FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : T. A NO. 22 OF 2011 {WP (C) No. 2593 of 2006)}

THIS 1st DAY OF AUGUST, 2014

CORAM: HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Anil Kumar Mishra, Ex Sepoy
Aged about 26 years,
S/o Basanta Kumar Mishra
C/o Sunil Kumar Mishra,
R/o Mardamekha, PO-PS Jorum
Via Narasinghpur, Dist. Cuttack

-VS-

1. Addl. Directorate General (Personnel Services),
   Adjutant General Branch, (PS-4(d), Army Headquarters,
   New Delhi-110 011

2. CO, Mahar Regiment, Abhilekh Karyalaya,
   Records, The Mahar Regiment, Sougor (MP)
   Madhya Pradesh

3. 11 Mahar, C/O 56 APO

4. Military Hospital, Ahmedabad
   Ahmedabad, State Gujarat

5. Union of India through
   The Secretary, M/o Defence
   South Block, New Delhi-110 011.

6. The Chief of Army staff, Integrated HQ of
   Ministry of Defence (Army)
   South Block, New Delhi-110 011

7. Principal Controller of Defence Accounts,
   (Pension), Drapaudi Ghat, Allahabad, UP

…. …. Respondents.

For the Applicant : Mr. S.K.Choudhury, Advocate

For the respondents : Mr S.K.Bhattacharyya, Advocate

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O R D E R

PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

This matter was initially filed before the Hon'ble Orissa High Court as Writ Petition No.WP (C) 2593 of 2006 by the applicant being aggrieved by his discharge on medical ground from Army Service and also against denial of grant of disability pension. The said Writ Petition was subsequently transferred to this Bench under operation of Section 34 of the AFT Act 2007 and accordingly it has been renumbered as TA 22 of 2011.

2. Briefly stated the facts of the case are the applicant was enrolled in the Indian Army in MAHAR Regiment on 8-7-2000. After completion of training for a period of one year at MAHAR Regimental Centre, Saugar (MP) he was posted in the 11, Mahar with effect from 19-8-2001. According to the applicant, during his short span of service he was harassed by his superior authorities and physical punishment was also inflicted on him. At that time, one day due to severe physical punishment and hunger, he became senseless for a few moments and was admitted to Military Hospital. After treatment he was discharged and declared fit and accordingly he re-joined his unit. It is also submitted by the applicant that while discharging his duties, he got injured in his ears and was admitted to Military Hospital, Ahmedabad. However, after treatment he was declared fit and he resumed his duties. All of a sudden, the applicant was sent to INHS Ashwini (Naval Hospital in Bombay) without intimating any reason. In that Hospital, EEG test was done. However, the applicant submits that the report which was furnished is that of another person, viz. A.K. Sharma, whereas he

is A.K. Mishra. According to doctor, the applicant was suffering from *Generalised Tonic Clonic Seizure*.

3. The applicant was thereafter brought before the Invalidating Medical Board in December 2001 and on the basis of the medical report, he was recommended to be invalidated out of service. It was mentioned therein that the ibid disease had its onset on 15-9-2001. Subsequently the applicant was discharged on 9-2-2002. The applicant came back to his home and got himself treated by a Neuro Surgeon at Cuttack. According to this report the applicant was fully fit.

4 The applicant made an application to the authorities for holding a fresh IMB but in spite of various correspondences nothing had happened (vide Annexure-4 series). The applicant also prayed for grant of disability pension which was rejected by PCDA (P), Allahabad. The applicant preferred an appeal, but nothing was forthcoming and therefore he filed this application before the Hon'ble High Court praying for quashing of the order of his discharge as also the rejection order (Annexure A6) by which his claim for disability pension was rejected vide Order dated 26-10-2002. He has prayed for holding a fresh Invalidation Medical Board and also for his reinstatement in service with all consequential benefits.

