Permanent) because of disease "Neurotic Depression" under AR-13(3)(III)(iii) and disburse invalid Pension in favour of the applicant w.e.f. 01.11.1998 with accrued interest.
- (ii) To direct the respondents to condone five months short fall of service and disburse normal pension in favour of the applicant w.e.f. 01.11.1998 with accrued interest.
- (iii) To direct the OIC Records (Respondent No.5) to act upon its own letter dated 09.12.99 placed at Annexure-AS3 to set aside the impugned letter dated 16.07.2007 of the Accounts Officer (P) of the office of the P.C.D.A. (P), Allahabad (Respondent No.4) placed at Annexure-A5 and to direct the respondents to grant disability pension in favor of the applicant w.e.f. 01.11.1998 with accrued interest with a stipulated time.

3. Since there was delay in filing the original application, the applicant had also prayed for condonation of delay by filing MA 70/2011 which was allowed on 18.1.12 and the delay was condoned.

4. The respondents have contested the application by filing a reply affidavit wherein they have not disputed the averments made in the application. They have admitted that the applicant had suffered mentally because of the tragic death of his elder brother as also his wife in quick succession. It is their case that the unit was very sympathetic towards his family tragedy and rendered all help to overcome the situation. It is also admitted that the applicant was placed in low medical category in April 1996 temporarily and was placed permanent low medical category in August 1998 by the medical board which recommended his release. However, the applicant had earned six red ink entries on account of offences committed under the Army Act during his service period and, therefore, he was considered by the competent authority to be an undesirable soldier and accordingly he was discharged under Army Rule 13(3)(iii)(v) on disciplinary ground. It is further stated that the case of the applicant was forwarded to the PCDA(P), Allahabad for grant of disability pension as his disablement was partially attributable to and aggravated by military service as held by the appropriate Medical Board. However, the PCDA (P) rejected his case in the year 2001 which was communicated to him through a communication from the PCDA (P) dated 19 Jul 2001 (Para 4 of A/O), but the applicant suppressed that fact and filed the writ petition before the Hon'ble Orissa High Court. However, the PCDA (P), due to inadvertence had overlooked that the case was already dealt with in 2001 and again rejected his case, which was intimated by a communication dated 16.07.2007 on the ground that the applicant was not entitled to such disability pension as he was discharged on disciplinary ground being an undesirable soldier. It is further stated by the respondents that the applicant did not serve for full 15 years and he actually served for 14 years 7 months 1 day but out of the said period 357 days were treated as non-qualifying service

(period of absence without leave and period in military custody) and therefore, the applicant has rendered qualifying service for 13 years 7 months 9 days and, thus, he was also not entitled to get service pension having not completed 15 years of service. Accordingly, the respondents have prayed for rejection of the original application being devoid of any merit.

5. The applicant has filed a rejoinder reiterating the averments made in the OA.

6. We have heard Mr. Bisikesan Pradhan, Id. counsel for the applicant as well as Mr. Tapas Kumar Hazra, Id. counsel for the respondents. Mr. Pradhan has also submitted a written note of arguments annexing certain judgements in support of his case. We have also gone through the original records containing the medical board proceeding as also the documents relating to award of red ink entries, as produced by the respondents.

7. It appears that the applicant has claimed mainly two reliefs – First, disability pension on the ground that he was placed in low medical category and his disability was found to be aggravated due to the military service and such disability was assessed as 20%, despite the fact that he was discharged by way of an administrative action under rule 13(3)(iii)(v) of the Army Rules. The applicant contends that according to regulation 173 of the Pension Regulation, he is entitled to disability pension which was wrongly denied to him.

8. The second prayer of the applicant is for grant of service pension as he has rendered service for 14 years and 7 months and he has prayed for condonation of shortfall period of few months to complete 15 years in order to be eligible to get such service pension.

9. However, during the course of hearing Mr. Pradhan has made an alternative prayer relying on a decision of the Kochi Bench of AFT in the case of **N.G.Santosh –vs- UOI**, reported in Mil. LJ 2011 AFT (Kochi) 192, that the applicant for grant of invalidment pension as he was advised to be released by the Medical Board on medical ground and, therefore, his release should be treated as being invalidated out and in that event he was to get invalidation pension and rounding off benefit.

10. So far as claim for disability pension is concerned, it is admitted by the respondents and it is also evident from the original Medical Board Proceedings that the applicant was diagnosed as a case of Neurotic Depression and his disability was assessed as 20% for two years. His such disability was also held to be aggravated due to the stress and strain of military service, therefore, in the normal course, the applicant is entitled to disability pension for which necessary recommendation was also made to the PCDA (P). It appears that the PCDA (P) rejected his case on the ground that he was discharged by way of administrative action being an undesirable soldier and therefore, he is not entitled to such pension.

