ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: T.A. 66 OF 2010

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

No. 14559012-L Hav (REC/MECH)
Hrushikesh Sutar Aged 39 years
Occ : Army service R/O Trimulghery
Secunderabd (AP) 500 015
Presently R/o Vill/PO taradipal, PS Pattamundai,
Dist. Kendrapada, Orissa

..... Applicant

- Versus –

1. Union of India
   Service through the Secretary,
   Ministry of Defence,
   New Delhi-110 011

2. The Officer-in-Charge,
   EME Records. Secunderabad (AP)

3. The Commanding Officer,
   EME Depot Battalion. Secunderabad (AP)

.....Respondents

For the applicant : Mr. Sambhu Chandra Nath Sharma, Advocate

For the respondents : Mr. Sudipto Panda, Advocate

Date of Order on : 7.6.13

O R D E R

This writ petition being No.WP 5303 of 2003 was originally filed before the Hon'ble Andhra Pradesh High Court at Hyderabad, which subsequently has stood transferred to this Bench

by operation of Section 34 of the Armed Forces Tribunal Act, 2007 for disposal. Accordingly, it has been re-numbered as T.A. No.66/2010.

2. Mr. Sambhu Chandra Nath Sharma, ld. counsel appears for the applicant and Mr. Sudipto Panda, ld. counsel appears for the respondents. The T.A. is taken up for hearing.

3. The case of the applicant, in brief, is that he was enrolled in the Army on 30.09.1983 and in course of his service was promoted to the rank of Havildar in the trade of Recovery Mechanic on 04.12.1992. At the relevant point of time in the year 2001, while the applicant was posted in the L & W (Light Repairing Workshop, EME) of 287 Medium Range (Artillery) in the operational area at J.K, he met with an accident; as a result of which his index finger was amputed on 03.08.2002. He was hospitalized and was released thereafter. Due to such amputation he was placed in medical category BEE permanent. A court of inquiry was held and the disability of the applicant was declared to be attributable to military service.

4. It is the case of the applicant that in February 2003 he came to know that he would be discharged from service for being in low medical category. However, it appears that the applicant received a discharge notice on 10.08.2002 which was ordered to be effective from 31.3.2003. At that point of time, he moved the Hon'ble Andhra Pradesh High Court by filing the instant writ petition challenging the discharge notice dt. 10.08.2002 on the ground that as per terms and conditions of his service, he was entitled to serve till 24 years and in that event his due date of retirement would be 30.09.2007, but the respondents have sought to discharge him prematurely.

5. During the pendency of the writ petition the applicant was eventually discharged from service with effect from 31.03.2003.

6. After transfer of the writ petition to this Tribunal, the applicant sought for and was granted leave to amend the prayer portion and accordingly, he has amended the prayer wherein he has,

apart from challenging the discharge notice dated 10.08.2002, has also prayed for his reinstatement in service with all consequential benefits including arrears of salary till 30.09.2007 when he would complete his statutory service period of 24 years.

7. The respondents have contested this application by filing an affidavit-in-opposition to which an affidavit-in-reply has also filed by the applicant.

8. The respondents have stated that the applicant was placed in Low Medical Category (LMC) A3 (temporary) with effect from 29.09.2001 for "TRAUMATIC AMPUTATION (RT) INDEX FINGER THROUGH DIP JOINT (OPTD)". Later, the petitioner was placed on permanent low medical category with effect from 15.03.2002. It is further submitted that employment of LMC personnel at all times is subject to availability of suitable alternative appointment as per their medical category. However, in the case of the applicant, the Commanding Officer, 287 Medium Regiment did not recommend him for further retention as he was not found fit for field/ operational area duty where the unit was then deployed and no sheltered appointment was available with the unit. Moreover, the applicant was an undesirable NCO for medical as well as discipline reasons. Accordingly, the applicant was discharged from service. It is also submitted that the applicant was sent to EME Depot, Secunderbad on 03.03.2003 for discharge drill. It is submitted by the respondents that in terms of Army order no.46/80 read with Army headquarter policy letter dated 15.03.2000 as also EME ROI 7/87, the applicant was discharged wef 31st March 2003.

9. We have heard ld. advocates for both sides in detail and have perused the documents placed on record. We have also gone through the original medical board proceedings and record of court of inquiry as produced by the respondents.

