FORM NO. 21
(SEE RULE 102(1))
ARMED FORCES TRIBUNAL ,KOLKATA BENCH

OA 133/2016.

THE 10TH DAY OF JANUARY 2024.

Ex. NK Nitai Sikder ... Applicant.

(Through Mr Subhash Chandra Basu, Advocate).

-Vs-

Union of India and others. .... Respondents.

(Through Dr Debu Chowdhury, Sr. Panel Counsel).

CORAM:

HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, MEMBER(JUDICIAL).

HON'BLE LT GEN SHASHANK SHEKHAR MISHRA, MEMBER (ADMINISTRATION).

## O R D E R(ORAL)

*JUSTICE DHARAM CHAND CHAUDHARY, MEMBER(JUDICIAL).*

Heard learned counsel on both sides.

(2) In this application following relief has been sought to be granted:

> To quash the impugned order dated 17.03.2016(A/1) and direct the respondents to grant disability pension to the applicant with interest from the date of his discharge from service, i.e., 30.04.2011.

(3) Admittedly, the applicant was enrolled in the Indian Army as infantry soldier on 28.04.1994 and discharged from service on medical ground on 30.04.2011. He remained hospitalised in Military Hospital Ahmedabad due to acute renal failure. On his check-up there he was diagnosed hydronephrosis(Right). In the opinion of doctors attended on him in the military hospital, he suffered the disease in consequence of a congenital pelviureteric junction obstruction with non-functional right kidney. On 12.12.2001, he was operated for removal of the kidneys. After having undergone the surgery he was transferred to his Unit(85 Infantry BDE) at Gandhinagar and assigned temporary category P3T-12 for 3 months. He also remained hospitalised in military hospital at Ahmedabad and subsequently was referred to Navy hospital INS Asvini where he was medically categorised SHAPE-I and thereafter P3 T24 post removal of one of the kidneys and was granted 42 days' sick leave. On completion of the leave he reported to Military Hospital at Bombay and he was transferred to Military Hospital Ahmedabad from there. His medical board was held in the year 2002 there and he was categorised P3 T24 for 6 months and after that he was transferred to Jammu & Kashmir and from there to Yol Camp in the state of Himachal Pradesh.

(4) It is during this period that he was placed under the category P2(Permanent) for 2 years in the year 2005 at Military Hospital Satwari in Jammu and thereafter under category P2(Permanent). Thereafter in Military Hospital Binnaguri(West Bengal 20 Division) he was given the category P2(Permanent) in the year 2009. It is thereafter that he was discharged from military service under Rules 13(3) and 111(1) of the Army Rules, 1954 after rendering a total of 17 years and 2 days' service.

(5) The applicant came to know from the entries in the discharge book(A/2) that he was discharged from service on medical ground and that he was held fit for civil employment; however, unfit for employment in DSC. The disability was assessed less than 20%. He claimed disability pension; however, such claim was rejected on the ground that the disability he incurred upon is neither attributable to nor aggravated by military service. Aggrieved, he filed first appeal and the same was rejected vide order dated 07.05 2011(A/3). After that on 14.04.2012 second appeal(A/8) filed was also rejected and the decision so taken was conveyed to him vide letter dated 30.09.2013(A/11).

(6) The complaint is that the medical board without conducting proper investigation into the claim came to an erroneous decision that the disability is neither attributable to nor aggravated by military service. The rejection of the first and second appeals vide Annexure 3 and 11 is stated to be illegal, whimsical, and the result of arbitrary exercise of power by respondents and as such has been sought to be quashed and set aside.