5. The respondents have filed a counter affidavit contesting the application. It is stated that the applicant was enrolled on 8-7-2000 and was invalided out of service on medical ground under Army Rule 13(3)(III)(iii) with effect from 9-2-2002 after completion of one year seven months and two days of service for the disease *Generalised Tonic Clonic Seizure*. The Invaliding Medical Board held at Military Hospital, Ahmedabad opined that disability of the applicant was neither attributable to nor aggravated by military service, although the

percentage of disability was assessed at 20%. Accordingly, in terms of Reg. 173 of Pension Regulations, the applicant was not entitled to disability pension. However, his case was forwarded to PCDA (P) on 26-10-2002 which was rejected by order dated 12-5-2003. This was intimated to the applicant in June 2003 with the advice that he could prefer an appeal against the rejection order. The applicant preferred an appeal on 1-9-2003 but the same was also rejected. After the writ petition was filed, the applicant by filing a Supplementary Application also challenged the rejection order dated 24-4-2006 (Annexure 9).

6. The respondents have further stated in Para 11 that the name of A.K. Sharma was wrongly written in the AFMSF 16 in the EEG report. It is further stated that since the applicant was invalidated out by a Medical Board duly constituted, there is no provision for any further Medical examination, as claimed by the applicant.

7. In Para 15 of the counter affidavit, the respondents have stated that the applicant was placed in Low Medical Category with effect from 6-8-2001 for principal disability of SEVERE MIXED HEARING LOSS (LT) EAR, and he was due for review on 6-2-2002 i.e. after six months. Accordingly Military Hospital, Saugar was asked to return the medical documents for holding IMB for the ibid disability of *severe mixed hearing loss (LT) Ear*. It was further stated that since the applicant was already invalidated out by duly constituted Medical Board there was no need for holding any further Invaliding Medial Board for the disability of *severe mixed hearing loss (LT) ear*.

8. In sum, it is the case of the respondents that the applicant has rendered only 1 year and few months of service and was invalidated out for the disability of *generalised Tonic Clonic Seizure* through a duly constituted Invaliding Medical Board. It is however admitted that the applicant had another disability of *severe mixed hearing loss (LT) ear* for which he

was placed in low medical category for a temporary period of 24 weeks with effect from 6-8-2001 and further Board was scheduled to be held on 6-2-2002; but in the mean time the invalidation Medical Board for the applicant was already held for the first mentioned disability, it was decided by the authorities for some unexplained reasons not to hold any further IMB for the second disability of hearing loss for which he continued to remain in a temporary low medical category. It is further stated that the ibid first disability of the applicant was held to be neither attributable to nor aggravated by military service and was considered to be constitutional and idiopathic nature. Therefore, the applicant was not entitled to any disability pension.

9. We have heard the learned counsel for both the parties at length and perused the documents placed on record. The original medical invaliding board proceedings were submitted by the respondents for our perusal. The ld counsel for the applicant has also inspected these documents with permission of the court.

10. Mr. S.K. Choudhury, learned adv. appearing for the applicant has submitted that the applicant suffered an injury in his left ear in August, 2001 due to slapping by his Platoon Havildar, Nk Nain Singh for which the applicant was hospitalised and it was opined by the attending doctor that he suffered the disability of *severe mixed hearing loss (LT) ear*. Accordingly, he was placed in Medical Category H2 temporarily for 24 weeks. Subsequently, he was sent for medical invalidation by an IMB which diagnosed him as a case of *Generalised Tonic Clonic Seizure* (P5) and the percentage of disability was assessed at 20% for five years. Mr. Choudhury has contended that at the time of entry in the Army Service the applicant was medically examined and there was no indication of any such diseases i.e. either *Generalised Tonic Clonic Seizure* or *severe mixed hearing loss (LT) ear*. He served only

for one year and few months and during this short period the above disabilities had developed. That apart, disability of hearing loss was due to slapping by his superior for which an injury report was prepared but no Court of Inquiry was held. He submits that the IMB failed to consider all these aspects and give its opinion in a very cryptic and casual manner holding that the disability was neither attributable to nor aggravated by military service and the same is constitutional and idiopathic in nature. Under such circumstances, no reliance can be placed on such opinion of the IMB.

11. Mr. Choudhury, has referred to the decision of the Hon'ble Supreme Court in the case of **Dharam Singh vs Union of India AIR 2013 SC 2840** and submitted that in view of this decision of the Hon'ble Apex Court, the opinion of the IMB should be ignored so far as attributability or aggravation aspect is concerned and the applicant should be sent for Re-Survey Medical Board and reinstated in the service. He has also prayed for grant of disability pension.