10. Ld. counsel for the applicant has challenged the discharge order mainly on the ground that the applicant was placed in permanent low medical category but was not given any sheltered appointment. By referring to rule 13(3)(III(ii) of Army Rules, he has submitted that in such a situation the applicant ought to have been placed before an Invalidment Medical Board but the respondents have placed the applicant before a Release Medical Board and as such, the discharge of the applicant was illegal and against the rules and on that ground the same should be set aside and the applicant should be reinstated and be allowed to serve till his statutory service period of 24 years ie. 30th September, 2007. He has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Union of India & Ors. vs. Rajpal Singh, 2009 (1)SCC 216** as also on an unreported decision of the Hon'ble Delhi High Court in a group case of **Subedar (SKT) Puttan Lal vs. Union of India & Ors. (WP© 5946/2007** etc. etc.) decided on 20.11.2008.

11. Ld. counsel for the respondents, on the other hand, by referring to Army order No.46/80 has submitted that sheltered appointment is always subject to availability of suitable post. In the present case, the commanding officer could not provide any sheltered appointment, since the unit was in field area. He recommended for his release thought the applicant was willing to serve in any sheltered appointment. The EME Records could not provide any sheltered appointment and concurred with the CO's recommendations. In the case of the applicant the RMB did not recommended him for release. Therefore, efforts were made to provide him with suitable alternative appointment but the concerned Commanding Officer did not accept him to be retained in field area and, therefore, he was discharged. He has submitted that the decision in **Rajpal's case** is not applicable as the factual position is different.

12. In this case, the facts are not in much dispute. It is admitted that the applicant while in service met with an accident for which his index finger was amputed and he was placed in low

medical category by the medical board dt. 15.3.2002. He was issued with a show case notice dated 21.5.2002 (annexure-R4 to the A/O) which reads as follows :-

> " **SHOW CAUSE NOTICE FOR DISCHARGE FROM SERVICE FOR PERMANENT LOPW MEDICAL CATEGORY.**
>
> 1. It is intimated that you have been downgraded to permanent low medical category $S_1H_1A^{2(U)}P_1E_1$ wef 15th March. Diagnosis : TRAUMATIC AMPUTATION (RT) INDEX FINGER (OPTD).
> 2. You are therefore directed to intimate the reasons why action should not be initiated against you for your discharge from service as peer EME ROI 7/87
> 3. Your reply should reach to the undersigned by 23 May 2002."

13. Although only two days were given to the applicant to reply to the said show cause notice dated 21.5.2002, a point that he has agitated in the TA, he replied to the said notice on 23.5.2002. Admittedly the applicant gave a reply indicating his willingness to continue in service. However, the impugned discharge order was issued on10th Aug 2002. Para 2 of the discharge order reads as follows :-

> " 2. Approval of OIC EME Records is hereby accorded for disch from service in respect of other Ranks of your units listed in Appx A to this letter wef 31 Mar 2003 (AN) being placed in permt low med cat lower than SHAPE-1. Their cause of discharge and Army Rule under which discharges will be carried out are shown against each in the appx. Please dispatch them to report to EME DEPOT BN on 03 Mar 2003 for disch drill. They will be SOS from the Corps wef 31 Mar 2003(AN) ...."

14. It appears from the enclosure to this order that the applicant was discharged after he has rendered about 18 years of service under item **2(A)** of table annexed to AR 13(3) inserted by SRO 126/64.

Rule **(2A) of Army Rule 13** is quoted below :-

> "13.(2A) - Where the Central Government or the Chief of the Army Staff decides that any person or class or persons subject to the Act should be discharged from service, either unconditionally or on the fulfillment of certain specified conditions, then, notwithstanding anything contained in this rule, the Commanding officer shall also be the competent authority to discharge from service such person or any person belonging to such class in accordance with the said decision."

15. The ld. counsel for the applicant has assailed the impugned discharge order mainly on the ground that the applicant having been placed in permanent low medical category and having not been given any sheltered appointment despite his willingness to continue, should have been placed before a Invalidating Medical Board (IMB) before discharge, whereas he was placed before a Release Medical Board (RMB), which is against the statutory rules because Army Rule 13(3)III(iii) clearly provides that when an individual (Other Rank) is discharged on medical ground, he shall be placed before an IMB. The ld. counsel, by placing reliance on the decision of the Hon'ble Supreme Court in the case of **Union of India & Ors –vs- Rajpal Singh** (supra), has contended that the impugned discharge order is bad being contrary to rules and, therefore, cannot be sustained in law and should be quashed.