(7) In reply, the facts as detailed in the application have not been disputed by the respondents. The only plea raised in their defence is that as per the medical opinion given by specialists under the Release Medical Board the disability held to be incurred upon by the applicant was in existence well before his enrolment in service. It is a congenital condition, not connected with the service, and the board mentioned the disability "Right congenital PUJ obstruction kidney(OPTD)", hence rightly held to be not attributable to and aggravated by military service. The applicant as such is stated

to be not entitled to disability pension in terms of Para 173 and 179 of the Pension Regulations of the Army, 1961(Part I). The medical authority has recommended him to be released in medical category P(2)(Permanent) and declared fit for suitable job in civil employment within the limitation of his disability and since he was in low medical category was not eligible for enrolment in DSC service. He is stated to have been discharged from service in low medical category on fulfilment of the terms and conditions of his enrolment and granted service pension as is apparent from the perusal of the copy of the PPO(A/1). His claim for grant of disability pension as such is stated to have been rightly rejected and first and second appeals filed have also been considered and accordingly rejected.

(8) On completion of the record we have heard learned counsel representing the parties and also gone through the records. We have also taken into consideration the law laid down by the Hon'ble Supreme Court by way of various judicial pronouncements.

(9) The present is a case where the applicant has been discharged from service on superannuation, i.e., on fulfilment of the terms and conditions of his enrolment on 30.04.2011. He has been granted service pension as is apparent from the perusal of copy of the PPO(A/1). The disability element of disability pension has however been denied on the grounds inter alia that the disability "Right congenital PUJ obstruction kidney(OPTD)" being congenital in nature in the opinion of the medical board, is neither attributable to nor aggravated by military service. Such reasons for rejection

of the claim of the applicant mentioned in the order dated 17.03.2016(A/1) passed by the appellate authority consequent upon the order dated 22.06.2015 passed by this Bench in OA No.111/2013(previously instituted by the applicant) reads as follows:

*"Tele No.35397/011-23093704*

*REGD SDS/BY POST*
*Addl. Dte Gen Personnel Services*
*Adjutant General's Branch*
*IHQ of Mood(Army)*
*Room No – 11, Plot No-108(West)*
*Brassey Avenue, Church Road*
*New Delhi – 110 001*

*B/38046A/10/2016/AG/PS-4(2nd Appeal)*

*Records The Mahar Regt*
*PIN 900127*
*C/o 56 APO*

***SECOND APPEAL AGAINST REJECTION OF DISABILITY PENSION IN R/O NO 4564538K EX NK(TS) NITAI SIKDER(MAHAR)***

*1. Reference your letter NO4564538/LC dated 05 Aug 2015.*

*2. Second appeal arising vide Hon'ble AFT(RB) Kolkata Court Order dated 22 Jun 2015 filed by No.4564538K Ex Nk (TS) Nitai Sikder vide OA No.111/2013 and his Execution Petition No 02/2016 against rejection of disability pension has been examined by the Second Appellate Committee on Pension(SACP) on his service/medical documents and in the light of relevant rules/instructions on the subject. The SACP has considered his ID (Invaliding Disease) 'CONGENITAL PUJ OBSTRUCTION(RT) KIDNEY(OPTD)' as neither attributable to nor aggravated by military service on the following grounds:-*

*"Perusal of his enclosed medical/service documents reveals that onset of the indl's ID was in Dec 2001 in Gandhinagar(Peace). The indl had been admitted as a case of Acute Gastroenteritis to MH Ahmedabad in Dec 2001 when he developed Acute Renal Failure. He was evaluated and found to have Hydronephrosis (Right). Further investigations revealed that the hydronephrosis was a consequence of a congenital PUJ obstruction. Congenital Pelviureteric Junction (PUJ) obstruction cannot be detected without sophisticated imaging tests which are not carried out during routine medical examination at the time of enrolment. Hence, the disability could not*

*be detected at the time of his entry into service. The disease naturally progresses to hydronephrosis due to prolonged obstruction and backpressure changes. Being a congenital malformation, the ID cannot be constructed to be attributable to Service. Conditions of military service do not play a role in the progression of the disease. In other words, the individual's hydronephrosis would have developed similarly even if the individual was not enrolled in military service. In the instant case, the individual presented with acute gastroenteritis and developed acute renal failure while in hospital. He was treated with a (Rt)nephrectomy following which he had been asymptomatic. At RMB. His renal parameters were within normal limits. The PUJ obstruction, being congenital in nature, is not attributable to service. He was operated upon following which his renal parameters reverted to normal. There were no complications of surgery. There was no evidence of service related trauma either. Hence, the ID "congenital PUJ Obstruction(Rt) Kidney(Optd) is conceded as neither attributable to nor aggravated by military service in terms of Para 74, Chap VI, GNO 2002, Amendment 2008".*

