

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : O. A NO. 96 OF 2011

ON THIS 13th DAY OF SEPTEMBER, 2013

CORAM : HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Dinesh Sharma (Ex-Nayak Honoray Havildar) son of Girija
Sharma, resident of Village + P.O. Anandpur, Via Bihta,
District - Patna

-.....Applicant

-VS-

1. The Union of India, through the
Chief Secretary, Ministry of Defence,
New Delhi.
2. The Chief Secretary, Ministry of Defence,
New Delhi.
3. The Assistant Secretary, Ministry of Defence,
New Delhi – 110011.
4. The Secretary, Ministry of Defence,
South Block, New Delhi – 110011.
5. The Chief of Army Staff, Army Headquarters,
South Block, New Delhi – 110011.
6. The Deputy Secretary, Government of India,
Ministry of PPG & (Dept. of P & PW),
Lok Nayak Bhawan, New Delhi – 110011.
7. The Director (Pension), Government of India,
Ministry of Defence (Pension), Sena Bhawan,
Wing “A”, New Delhi.
8. The Major, Vidut and Yantrik Engineer,
Abhilekha Karyalaya, EME Records,
Secunderabad (A.P.) – 500021
9. The Senior Records Officer (For OIC Records),

- EME Records, Secunderabad (A.P.) – 500 021.
10. The Chief Records Officer, EME Records, Secunderabad (a.P.) – 500 021.
 11. The Officer-in-charge, EME Records, Secunderabad (A.P.) – 500 021.
 12. The Officer-in-charge, P.C.D.A.(P), G3, RA Section, Allahabad (Uttar Pradesh).
 13. The Officer-in-charge, Pension Liaison Cell, C/o 508 Army Base Workshop, Allahabad (U.P.)
 14. The Officer-in-Charge, Army Group Insurance Fund, AG I, Bhawan, Rao Tula Marg, PB No. 14, PO Vasant Vihar, New Delhi- 110 057

.... Respondents.

For the Petitioner: Mr. Monohar Prasad Singh Advocate

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

ORDER

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

In this original application the applicant, who at the time of his discharge from Army service on medical ground, was a Naik and conferred the Honorary rank of Havildar, has prayed for the following relief :-

- i) Direction upon the concerned respondent authorities to grant/pay the disability pension @ 50% instead of 20% with effect from 01.0.1.1999 and the benefits of Army Group Insurance Scheme with statutory interest @ 9% to the applicant in accordance with law.
2. At the outset, it may be stated that the applicant had earlier filed a writ petition before the Hon'ble Patna High Court being CWJC 17959 of 2009 which was rejected vide a detailed order dt. 22.12.2010 on the ground of jurisdiction since in the meantime, the AFT Act, 2007 has already come into force. Therefore, the Hon'ble Patna High Court

granted liberty to the applicant approach appropriate forum and the period, which had been consumed while pursuing the said writ petition, from 17.12.2009 till the date of the order would be excluded while presenting the petition before the appropriate forum.

3. The facts of the case, stated very briefly are that the applicant was enrolled in the Army on 23.12.78 and was discharged on 31.12.98, after completion of 20 years of service, under Army Rule 13(3)(III(i) i.e. on fulfilling the condition of his service. At the time of his discharge, he was placed before a Release Medical Board on 26.5.98 at MH, Ambala, which opined that the disability (fractured patella) with which the applicant was suffering from, was attributable to military service. For this purpose, the ibid medical board awarded the percentage of disability as 20% disablement for two years which was subsequently held by re-survey medical board to be for life. Accordingly, the applicant is in receipt of 20% disability pension from the time he retired in 1998 along with his normal service pension.

4. According to the applicant, post-5th CPC (Central Pay Commission), the services of all ranks were extended by two years with a proviso that they would be screened two years prior to such extension. As per contention of the applicant, the term of service of the applicant as Naik would be actually 22 years instead of 20 years, which was hitherto fore applicable. He would have been screened for extension after 20 years of service; and further extension had been given to him, he could complete 22 years of service. He, however, concedes that he was in low medical category which actually debarred him from getting any extension when he was screened. He, however, contends that had this low medical category not been there, which was held by the appropriate medical board to be, 'attributable to military service', he would have got extension by two years and

served for 22 years of service which was actually the terms of service span for a Naik. Under such circumstances, it should be treated as a case of curtailment of service on account of medical disability, which in this case was attributable to military service. It is on this ground that he has prayed that as per policy of the Govt. of India, in vogue, 20% disability pension which he is in receipt should be rounded off to 50% with consequential benefits after treating the RMB as IMB.