16. The relevant portion of rule 13(3)(III)(iii) of Army Rules is reproduced below for the sake of convenience :-

> "13. Authorities empowered to authorize discharge – (1) Each of the authorities specified in Column 3 of the Table below shall be competent authority to discharge from service persons subject to the Act specified in Column 1 thereof on the grounds specified in Column 2.
>
> (2)Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority superior to it.
>
> (2-A) ..... (already quoted above)
>
> (3) In this Table, 'Commanding Officer' means the officer commanding the corps or department to which the person to be discharged belongs except that in case of Junior Commissioned Officers and Warrant Officers of the Special Medical Section of the Army Medical Corps, the 'Commanding Officer' means the Director of the Medical Service Army, and in the case of Junior Commissioned Officers and Warrant Officer of Remounts, Veterinary and Farms Corps, the 'Commanding Officer' means the director, Redounds, Veterinary and Farms.

TABLE

Category	Ground of discharge	Competent Authority to authorize discharge	Manner of discharge
***	I. ***	***	***
	II		
Persons enrolled Under the Act who Have been attested.	III, (i)		
	(ii)		
	(iii) Having been found medically unfit for further service	Commanding Officer	To be carried out only on the recommendation of an invalidating Board

17. Another ground for assailing the impugned discharge order is that although it was clearly advised in the said order at para 7 that a show cause notice was to be issued under Army Rule 13(3) item 2(A) before such discharge is carried out, but no such notice was issued to the applicant. It will be appropriate to quote para 7 of the discharge order which is as follows :-

> **"7. The issue of "Show Cause Notice" would be necessary in respect of the indl whom discharge is carried out under Army Rule4 13(3) item 2(A) as inserted by SRO 126/64 and clause 2A of Army Rule 1954 irrespective of case of disability. In case of the pers mentioned at Appx A who have not been issued "Show Cause Notice' will now be issued with the same and "Show Cause Notice' with its reply from the indl will be dispatched while submitted the docu to EME Depot Bn."**

18. It is the specific allegation of the applicant in the writ petition, which was emphasized by the ld. counsel for the applicant during the course of hearing that no such show cause notice was issued and therefore, the discharge order was in violation of the principle of natural justice.

19. Ld. counsel for the respondents, on the other hand, has referred to the show cause notice at annexure-R4 (which is quoted above) and submitted that show cause notice was indeed issued and the applicant also gave his reply. We are, however, not inclined accept the contention of the respondents. The show cause notice at annexure-R4 is dated 21st May 2002 whereas the discharge

order is dated 10th Aug 2002. There was no mention of application of Army Rule 13(2-A) in that notice. In the discharge order advice was given to the unit of the concerned individual, who was to be discharged, to issue such show cause notice before actual discharge being effected from 31st March 2003. Obviously, this has not been done. At least no such document has been placed before us either by the applicant or by the respondents. In that view of the matter, we tend to accept the contention of the applicant that he was not issued with such show cause notice despite clear direction in the discharge order itself and hence, the same was in violation of the principle of natural justice and, therefore, not sustainable in law.

20. Now, coming to the main contention of the ld. counsel for the applicant that as held by the Apex Court in **Rajpal Singh case**, the applicant ought to have been placed before an IMB and not RMB because he was discharged for being placed in low medical category. We have carefully gone through the decision of the Hon'ble Supreme Court in **Rajpal Singh** case (supra) and we agree with the contention of the applicant in this regard for the following reasons.

21. In **Rajpal Singh case(supra)**, the facts were identical. There, Rajpal Singh, a JCO was declared in low medical category and was discharged from service on the recommendation of RMB and not of IMB as required under clause I(ii) of Rule 13(3). (Incidentally it is mentioned that identical provision is there in clause III(iii) of Rule 13(3) (quoted above) in respect of other rank official like the applicant. Challenging the said discharge, Rajpal Singh moved before the Hon'ble Delhi High Court contending that he should have been placed before an IMB. The stand of the respondents was that retention of low medical category personnel is always subject to the availability of suitable sheltered appointment and since no suitable sheltered appointed was available in field area, the applicant (Rajpal) had to be discharged from service under Army Rule 13(3)(I)(iii)© read with Rule 13(2A) and Army Order 46/1980. The Hon'ble High Court held that

such discharge was illegal being de hors the rules and quashed the discharge order with direction for reinstatement of the petitioner. Against this order of the Hon'ble Delhi High Court, the Union of India respondents went before the Hon'ble Supreme court in appeal.