12. Mr. S K. Bhattacharjee, the learned advocate for the respondents has vehemently resisted the contentions of Mr. Choudhury. He repeatedly submitted that since the IMB has held that the disability of the applicant was neither attributable to nor aggravated by military service, this Tribunal need not interfere with such medical opinion which is rendered by experts in the field. While confronted with the fact that the IMB (Invaliding Medical Board) has failed to take notice of the other disability of the applicant, i.e. *severe hearing loss in left ear*; the learned counsel has very vehemently submitted that all documents were placed before the IMB and therefore, it has to be presumed that the ibid opinion has been given by the IMB based on all materials including the fact that the applicant had also suffered from the disability of hearing loss. He has further stated that if

the applicant so desired, he could also have made specific mention of his hearing loss problem before the IMB. His contention is that when duly constituted Medical Board has given its opinion, the Court/Tribunal should not interfere and substitute its own opinion. He has also submitted that the applicant was duly discharged from service being in low medical category through a duly constituted IMB under the rules and his disability having been found to be neither attributable to nor aggravated by military service, he was also not eligible for grant of disability pension in terms of reg. 173 of Pension Regulations for the Army. Therefore there is nothing to be adjudicated in this matter and it should be dismissed.

13. We have given our anxious thoughts to the rival contentions. We have also carefully perused the original medical board proceedings placed before us by the respondents. From the facts as discussed above, it is quite clear that the IMB which was held at MH, Ahmedabad on 5.12.2001, considered only one disability of the applicant that related to *Generalised Tonic Clonic Seizure* and held that it was constitutional in nature. It appears from Para 2 of Part I that the ibid disability first started on 15.9.2001 at Ahmedabad. But on the next page in Part II where statement of case is indicated, it is stated that the ibid disability had its origin on 23 Aug 2001. There is another medical examination report with regard to release or discharge, which was held on 20 Nov 2001 where in part II it has been mentioned that the applicant was also suffering from the disability of *Severe mixed hearing loss (LT) ear* for which he was placed in H2 (T-24) medical category. Obviously, so far as this disability was concerned, he was not made permanent low medical category subsequently since, as per the respondents, he was already invalidated out for another disability of *Generalised Tonic Clonic Seizure* for which he was in P5 medical category. Therefore, as contented by respondents, no further board was necessary.

14. We are at a loss to reconcile the facts. It appears from the original records that the applicant made a report about injury sustained by him on 4 Nov 2000 when he stated that "while I was preparing for my drill test in my coy, I was slapped on my lt. ear by my Pl. Hav Nk Naim Singh and I sustained injury." The injury was *severe mixed hearing loss (LT) ear.* We also find that the Officer Commanding in his report dt. 7 Nov 2001 has observed as follows:-

"

1. No…… Sep Anil Kumar Mishra was undergoing physical training during Mil. Trg.
2. The individual sustained injury of *severe mixed hearing loss (LT) ear* of severe nature.
3. *Apparently the individual is not to be blamed for the injury.*
4. *The injury is attributable to mil service. "*

15. It also appear that a medical board was held for the ibid disability and opinion of Maj K.D.Singh, graded specialist (ENT) dt. 18 Jul 2001 is available in the original record. In a very detailed opinion he has indicated that the onset of symptoms was in Nov 2000 following trauma to LT ear when he was slapped on his Left ear by some instructor while undergoing training at MRC as a recruit. He was placed in H2 temporarily wef 6 Aug 2001. Thus, when he was discharged on medical ground subsequently, he was in this category and not made permanent H2 or otherwise. It is also astonishing to note that the IMB held on 5 Dec 2001 did not take note of this particular disability suffered by the applicant due to an injury caused while on training duty, which was very emphatically opined by the CO to be attributable to military service. The IMB without going through all these recommended his invalidation for another disease i.e. *Generalised Tonic Clonic Seizure* for which he was considered as P5 with 20% disablement for five years. Interestingly, it is to be noted that

onset of this disability occurred on 15.9.2001 i.e. after he was placed in H2 in Aug 2001 caused due to injury. As already indicated in part II of this board proceeding, the date of origin has been mentioned as 23 Aug 2001. There is no explanation for such difference in dates. If the second date i.e. 23 Aug 2001 is taken to be correct, there is also no record that he was ever treated for this disease though in part I it was stated that he was treated at MH Ahmedabad till date i.e. holding of IMB on 5 Dec 2001. No medical document is there in support of this disease and its treatment, as if this disease has developed suddenly without any prior symptoms. From the facts, it is quite apparent that the concerned authorities were eager and interested to get rid of this soldier and for this purpose; he was placed before an IMB which recommended his invalidation out of service for a disease which was held to be constitutional in nature.