11. Mr. Pradhan has drawn our attention to two decisions of the Chandigarh Bench of AFT, in T.A. 196/2009 (**Kulwinder Singh Vs. Union of India**) decided on 19.05.2001(unreported) as also the case of **Baljeet Singh Vs. Union of India** in O.A.739/2010 decided on 27.01.2001 (unreported) . In those cases, under more or less identical facts and circumstances, it was held that even if a soldier is discharged by way of administrative action under rule 13(3)(iii)(v) of the Army Rules being an undesirable soldier, his entitlement to disability pension is not extinguished and he is still entitled to get disability pension provided his disability is attributable to or aggravated by the military service and such disability is not less than 20% as per regulation 173 of Pension Regulations.

12. Although it is the case of the respondents that PCDA (P) has rejected the claim of disability pension of the applicant on the ground that the applicant was discharged under Army Rule 13 (3) (iii) (v), being an undesirable soldier for accumulating six red ink entries, we do not find any rule or regulation that has been brought on record by which such a decision can be taken by the PCDA (P). Under the Pension Regulation, pension can be withheld either wholly or in part only by the President or by the Central Government. PCDA (P) cannot assume the jurisdiction and authority of the President or the Central Government to deprive a soldier of his due disability pension. It is well settled legal position that pension is a valuable right which

cannot be withheld or denied at the sweet will of the PCDA (P), that too without issuing any show cause or without the sanction of the rules or regulations on the subject. The decisions of the Chandigarh of AFT (supra) also support this view and we agree with the same.

13. In view of the above, we hold that the applicant is entitled to disability pension on his discharge from service on medical ground and the rejection orders from PCDA (P) dated 19.07.2001 and 16.07.2007 (Annex A-5) in that regard are liable to be quashed. However, as recommended by the Medical Board such disability pension at 20% disability is to be paid for two years and thereafter, the applicant is required to be brought before a review medical board and based on its decision, further continuance of payment of such disability pension will be considered.

14. At this stage we may consider the other prayer of the applicant, as emphasized by Pradhan relying on Kochi Bench of AFT referred to above. We are, however, not inclined to accept the view of Mr. Pradhan because in this case the disability of the applicant is only for two years and not for life, as opined by the Medical Board which was not the case before Kochi Bench. Moreover, the applicant was admittedly not discharged because of him being in low medical category, but was actually discharged being an undesirable soldier after accumulating six red ink entries on disciplinary grounds. Such discharge was carried out as an administrative action under Army Rule 13 (3) (iii) (v). Therefore the contention made out by Mr Pradhan that the applicant should have been considered to have been invalidated out of service for the disability as specified, does not hold any logical ground. We also observe that the applicant's final medical category in the RMB was 'BEE', which is not that low a category for which a soldier needs to be boarded out.

15. Now, coming to the question of service pension, as claimed by the applicant by condoning the shortfall period of a few months so that he could complete 15 years of service, which is the eligibility to be entitled to such pension, we find that the applicant has claimed that

he has rendered 14 year and 7 months of service whereas the respondents have disputed this claim and stated that he had rendered actually 13 years 7 months and 9 days of service, as 357 days of non-qualifying service was to be deducted from 14 years and 7 months service because of absence without leave and punishment awarded to him. Therefore his total qualifying service pension would actually work out to 13 years 7 months and 9 days (Para 9 of A/O). The shortfall thus works out to one year and five months for him to be eligible for pension.

16. It is the admitted position that the sole ground on which the applicant was discharged under rule 13(3)(iii)(v) of the Army Rules is that he had earned six red ink entries during his service tenure. On perusal of the tabular statement indicating the occasions on which such red ink entries were awarded, as given in the reply of the respondents, it will be seen that the applicant had committed the alleged offences like overstaying of leave or using abusive language to fellow soldiers during the period from 2nd July, 1990 to 27th March, 1991 i.e. immediately after his elder brother was killed in helicopter accident on 24th April 1990 and thereafter during 1997 and April 1998 after his wife was murdered in December 1995 (not in 1994 as stated in the petition) and the onset of his mental disease had started in April 1996. The condition of the mind at that point of time is quite understandable and in that state of mind, he might have committed such offences, which should be viewed with due sympathy and compassion.

17. In this context, the respondents have stated that under Army instruction dated 28.12.1988 (Annexure-R8) the procedures for removal of undesirable and inefficient officials have been followed by them and show-cause notice was also issued to the applicant and after considering the reply to the show-cause the decision was taken by the competent authority.

18. We have gone through these instructions and we find that in Note-2 of Para.-5 of these instructions it is clearly stated that discharge from service consequent to four red ink entries is not a mandatory or legal requirement. It is also provided that due consideration should be given

to the long service and no harsh action should be taken in respect of individuals when they are about to complete the pensionable service.