22. The Hon'ble Apex Court after analyzing Rule 13, (2A) of Army Rules as also Army Order 46/80 and other Govt. orders relied on by the UOI appellants, observed in para 27 as follows :-

> " 27. In view of the foregoing interpretation of the relevant rule, we are in agreement with the High Court that where a JCO is sought to be discharged on the ground of medical unfitness for further service, his case has to be dealt with strictly in accordance with the procedure contemplated in clause I(ii) in column 2 of the Table appended to Rule 13. **The rule prescribes a particular procedure for discharge of a JCO on account of medical unfitness, which must be followed and, therefore, any order of discharged passed without subjecting him to the Invalidating Board would fall foul of the said statutory rule.**

The Hon'ble Apex Court further held in paras 30 and 31 of the said judgement as under :-

> "30. A plain reading of the Army Order shows that it comes into operation after an opinion has been formed as to whether a particular personnel is to be retained in service or not, is so for what period. If a person is to be retained in service despite his low medical category for a particular period as stipulated in Army Order 46 of 1980, the question of subjecting him to the Invalidating Board may not arise. However, **if a person is to be discharged on the ground of medical unfitness, at that stage of his tenure of service or extended service within the meaning of the Army Order, he has to be discharged as per the procedure laid down in Clause I(ii) in Column 2 of the said Table.**
>
> 31. Similarly, sub-rule (2-A) of Rule 13, heavily relied upon by the appellants does not carry the case of the appellants any further. **It is only an enabling provision** to authorize the Commanding Officer to discharge from service a person or a class of persons in respect whereof a decision has been taken by the Central Government or the Chief of the Army Staff to discharge him from service either unconditionally or on the fulfillment of certain specified conditions. **The said provision is not in any way in conflict with the scope of the remaining part of Rule 13, so as to give it an overriding effect, being a non obstante provision.**"

23. Ld. counsel for the respondents tried to make out a distinction by contending that in **Rajpal Singh's** case, he was recommended for discharge for medical unfitness by the RMB whereas in the instant case, there was no such recommendation by the RMB. In fact, the respondents tried to provide a sheltered appointment to the applicant but his commanding officer did not recommend

him for further retention being LMC and he was also not fit in field or operational area. Therefore, the applicant had to be discharged.

24. We are unable to agree with this view of the respondents. Whether the applicant was recommended by RMB for discharge being unfit for further service is quite immaterial. Factually, the applicant was sought to be discharged on medical ground alone as per the show cause notice and the discharge order itself also states so. Therefore, the fact remains that the because of his low medical category he was discharged since he could not be retained in any sheltered appointment. In such a situation, he ought to have been placed before an IMB before actual discharge, which was admittedly not done whereas he has been discharged by operation of Rule 13(2-A). As observed by the Hon'ble Apex Court in para 30 ibid, when a person is to be discharged on the ground of medical unfitness, the procedure laid down in statutory Rule 13 must be followed and any order of discharge passed without subjecting him to IMB would fall foul of the statutory rules. In our considered view, it is irrelevant whether the individual was recommended by the RMB for discharge or being retained on medical ground or not. When the individual is actually discharged after he was placed in low medical category and he could not be provided any alternative or sheltered appointment, the result becomes the same i.e. he stands discharged in any event either on the recommendation of the RMB or not. In that case, IMB is a must and any order of discharge passed otherwise is not sustainable.

25. As already indicated above, the applicant was discharged by operation of rule 13 (2-A) which was quoted above. The Hon'ble Apex Court in interpreting this provision of the Army Rules has categorically held that it is only an enabling provision to authorize the commanding officer to discharge a person or class of persons in respect whereof a decision has been taken by the Central Govt. or the Chief of Army Staff either unconditionally or on the fulfillment of certain specified

condition. However, because of *non obstant* provision in the rule, it has no overriding effect or is not, in anyway, in conflict with the scope of remaining part of Rule 13 of Army Rules. In other words, the cases which are not covered under the remaining part of Rule 13, can be dealt with by operation of the provision of Rule 13 (2-A). By applying this provision in the case of the applicant notwithstanding existence of clear provision in the Rule 13(3)(III)((iii), in our considered opinion, the respondents have manifestly misused the power vested in them, which cannot be supported by us.

26. It has been held by the Hon'ble Supreme Court in the case of **Ramchandra Keshav Adke –vs- Govind Joti Chavare and others**, AIR 1975 SC 915 : (1975) 1 SCC 559 that "*where a 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 other methods of performance are necessarily forbidden.... This rule squarely applies 'where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner*". This decision of the Apex Court was based on the decisions in **Taylor –vs- Taylor,** (1876) 1 Ch.D. 426, **Nazir Ahmed –vs- Emperior**, LR 63 IA 372: AIR 1936 PC 253, **Shiv Bahadur Singh –vs- State of UP**, AIR 1954 SC 322 and **Deep Chand –vs- State of Rajasthan** AIR 1961 SC 1527.