16. We have carefully considered the argument of Mr. Bhattacharyya that opinion of the medical board is sacrosanct and final and cannot be interfered with. He has also submitted that the medical opinion given by a graded specialist i.e. a Major cannot be given much value when subsequently the IMB which consisted of specialist on the subject gave a further opinion. We are, however, of the opinion that the graded specialist was an ENT doctor whereas in the IMB no ENT doctor was there and opinion was given by Lt. Col. S.Ruhatgir, classified specialist in Neuro where he stated that only one episode of generalised seizure occurred on 23 Aug 2001 and he was unlikely to become a fit soldier and accordingly recommended for invalidation in cat P5. Had the injury report been placed before this specialist doctor, he may have opined otherwise because seizure may also occur due to trauma injury on the ear. It appears he was denied proper medical care by the military authorities.

17. Now, we may refer to the recent decision of the Hon'ble Apex Court in the case of **Dharamvir Singh –vs- UOI & Ors,** 2013 AIR SC 2840, on which ld. Adv. for the applicant has placed much reliance. In that case the appellant was detected to have been suffering from 'Generalized seizure (Epilepsy)" after 9 years of service, although at the time of his enrolment, there was no indication of such illness. He was discharged from service on medical ground and was denied disability pension as the medical board held that the disability was not attributable to military service and the same was constitutional in nature. However, the contention of the applicant was that since the disease could not be detected at the time of his enrolment and no note of such illness was made to that effect, it has to be assumed that the ibid illness had developed due to stress and strain of military service. In that context, the Hon'ble Apex Court considered the matter after carefully explaining all the rules and regulations on the subject and formulated the following two issues:-

i) Whether a member of Armed Forces can be presumed to have been in sound physical and mental condition upon entering service in absence of disabilities or disease noted or recorded at the time of entrance?

ii) Whether the appellant is entitled for disability pension?

18. The Hon'ble Supreme Court has graphically discussed the scope of rules 5.6, 7(a), (b) and (c), 8, 9 and 14(a), (b), (c) and (d) of Entitlement Rules, 1982 as also regulation 173 of Pension Regulations. It was also noticed by the Apex Court that the Entitlement Rules, 1982 were allegedly amended by Ministry of Defence letter No. 1(1)/81/D(Pen-C) dated 20th June, 1996 and after comparison of the Rules obtaining in 1982 Entitlement Rules as also amended Entitlement Rules of 1996 (not printed or published), it was held that both sets of rules were basically the same without any significant difference. The Apex Court also discussed the effect of earlier decision of the Hon'ble

Supreme Court in **UOI & Ors –vs- Keshar Singh**, (2007) 12 SCC 675, as also the case of **Om Prakash Singh –vs- UOI & Ors**, (2010) 12 SCC 667. The Apex Court also considered rule 423 of General Rules of Guide to Medical Officers (Military Pensions) 2002.

19. In para 28 of the judgement it is held as under:-

"28. A conjoint reading of various provisions, reproduced above, makes it clear that –

(i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173)

(ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 r/w Rule 14(b)]

(iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9).

(iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [Rule 14©].

(v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [rule 14(b)]

(vi) If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical board is required to state the reasons. [Rule 14(b)]

(vii) It is mandatory for the Medical board to follow the guidelines laid down in Chapter II of the "Guide to Medical (Military Pension), 2002 – Entitlement : General Principles", including paragraph 7, 8 and 9 as referred to above.

After explaining Rule 423 of Guide to Medical Officers (Military Pensions) 2002, which deals with attributability aspect, it has been observed by the Apex Court in para 25 of the ibid judgement :-

"25. Therefore, as per rule 423 following procedures to be followed by the Medical Board :

(i) Evidence both direct and circumstantial to be taken into account by the Board and benefit of reasonable doubt, if any would go to the individual;

(ii) a disease which has led to an individual's discharge or death will ordinarily be treated top have arisen in service, if no note of it was made at the time of individual's acceptance for service in Armed Forces.