*3. In view of the above, the appeal has not been accepted by the SACP and the said individual is not entitled for disability pension. One ink signed copy may be forwarded to the appellant accordingly.*

*Please acknowledge.*

*Encls – (As stated above)*

*(Som Dutt)*
*Dy.Dir, AG/PS-4(2nd Appeal)*
*For Adjutant General."*

(10) It is thus seen that the claim of the applicant has been rejected on the sole ground that the disability he incurred upon is neither attributable to nor aggravated by military service. The disease Hyrdonephrosis(right) was in consequence of a right congenital PUJ obstruction kidney(OPTD) which could not be detected at the time of enrolment of the applicant in service fo. want of sophisticated tests which are not being conducted during routine medical examinations. Its onset is also stated to be at Gandhinagar(Gujarat), a peace area, in the year 2001.

(11) As noticed in preceding paragraphs the applicant has extensively served in field areas in close proximity to environment of his disability and even after undergoing surgery also is against the records.

(12) Even otherwise this Bench following the law laid down by the Hon'ble Supreme Court in a catena of judgments has held that "the onset of disabilities incurred upon by a soldier in peace area is hardly of any help to the case of the respondents for the reasons that normally the same are not incurred upon in a fortnight, but diagnosed after the applicant having rendered service in the Army for years together. Above all, in Army service a soldier is under stress and strain due to variety of reasons i.e. climatic, geographical and being away from the company of family members, hence the origin of the disability in peace area or hard area is not of much consequence." Similar is the ratio of the order passed by Chandigarh Bench in ***OA 3211 of 2019*** in ***Ram Kishan versus Union of India & others***, decided on 12.01.2023.

(13) The Respondents have argued that disabilities like hypertension, heart diseases etc are such disabilities that cannot be affected by stress and strain of military service conditions. Now coming to **Entitlement Rules for Casualty Pensionary Awards, 1982** applicable to the applicant in respect of various diseases some rules are particularly relevant for the purpose of adjudication of the present controversy.

**Rule 14 is reproduced hereunder:**

In respect of diseases the following rule will be observed:-

(a) Cases in which it is established that conditions of Military Service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease, will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(c) If a disease is accepted 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.

(14) Rule 14 is qualified farther by **Rule 15,** which is also reproduced hereunder:

***The onset and progress of some disease are affected by environmental factors related to service conditions, dietary compulsions, exposure to noise, physical and mental stress and strain. Disease due to infection arising in service, will merit an entitlement of attributability. Nevertheless, attention must be given to the possibility of pre-service history of such conditions which, if proved could rule out entitlement of attributability but would require consideration regarding aggravation. For clinical description of coomon disease, reference shall be made to the Guide to Medical Officers(Military Pensions) 1980, as amended from time to time. The classification of diseases affected by environmental factors in service is given in Annexure III to these rules.***

(15) The same aspect was also deliberated upon by Raksha Mantri's Committee of Experts (2015) while making a reference to Rule 423 of the Regulations for Medical

Services in Armed Forces (RMSAF) and **Annexure III** to the Entitlement Rules reproduced supra while drawing distinction between ***peace*** or ***field*** area observed as follows in its report:

> *"Rule 423 of the Regulations for Medical Services in the Armed Forces(RMSAF) ordains that service in peace or field has no linkage whatsoever with attributability of disabilities to military service but still disabilities are regularly treated NANA on the pretext that the disability had arisen in a "peace area". Further Annexure III to the Entitlement Rules contains a list of disabilities that are "affected by stress and strain of service" and which includes the most commonly found disabilities such as Hypertension, Psychosis and Neurosis etc, still even such scheduled disabilities are being routinely incorrectly declared as "unrelated to service" by the establishment ...*
>
> *... The problem emanates from an interplay of lack of correct application of rules and law from a multitude of authorities including the office of DGAFMS which had locally issued instructions and DO letters having no sanctity in law, military medical boards as well as Finance elements. Though the fact that soldiers face an inherent stress and strain in their daily routines in military life, in peace as well as field, is well recognized in all democracies and is also recognized by our rules and consistent rulings of Constitutional Courts, that is, our High Courts and the Supreme Court, the resistance to the rule of law continues thereby forcing disabled veterans into litigation. It is also observed that many common disabilities such as hypertension, seizures/epilepsy, heart diseases, psychosis, neurosis etc which are listed in the Schedule of the Entitlement Rules as ones 'affected by stress and strain of service' are also routinely brushed aside as having been caused during 'peace' or 'not related to service' by directly contravening the provisions of the rules. We are also constrained to observe that heart related disabilities are, even in this tie and age, being adjudicated based on the '14 Days Charter of Duties', that is , the activities carried out by the person during the last 14 days from the onset of the disability, whereas even common knowledge dictates that such disabilities arise over a long period of time and not suddenly. The 14 Days Charter of Duties therefore has no logical nexus with attributability / aggravation ....*
>
> *......While the world has moved much ahead, as explained above, in India many disabled soldiers are still denied disability benefits on hyper-technical reasons. This is in direct contravention of the Rules as explained above which provide that unless rebutted in writing as to how the disability was such that could not have been detected at the time of entry into service, all disabilities arising in service are to be treated/deemed as service-related irrespective of whether the disabilities occur in peace or field areas.* ***When Courts and Tribunals correctly interpret rules and direct the Services HQ/MoD to grant benefits, the latter are quick to challenge such decisions in the Supreme Court on the pretext of 'contravention of Government policy'***

*forcing poor disabled soldiers into litigation till the highest Court of the land. It is important to realize that there is inherent stress and strain in military service coupled with the fact that a person stays away from family during most of his/her length of service in a regimented lifestyle under a strict disciplinary code which is recognized all over the world and attributability or aggravation need only be refused in cases of gross negligence, gross misconduct or intoxication since a presumption operates under the rules that all disabilities are affected and at least aggravated by stress and strain of service. In all democracies, disabilities arising in service or during authorized leave are considered as "attributable or aggravated by military service".*

(16) The crux of the report(ibid) reproduced above as such is that onset of a disability in peace or field area hardly makes any difference in the life of a soldier who is 24 hours x 365 days on call, sometime under the shadow of gun, under a strict disciplinary code mostly away from his family in a strictly regimented routine. Therefore, the practice to deny benefit of disability on the ground that onset of disability was in peace area has been deprecated not only by the Hon'ble Apex Court but also Entitlement Rules and Para 2.2.1 of the report of Raksha Mantri's Committee of Experts 2015 constituted for review of service and pension matters including potential disputes, minimizing litigation, and strengthening institutional mechanisms related to redressal of grievances.

(17) How a soldier has to be considered vis-à-vis an ordinary person the report tells us further which reads as follows:

*"While dealing with disabilities of military personnel, the much argued comparison with an ordinary person is not based on a sound footing. There are times when it is remarked that such a disease may also have arisen had the particular person not been in the Army. The Committee notes that there can be no comparison of the inherent stress and strain of military life with a civilian employee or others and what may be 'lifestyle diseases' for a common person on the street may be aggravated by stress and strain in case of military personnel. A person who is 24 hours x 365 days on call,*

