

ARMED FORCES TRIBUNAL, KOLKATA BENCH

O.A.No. 09/2021 with M.A.No. 06/2021

THE 16<sup>TH</sup> DAY OF MAY, 2024  
No. 13984367Y Ex-Hav (Health Assistant) Kamalesh Kumar Diwakar  
..... Applicant

-Vs-

Union of India & Ors.

.... Respondents

Advocates present:

For the applicant,  
Mr. S.K. Choudhury, Advocate

For the respondents,  
Mr. Ajay Chaubey, Senior Panel Counsel

CORAM:

HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, MEMBER (JUDICIAL)  
HON'BLE LT GEN SHASHANK SHEKHAR MISHRA, MEMBER (ADMINISTRATIVE)

ORDER (Oral)

JUSTICE DHARAM CHAND CHAUDHARY, MEMBER (JUDICIAL)

We have heard this matter at length.

- (2) In this application following reliefs have been sought to be granted:
- (i) Quash and set aside the Commandant, AMC Centre and College Order dated 30 Aug. 2018 whereby the mercy petition preferred by the applicant for grant of service pension and other retiral benefits has been rejected without application of mind and without assigning any valid reason, hence stated to be not only discriminatory but violative of Article 14 & 21 of the Constitution of India.
  - (ii) Issue directions to respondent No.1 to grant service pension to the applicant along with arrears as admissible in accordance

with Para 41(a) of Pension Regulations for the Army, Part-I, 2008.

- (iii) Issue directions to respondent No.1 to hold Release Medical Board for his medical examination to assess the disability he incurred upon and grant disability pension as admissible along with arrears.
- (iv) Issue directions to respondent No.3 to produce record of all service documents and his medical record including his hospitalisation, discharge from the hospital and categorisation of his low medical category;
- (v) Pass such other and further orders/directions as may be deemed just and proper in the attendant circumstances of this case.

(3) The present is a case of solitary instance of overstayed of the applicant and as a result thereof absence from duty. The action has been taken against the applicant by the District Court Martial. The District Court Martial has tried the applicant and awarded the sentence i.e. dismissal from service. The confirmation authority i.e. the Commandant, has confirmed the sentence so awarded against the applicant vide impugned order at page Nos. 15 to 17 of the paper book.

(4) Admittedly, the applicant has served the Indian Army for a period of 20 years. Learned counsel for the applicant submits that the respondents should have taken into consideration long service the applicant rendered in the Army at the time of awarding sentence i.e. dismissal from service.

(5) We, therefore, find the present a fit case where the competent authority should treat this application as mercy petition and take a decision as warranted in a time bound manner. In the nature of the order, we

propose to pass in this matter, no prejudice is likely to be caused either to the applicant or the respondent-UOI.

(6) Therefore, deciding the points raised by the applicant in this application, we deem it proper to direct the competent authority to consider this case with the help of rules and regulations as applicable and also the law laid down by various Courts including the judgments passed by the Hon'ble Supreme Court in *Veerendra Kumar Dubey v. Chief of Army Staff*, 2016 (2) SCC 627 and *Narain Singh v. Union of India*, 2019 (9) SCC 253. In *Veerendra Kumar Dubey's* case, he was ordered to be discharged from service on the ground that there were four red ink entries in service record and that of *Narain Singh's* case, five red ink entries. *Veerendra Kumar Dubey* (supra) was discharged after having rendered 12 years' service and as regard *Narain Singh* (supra) after having rendered 13 years, 11 months and 08 days service. The Hon'ble Apex Court while noting that the respondents have not taken into consideration such a long service rendered by them which were nearer to complete 15 years service required for grant of service pension vis-à-vis the procedural violation during the course of trial conducted on the basis of the charge that they have overstayed the leave or availed leave without sanction has held that the penalty of discharge from service awarded against them is illegal and arbitrary, hence, quashed and set aside the same and the direction was issued to respondents to count their service as 15 years and grant pension to them. The Regional bench of this Tribunal at Chandigarh has relied upon the judgments passed by the Hon'ble Apex Court in *Veerendra Kumar Dubey* and *Narain Singh* (supra) in *Lakhvinder Singh v. Union of India* in O.A.No.

1151/2015 decided on 24/11/2022 by a Bench of which one of us (Justice Dharam Chand Chaudhary) is a Member. The relevant portion of this judgment as follows:-

*“24. The crux of the law laid down in the judgment cited (supra) is that mere issuing show cause notice is not sufficient to discharge a soldier from service on the ground “SERVICE NO LONGER REQUIRED” UNDER Section 13 of the Army Rules and inquiry envisaged in para 5-A of the Circular dated 28/12/1998 into the allegations is also required to be conducted. Besides, the total service rendered by an Army personnel should also be given due weightage. As a matter of fact, in Narain Singh’s case, the soldier had rendered 13 years 11 months and 08 days service and as such was nearer to qualify for 15 years service required for the grant of service pension. The competent authority while discharging said Narain Singh from service had not taken into consideration the same.*

*25. Not only this, but only for instance of five red ink entries being close in proximity should not have been made the basis to discharge him from service that too after he having rendered 13 years of service and as such was about to complete pensionable service. The discharge of Narain Singh therefore, was held mechanical without application of mind and solely on the basis of five red ink entries in his credit. It is further held that mere award of four red ink entries does not make the discharge mandatory. The Hon'ble Apex Court in Veerendra Kumar Debey’s case cited supra has observed that “four red ink entries is not some kind of ‘Laxman Rekha’ which if cross would by itself render the individual concerned undesirable or unworthy of retention in the force”. Therefore, the order of discharge passed against the appellant was set aside with all consequential benefits”.*

(7) Accordingly, this application is disposed of with a direction to the respondents to treat the same as representation and the competent authority shall consider this matter in view of the rules and regulations and law laid down by the Hon'ble Supreme Court in the judgments cited (supra) and take conscious decisions/pass speaking order within four months from the date of receipt of certified copy of this order and also that of the original application from OIC Armed Forces Tribunal Legal Cell, Kolkata/learned senior panel counsel representing the respondents. The opportunity of

being heard be afforded to the applicant, if requires. The copy of order passed by the competent authority be supplied to the applicant. In case, aggrieved thereby, he will be at liberty to resort to the remedy available to him in accordance with law. This application is, accordingly, disposed of.

(8) This application is accordingly disposed of. Miscellaneous Application(s), if any pending, will also stand disposed of accordingly. <sup>1</sup>

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

JUSTICE DHARAM CHAND CHAUDHARY  
HON'BLE MEMBER(J)

vr/-