19. In the instant case, the applicant rendered 14 years 7 months of service and the disability with which he was suffering, had its onset in April 1996, as admitted by the respondents as at that point of time medical board diagnosed him to be suffering from mental imbalance. Even though he was retained in service thereafter, there was no explanation from the side of the respondents as to why the applicant could not have been retained for a few months or a year more so as to enable him to complete 15 years of service to be eligible to get service pension.

20. In this connection, we may refer to a decision of the Hon'ble Delhi High Court reported in **140 (2007) Delhi Law Times 26 (DB)** in the case of **Sube Singh (Ex Sepoy) -vs- UOI & Ors**). In that case also, the petitioner was discharged after serving for more than 12 years and he was also discharged under Army Rule 13(3)(iii)(v). The Hon'ble High Court considered the Circular dated 18.12.1988 and observed that –

“9. In the case of discharge proposed on the basis of red ink entries the competent authority has also to bear in mind that such discharge does not become mandatory merely because of such entries having been made. Nature of the offences for which such entries have been awarded has also to be considered by the competent authority. More importantly, the authority has to keep in mind that in the case of individuals who are about to complete their pensionable service, there is no injustice or harshness caused because of discharge. It is obvious that injustice would be more in cases where the person being discharged was about to complete pensionable service than those who have yet to put in the requisite number of years. All told, the competent authority has an onerous duty to perform while deciding whether or not to discharge an individual from service. The least that he must, therefore, do is to ensure that he applies his mind to each one of the factors that are made relevant by the circular and which even independent of the circular appear to be relevant to a proper exercise of power vested under Section 22 rule 13 of the Army Act and the Rules.”

The Hon'ble High Court went on to observe as under –

“10.Simply sanctioning the discharge would not, therefore, meet the requirements of law. We are conscious of the fact that in matters relating to Armed forces, courts adopt a liberal approach in accepting as valid orders even when they are not reasoned. Some amount of latitude is in the very nature of military customs,

disciplines and hierarchy due to the armed forces. That latitude cannot however extend to upholding an order which does not on the face of it show due and proper application of mind by the authority passing the same. If the Army Headquarter has itself issued instructions setting out the procedure which the decision making process must go through, we see no reason why the authority should ignore the said instructions and pass orders that are non-speaking and cryptic. Keeping in view the nature of the order, the implications the same has for the individual and the need for fairplay and justice even in matters relating to service in Armed forces, we have no hesitation in holding that an order passed without application of mind would fall short of the legal standards.”

In Para.11 of the judgement, the Hon’ble High Court considered as to what relief should be granted in that case to the petitioner and held as under –

“11.We are of the view that the minimum which the petitioner must be held entitled to, is the service pension and other benefits due upon completion of the 15 years of service in the Indian Army. This can be achieved by directing that instead of the petitioner’s discharge taking effect on the date mentioned in the impugned order, the same shall take effect on the date he would have completed 15 years of pensionable service. Consequently, the petitioner’s discharge pursuant to the impugned order of discharge shall be deemed to have taken effect from 21st October, 2002. The extended period of service will not however entitle the petitioner to any arrears of salary, but for purposes of all retrial/pensionary benefits, the petitioner shall be deemed to have completed his pensionable service as on the date of his discharge. The respondents shall in consequence of the above, process the petitioner’s case for payment of pension and ensure that the same is released to the petitioner expeditiously but not later than six months from the date of the pronouncement of this order.”

21. In view of the above discussion and legal position, we are of the considered opinion that this is also a fit case where the service of the applicant should be extended notionally for another one year and five months, by when he completes 15 years of qualifying service in order to be eligible to get service pension. However, for this extended period he will not get pay and allowances and such notional extension is only for the purpose of pensionary benefits.

22. In the result, we allow the application in part to the following extent :-

1) The rejection orders issued by the respondents dt. 19.7.2001 and 16.7.2007 rejecting the claim of disability pension of the applicant be hereby set aside.

2) The respondents are directed to release disability pension in favour of the applicant on the basis of the recommendation of the Medical Board from the date he is entitled to such disability pension, which will be payable for two years initially and then continued

till the applicant is brought before a review medical board to consider further continuance of such payment based on the recommendation of the review medical board. Such review medical board shall be convened by the respondents at the earliest convenience of the authorities.

3) The respondents are further directed to treat the deemed date of discharge of the applicant as 31 March 2000 instead of 31 Oct 1998, only for the purpose of qualifying service for service pension, which, as per rules, be granted to him from that date including other pensionary benefits like gratuity etc. as due. However, he will not be eligible to get any pay and allowances during this notional extension of his service. The discharge order of the applicant stands modified to the above extent.

4) The respondents are to implement the above directions within 90 days from the date of communication of this order.

5) No cost.

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

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

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

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