*sometimes under the shadow of gun, under a strict disciplinary code mostly away from his family, in a strictly regimented routine, cannot be simplistically compared with a civilian employee.* ***The nature of military service denies to all military personnel a commune living with his family or in his hometown, the enjoyment of gazette holidays and even the enjoyment of normal day to day freedoms such as the very basic liberties of life which are taken by all citizens for granted. Even in a peace area, a member of the military does not have the freedom enjoyed by private citizens, even for something as simple as going to the market, permission is required from higher authorities. Life is highly regulated by order including for matters such as breakfast, lunch, dinner or even going to the toilet or bathroom. When a person is not with his or her family, even common ailments such as hypertension or IHD or minor psychiatric illnesses or psycho-somatic disorders are bound to get aggravated by seemingly insignificant incidents at the home or domestic front such as non-performance of children in school, property disputes, red-tapism in other spheres, family problems etc and such practical aspects of life in general cannot be ignored by the system by taking a highly technical and impractical approach of stating reasons such as 'posted in peace area' which have no link with practical on-ground realities. Even non-fulfilment of sexualneeds of soldiers by virtue of being away from the spouse could contribute to rise in stress levels, and all such reasons are being conveniently ignored and the stress and strain of military life is wrongly being compared with counterparts in other professions.*** *Most of the said disabilities are also scheduled in the rules as ones 'affected by stress and strain of service' and hence personal opinions such as the commonality of such disabilities in 'civil life' have no sanctity in the eyes of law which is supported by rules and already adjudicated as such by the Supreme Court of India".*

(18) The report even takes note of the life span of a soldier **vis-à-vis** a civilian. In the opinion of experts observing that the lifespan of a soldier is lesser than civilian employees points directly to the fact that stress and strain of military service affects all soldiers and the said proposition is hardly debatable.

(19) The committee on the basis of the law laid down by the Hon'ble Apex Court and various judicial pronouncements has observed that the attributability and aggravation of a disability incurred during military service is the rule and the same being 'neither

attributable to nor aggravated' by such service is an exception. This part of the report is also reproduced here under:

*"While the medical authorities have, as stated above, thankfully already realized the fact that in accordance with rules and the law laid down by the Supreme Court, grant of 'attributability/aggravation' is the rule rather than the exception unless a link is evident with a pre-existing condition or a person's own misconduct, financial authorities are still resisting progressive change in this regard. As harsh as it might sound, the opinion of the financial bodies or accountants cannot override medical opinion or law laid down by the apex Court and the job of finance instrumentalities is not to interpret medical conditions by going against the law as laid down, but only to render inputs on financial implications where required. The length and breadth of the charter of operation available to financial authorities is amplified in detail in another part of the instant report(See Para 2.4.3). Instances have been pointed out to us where the finance authorities have cited locally issued instructions to reject disability claims by ignoring actual rules, declarations of medical authorities, legal advice and even Supreme Court decisions. We are surprised to note that when even in a meeting with the Hon'ble Raksha Mantri positive statements have been made regarding progressive grant of disability benefits in terms of Supreme Court decisions, and when the Services HQ, the DESW / MoD, the MSAC and the office of DGAFMS have also endorsed the view which is anyway the law declared by Constitutional Courts, the financial entities are still opposing the same and indulging in hyper-technical surgical interpretation in this regard and that the appeals are still being filed and cases contested in Courts and Tribunals. <u>We are sorry to observe but the political will of the Hon'ble Prime Minister and the Raksha Mantri, the legal opinion of the Legal Advisor(Defence) and the endorsement of theexecutive authorities thereon with the overarching law declared by our High Courts and the Supreme Court, cannot be held hostage to the personal opinion of financial authorities who have no right to comment on the merits of disabilities but are only supposed to release and calculate amounts as ordained by law.</u> <u>It is surprising that once even the apex medical body, that is, the MSAC has itself conceded that medically speaking almost all such disabilities are affected by military service, which is also a universally accepted military norm, then why should other authorities be allowed to override the said reality. When it is also accepted by all stakeholders that life expectancy of members of the military is much lower than civilian employees, then there should remain no controversy on the effect of military service on the health of individuals. In any case, such instances are contemptuous to the decisions of the Supreme Court and we must remind here that under Article 144 of the Constitution, all authorities are to bow down to the majesty of the law laid down by the Supreme Court and act in the aid of the Supreme Court.....</u>*

*....<u>The health of our troops, our responsibility towards our veterans, the lesser life expectancy of our soldiers and veterans, cannot be measured in</u>*