(iii) If the medical opinion holds that the disease could not have been detected on medical examination prior to acceptance for service and the disease will not be deemed to have been arisen during military service, the Board is required to state the reason for the same.

20. Therefore, it is crystal clear that in the case of **Dharamvir Singh** (supra), the Hon'ble Apex Court has mainly dealt with the role and duty of medical board in assessing the condition of disability of the individual with reasons. It has been categorically pointed out

that as per rule 9 of Entitlement Rules, 1982, the "onus of proof" is not on the claimant and he shall not be called upon to prove the conditions of entitlements and he will get any benefit of doubt. In other words, the claimant is not required to prove his entitlement of pension such pensionary benefit is to be given more liberally. The duty of the medical board has also been highlighted in that decision as reproduced above.

21. It will be appropriate to quote below the observations of the Hon'ble Apex Court in paras 30-33 as under :-

> " ***30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows :***
>
> ***' (d) <u>In the case of a disability under C the board should state</u>***
>
> ***<u>what exactly in their opinion is the cause thereof</u> <u>Yes</u>***
>
> ***Disability is not related to mil service"***

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31. ***Paragraph 1 of 'Chapter II' – "Entitlement : General Principles" specifically stipulates that certificate of a constituted medical authority vis-à-vis invalidating disability, or death, forms the basis of compensation payable by the Government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre-and post-service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and dispute. For the said reasons the Medical Board was required to examine the cases in the light of aetiology of the particular disease and after considering all the relevant particulars of a case, it was required to record its conclusion with reasons in support, in clear terms and language which the Pension Sanctioning Authority would be able to appreciate.***

32. ***In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of 'Entitlement Rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Genrealised seizure (Epilepsy)" at the time of***

acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.

33. As per Rule 423 (a) of General Rules for the purpose of determining a question whether the cause of a disability or death resulting from disease is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. "Classification or diseases" have been prescribed at Chapter IV or Annexure I; under paragraph 4 post traumatic epilepsy and other mental changes resulting from head injuries have been shown as one of the diseases affected by training, marching, prolonged standing etc. Therefore, the presumption would be that the disability of the appellant bore a casual connection with the service conditions".

22. Here, we may also refer to yet another recent decision of the Hon'b le Apex Court in the case of **Veer Pal Singh –vs- Secretary, Ministry of Defence,** AIR 2013 SC 2827. In that case, in para 11 of the said judgement, the Hon'ble Apex Court has observed as under :-

" 11. Although, the Courts are extremely loath to interfere with the opinion of the experts, thee is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial/quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release/discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable."

23. In view of the above decisions of the Apex Court, the position is quite clear. It is categorically held that if no note was made at the time in the medical examination held

during enrolment about any disease, if such disease develops subsequently during military service, it has be held that the disability has arisen due to an attributable cause. In that case, disability pension cannot be denied to the individual.

24. In a recent decision the Hon'ble Punjab & Haryana High Court in CWP 7277 of 2013 (**Ex Naik Umed Singh –vs- UOI & Ors**) decided on 14.5.14 (unreported), has considered the issue which is under consideration before us. The Hon'ble High Court framed three issues as under :-

i) Whether the Armed Forces Tribunal or Writ Court in exercise of power of judicial review can re-examine the report of Release Medical Board categorising the disability either not attributable to Military Service or aggravated by Military Service ?

ii) Whether the disability suffered after enrolment irrespective of its nature, may be constitutional or otherwise, will entitle personnel of the Armed Forces for the disability pension as it would be presumed that such disability is attributable to or aggravated by Military service ?

iii) Whether the claim of the disability pension can be declined for the reason that it was not raised soon after discharge from the Army on the ground of limitation, even after the record has been weeded out by the authority after the expiry of the statutory period and if it is entertainable then what relief the personnel would be entitled to ?