27. For the reasons stated above, we hold that the discharge of the applicant by the impugned order dt. 10.8.2002 is wholly bad and illegal and is not sustainable in law and the same is liable to be quashed and is hereby quashed.

28. Having so done, the question now arises as to what relief the applicant is entitled to at this stage. The applicant in his amended prayer has prayed that he be allowed to continue in service till 30.9.2007 when he would have completed 24 years of service as per his term of enrolment had he

not been prematurely discharge w.e.f. 31.3.2003 and be paid full salary during the period. Admittedly, the applicant is now in receipt of service pension and also disability pension for disability percentage to the extent 40% after his discharge w.e.f. 1.4.2003. We, however, notice that as per term of enrolment of a Havildar, which post the applicant was holding, the statutory term of enrolment is 22 years of service extendable by another 2 years i.e. total 24 years. However, extension of two years is subject to scrutiny by a board and dependent on various conditions like acceptable medical criteria, ACR profile as also disciplinary background. We find from the affidavit-in-opposition filed by the respondents that the applicant's disciplinary record was also in question. That besides, he was suffering from two disabilities, viz. amputation of index finger and also spondylitis. Therefore, it is quite unlikely that he would have got extension as insisted by the respondents and we tend to agree with this view. However, even if extension for two years was not granted, he would have served till he completed 22 years service. It is the designated service to which as a Havildar he was fully eligible. Therefore, we are of the view that the applicant should be deemed to be continuing in service till he completed 22 years of service on 30.9.2005 notionally and he is entitled to get full salary for the period i.e. from the date of his premature discharge i.e. 31.3.2003 till 30.9.2005. However, since he has received pension during the period, such salary should be paid subject to adjustment of the pension/disability amount which he has received during the period, without asking him to refund the same first. The applicant shall be treated to be invalidated out of service w.e.f. 1.10.2005 on medical ground and his pension and other retiral benefits be recalculated as if he has completed 22 years of service without interruption with all due and admissible service and monetary benefits w.e.f. 1.10.2005. Such additional amount of pension and other retiral benefits, if found admissible, shall be paid to him after adjustment of the amount already received by him.

29. In the event of the applicant being considered as one who has been invalidated out of service, his disability pension shall be rounded off to the extent as permissible by rules on the subject.

30. For our this view, we lend support from the unreported decision of the Hon'ble Delhi High Court in the group case headed by **Subedar (SKT) Puttan Lal** decided on 20.11.2008 (supra). In that group case, identical matters were considered and decided relying on the decision in **Rajpal Singh's case** (supra). In that decision, a general direction was issued by the Hon'ble High Court in respect of persons who have already retired and are in receipt of pension after premature discharge, which stood set aside as per above judicial pronouncement, in para 7 (iv) and (v) which is 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."

31. In view of the foregoing, the transferred application is allowed in part on contest by issuing the following directions :-

a) The impugned discharge order dt. 10.8.2002 stands quashed.

b) The applicant shall be deemed to be continuing in service without any interruption till he completed 22 years of service i.e. till 30.9.2005.

c) The applicant shall be paid full salary and allowances admissible as per rules during the period from 1.4.2003 till 30.9.2005 after adjustment of the pension and other benefits he has already received during the period without asking him to refund the same at the first instance.

d) The applicant shall be deemed to be invalidated out of service w.e.f. 1.10.2005 on medical ground. His pension and other retiral benefits be recalculated as if he has rendered 22 years of service and be paid to him accordingly after making necessary adjustment of any amount that he has received on such account in the meanwhile.

e) Since the applicant is ordered to be deemed to be invalidated out on medical ground, his disability pension of 40% be rounded off to 50% as per extant Govt. policy on the subject.

f) Respondent No. 1 is directed to issue necessary instructions upon the PCDA(P), Allahabad and other authorities to comply with this order accordingly.

g) This order be implemented within 90 days from the date of receipt of a copy of this order failing which the arrear of pay and allowance and other dues payable after necessary adjustment, will carry interest at the rate of 12% per annum to be payable after the expiry of 90 days till the date of actual payment.

h) Parties are left to bear their own costs.

i) The Registry is directed to return the original records to the respondents on proper receipt.

j) Let a plain copy of this order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due procedure.

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

(JUSTICE RAGHUNATH RAY)
JUDICIAL MEMBER