*<u>monetary terms or by denying them minor amounts which they are fully entitled to under the rules.</u> Even as back as in 1982, the Constitution Bench of the Supreme Court in D S Nakara's case had endorsed the securing of socio-economic justice in a rapidly growing and flourishing State which can afford such benefits which are anyway admissible under law. In any case, all parties are bound by the law laid down by the Supreme Court and dissenting personal opinions have no legal sanctity in view of the settled law as per decisions mentioned in the preceding paragraphs, the practical realities and also the statements of the highest of political executive regarding the stress and strain of military life". (Emphasis supplied)*

(20) It is seen that the above-quoted portions of the report criticized the role of the functionaries such as financial authorities in getting the orders of the Hon'ble Supreme Court, and Armed Forces Tribunals /other courts implemented. As a matter of fact, the Entitlement Rules discussed herein above and also the Report submitted by **Raksha Mantri Committee of Experts** are based upon legal principles settled by the Hon'ble Apex Court in the judgments herein below: -

(i) **Dharamvir Singh Vs Union of India**(2013) 7 SCC 316
(ii) **Three Judge Bench decision** in Civil Appeal 2337/2009 **Union of India Vs Chander Pal** decided on 18-09-2013
(iii) **Union of India Vs Rajbir Singh** 2(2015) 12 SCC 264
(iv) **Union of India Vs Angad Singh Titaria**(2015) 12 SCC 257
(v) **Union of India Vs Manjeet Singh**(2015) 12 SC 275
(vi) Civil Appeal 4409/2011 **Ex Hav Mani Ram Bhaira vs Union** of India decided on 11-02-2016
(vii) Civil Appeal 1695/2016 **Satwinder Singh Vs Union of India** decided on 11-02-2016
(viii) **Ex Gnr Laxmanram Poonia Vs Union of India**(2017) 4 SCC 697

(21) The following observations of the Hon'ble Supreme Court in some of the decisions mentioned above merit reproduction.

(22) In **Dharamvir** case(supra) where the disability had been declared 'neither attributable to nor aggravated by military service' by the medical board, the Hon'ble Supreme Court went into detail of various applicable rules and also the case law cited by the respondents and held as under:

> *"29.1. Disability pension to be granted to an individual who is invalided 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 to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II(Regulation 173).*
>
> *29.2. A member is to be presume in sound physical and mentl condition upon entering service if there is no note or reord 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 read with Rule 14(b)].*
>
> *29.3 The 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).*
>
> *29.4 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(c)].*
>
> *29.5 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 a individual's discharge or death will be deemed to have arisen in service[Rule 14(b)].*
>
> *29.6 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)]; and*
>
> *29.7 It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers(Military Pensions).2002 "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above(para 27).*
>
> *Xxxxx*

*"Para 31 ... 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...*

*Para 33 ...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 "Generalised 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...*

*Para 34 ... 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 of diseases" have been prescribed at*

*Chapter IV of 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 ..."*

(23) Now coming to the law laid down by the Hon'ble Supreme Court in Sukhvinder Singh versus Union of India & others(2014) (14) SCC 364 reads as follows: -

*11. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the armed forces; any other conclusion would tantamount to granting a premium to the Recruitment Medical Board for their own negligence.*

*Secondly, the morale of the armed forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined.*

*Thirdly, there appear to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so.*

*Fourthly, wherever a member of the armed forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent.*

*Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty percent disability pension."*

(24) We have considered rival submissions made in the light of the law laid down in **Dharamvir** case(supra) and also the deliberations having taken place in the meeting of the Raksha Mantri Committee of Experts which lead to the only conclusion that if

at the time of enrolment of a soldier in Army any disability does not exist or is not detected, the disability with which he is found to be suffering while in service has to be believed to be attributable to and aggravated by military service. Be it stated that as per the own stand of the respondents and the disease from which the applicant suffered could not have been detected by the recruitment medical board for want of results of various sophisticated tests which are not being conducted at that time.