So far as first issue is concerned, it has been answered as under :-

"In view of the larger Bench decision in Veer Pal Singh's case (supra), and the principles of judicial review settled by the Supreme Court, we find that the process of judicial review exercised by the Court or armed Forces Tribunal in terms of Armed Forces Tribunal Act, 2007 is not an appellate jurisdiction. It is a jurisdiction of judicial review so as to ensure that the authorities remain within the confines of law. The power of judicial review is to examine the decision making process and if the decision making process contravenes the statutory regulations or the instructions issued, to correct the same. Therefore, if no note of the disease is made at the time of individual's acceptance in military service, it raises a presumption that an individual's discharge or death, will be deemed to have arisen for reasons

attributable to or aggravated by service. The exception carved out in clause 14(b) is that if medical opinion hols for reasons to be recorded that the disease could not have bee detected on medical examination prior to acceptance of service, the disease will not be deemed to have arisen during service. Therefore, if the Invalidating or Release Medical Board has not given any categorical opinion that the disease could not have been detected on medical examination; the disease which led to discharge of an individual will be deemed to have arisen in service, then this Court in exercise of power of judicial review will strike down such decision for the reason that the Medical Board has failed to carry out the mandate given to them by the Regulations and the instructions by the central Government. But if the Invalidating or Release Medical Board has categorised that the disability is either not attributable to military service or aggravated by military service for the reason that it could not be detected at the time of entry into service, then the said opinion is in terms of Regulations and Instructions issue and cannot be substituted while exercising powers of judicial review. "

So far as 2nd issue is concerned, it has been answered as under:-

" In view of the judgement in Dharmvir Singh's case (supra), we have no hesitation to hold that if note is given of any disease at the time of acceptance of an individual into service, the disease would be deemed to have arisen in service. The Invalidation Medical Board or Review Medical Board has to record a categorical opinion that the disease, the reason of invalidating out of service could not have been detected on medical examination at the time of enrolment. In the absence of any such finding of the Medical Board, the disease would be deemed to have arisen in service.

25. Coming to the case in hand, we have already analysed that no note was made in the medical examination that the disease for which the applicant was invalidated out of service to the effect as to why such disease could not have been detected at the time accepting the applicant in military service. In the IMB also no reasons have been recorded as to why such disease could not have been detected at the time of enrolment. We have also noted that

the applicant was invalidated out for a disease by placing him in P5 category through an IMB; but the same IMB failed to take note of the other disability with which the applicant was suffering that was available in medical record and was admittedly caused due to an injury sustained by him while on training duty and assess its possible casual connection with onset of '*seizure*' for which he was boarded out from service. The medical opinion in the IMB was definitely without adequate inputs that appear to have been denied to the medical specialist deliberately. The second disability of hearing loss for being slapped was not even assessed nor considered in the IMB. Therefore, applying the principles of law as enunciated by the Hon'ble Supreme Court as also the Hon'ble High Court quoted above, we are of the definite opinion that the disability of the applicant for which he was invalidated out has to be reviewed by a fresh board with sufficient inputs as discussed above in order to decide whether such disability was attributable to and aggravated by military service. That apart, the other disability i.e. 'severe hearing loss' surely caused due to military service as has been duly opined by the CO of the applicant. In such circumstances, denial of disability pension to the applicant is not justified and needs to be relooked. We, however, notice that the IMB opined that the disability of the applicant was for five years. Admittedly, no re-survey medical board was held obviously due to the fact that he was not granted any disability pension. Secondly, for the disability of hearing loss, no assessment was done as regards percentage; in fact he was allowed to be invalidated out of service in a temporary medical category (H2 (T-24)), which is grossly irregular.

26. Considering the matter from all angles, we are of the opinion that this is a fit case where in exercise of judicial review, we must interfere and set aside the finding of the IMB that the disability of the applicant for which he was invalidated out i.e. *Generalised Tonic Clonic Seizure* was not attributable to or aggravated by military service. Accordingly, a re-survey

board is to be held to review attributability/aggravation aspect best on fresh inputs and keeping in view the law laid down by the Hon'ble Apex Court as discussed above, as also to assess the other disability i.e. *severe mixed hearing loss (LT) ear*, and to decide composite percentage of disability for the ibid two disabilities. In view of what has been discussed above, TA stands allowed in part on contest but without any cost. Accordingly, following directions are issued:-

a) The applicant shall be brought before a Re-Survey Medical Board for fresh opinion as regards the attributability/aggravation aspects in respect of the ibid two disabilities and also to determine composite percentage of disability. Decision of this medical board shall supersede the findings/opinion of the earlier IMB and will be effective from the date of discharge of the applicant.

b) Such re-survey medical board shall be held at Command Hospital, Kolkata being nearest to the applicant's home town within 90 days after giving adequate notice to the applicant regarding date of the medical board.

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

28. 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)