(25) We are not satisfied with such a reasoning as the disease the applicant suffered from is not detected overnight but after having rendered 7 years' service. The reason given by the medical board is also not proved on record as there is nothing in this regard in the proceedings(A/R1) of the Release Medical Board. In case any such medical board was constituted in the year 2001 or after the applicant having undergone the surgery, nothing has come on record in this regard also. Therefore, in view of the law laid down by the Hon'ble Apex Court in Dharamvir Singh and Rajbir Singh cases cited supra it would not be improper to conclude that the applicant suffered from the disease hydronephrosis(right) while in service and the disability he incurred upon as such is not only attributable to but aggravated also by military service. There is no denial that the applicant on completion of training remained posted at Dehra dun(Uttarakhand), high altitude area in North Sikkim, Gandhinagar and Ahmedabad in Gujarat, Jammu & Kashmir, and Yol Cantt.(Himachal Pradesh). He was placed in low medical category(permanent) and after that also he continued till his discharge from service on 30.04.2011. He has lost his right kidney due to the ailment he contracted while in service. We fail to understand that in such circumstances how the respondents could have rejected his claim for the grant of

disability element of disability pension. In the given facts and circumstances of the case it is absolutely erroneous that the disability he incurred upon is neither attributable to nor aggravated by military service.

(26) Now coming to the disability the applicant incurred upon the same as per the medical board proceedings(A/R2) is 50% for life. We fail to understand as to from where the plea has been raised that the disability he incurred upon is less than 20%. True it is that the present may be a case of discharge on completion of the terms and conditions of enrolment of the applicant. He, however, has been granted service pension and is entitled to disability element of disability pension also.

(27) How the disease was not connected with military service the Board has failed to record cogent and plausible reasons. The only explanation that the disability having been incurred upon by the applicant in "peace area" and thus unconnected with the service rendered is neither attributable to nor aggravated by military service is absurd and also cryptic. The same even is also against the record and the rules and judicial interpretations, hence not sustainable in the eyes of law. The opinion that the onset of the disability was in "peace area" and as such the same is not attributable to or aggravated by military service is not based on sound and cogent reasoning. Above all, in military service a soldier suffers from stress and strain due to variety of reasons i.e. climatic, geographical and being away from the company of family members, hence the origin of the disability in a peace area or field area is not of much consequence as provided in rules interpreted by the Hon'ble Supreme Court and also noticed hereinabove while making reference to the observations of the Raksha Mantri

Committee of Experts qua this aspect of the matter. In fact the Committee of Experts has taken into account the effect of stress and strain of military service on the health of troops, besides the law declared by the Hon'ble Apex Court and other practical realities in the life of soldiers.

(28) The present as such is a case squarely covered in favour of the applicant by the ratio of the judgment of the Hon'ble Supreme Court in Dharamvir Singh case(supra).

(29) Considering the law laid down by the Hon'ble Supreme Court and also the rules and the attending circumstances the rejection of the claim of the applicant for grant of disability element of disability pension is neither legally nor factually sustainable. The applicant is therefore entitled to the grant of disability element of disability pension.

(30) For all the reasons stated hereinabove this application succeeds and the same is accordingly allowed. The proceedings of the Release Medical Board to the extent of declaring the disability hydronephrosis(right) incurred upon by the applicant "neither attributable to nor aggravated by military service" and subsequent rejection of his claim for the grant of disability element of disability pension are quashed and set aside. The applicant is held entitled to disability element of disability pension @ 50% **for life w.e.f 29.09.2016** by rounding it off 75% as per the policy and also the ratio of the judgment of the Hon'ble Supreme Court in **Civil Appeal No.418/2012** titled **Union of India Vs Ram Avtar, decided on 10.12.2014.** The due and admissible monetary benefits uptodate be calculated and released to him within a period of three

months from the date of receipt of certified copy of this order by learned Central Government Counsel /OIC Legal Cell failing which together with interest @ 8% per annum from the date of this order till realization of the entire amount.

(31) The application is accordingly disposed of. Miscellaneous application(s) if any pending shall also stand disposed of. No order so as to costs.

LT GEN SHASHANK SHEKHAR MISHRA
HON'BLE MEMBER(A)

JUSTICE DHARAM CHAND CHAUDHARY
HON'BLE MEMBER(J)

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