5. It is admitted by the applicant that he was given honorary rank of Havildar on the Republic Day of 1998. However, he was not in receipt of any monetary benefits for such honorary rank during his service. It is only subsequent to his retirement that as per rules pension benefits were given to him as it would be for a Havildar instead of Naik.

6. The applicant made prayers before the authorities for grant of rounding off benefit. However, the respondents by a communication dt. 9.7.2009 (annexure-A1) have rejected the prayer on the ground that since the applicant retired on fulfillment of term of engagement under Army Rule 15(3) III (i), he was not eligible for rounding off of the disability element of the pension. Being aggrieved by denial of the said benefit, the applicant had earlier filed a writ petition before the Hon'ble Patna High Court as already stated above. In terms of liberty granted by the Hon'ble High Court, he has filed this original application before this Tribunal praying for the relief mentioned above.

7. Mr. S.K.Bhattacharyya, Id. adv. for the respondents has, at the outset, raised the point of maintainability since according to him the cause of action arose when the applicant was discharged on 31.12.98 whereas the applicant approached the Hon'ble Patna High Court in 2009. This aspect of delay has not been explained appropriately by the applicant, as submitted by Mr. Bhattacharyya.

8. While keeping the above point of maintainability issue open, the respondents have contested the application by filing a written reply in which they have not disputed the facts stated by the applicant. It is admitted that the applicant was, Ex Naik (Honorary Havildar), who was enrolled in the Army on 23.12.78 in the Corps of EME and was locally discharged from service w.e.f. 31.12.98 on completion of terms of engagement i.e. 20 years. He was placed in low medical category CEE (Per) due to disability "FRACTURE PATELLA (LT) OPT V-67". He was brought before the RMB which considered the said disability as 'attributable to military service' due to injury sustained while on duty and assessed the same at 20% for two years. Accordingly, he was granted disability pension by the PCDA (P) initially for two years, which was subsequently extended for a further period of two years and then again extended till life through subsequent resurvey medical boards.

9. The respondents have contended that the applicant's discharge was a normal retirement on completion of terms of service and is not a case of invalidment on account of a medical disability by curtailing his service span. Therefore, they contend that he is not entitled to get the rounding off benefit, since in terms of Govt. of India, Ministry of Defence letter dated 31.1.2001 (Annexure R-1), and such benefits are admissible to those who are invalidated out of service before completion of their terms of service. In the instant case, the applicant was discharged on fulfilling his terms of service and not invalidated out before completion of service and in the circumstances, in view of decision of the Hon'ble Supreme Court in **P.K.Kapur –vs- UOI** decided on 1.2.2007 (Civil Appeal No. 4356 of 2006), where it was held that concept of invalidment does not apply

to cases where an individual completed his tenure of service and retires on attaining the age/service of superannuation, the applicant is not entitled to the said benefit.

10. Mr. Monohar Prasad Singh, Id. adv. for the applicant, making his oral submissions, emphasised that the applicant was not granted extension of two years which he was entitled to as per 5th CPC award, although he was screened for the purpose after 20 years of service; but denied the opportunity to serve up to his full entitled tenure of 22 years of service due to a medical disability that was on account of military service conditions and notified as 'attributable to service'. Therefore, it is a case of 'curtailment of service' due to a medical disability. Therefore, it is a clear case where the applicant was invalidated out of service prematurely on account of a medical disability and not a case of simple retirement on completion of laid down tenure of service, as the respondents have made out. Therefore, the respondents cannot deny rounding off benefit to the applicant, which is applicable to all those who were invalidated from service as per government policy (Annexure R1) and admitted by the respondents.

11. Mr. Bhattacharyya, Id. counsel for the respondents, does not deny any of the facts that have been submitted by the applicant both in his application as well as during oral submission that was made by his Id. adv. He, however, raises the issue of the applicant having got the benefit of grant of honorary Havildar, must take note of the rule that stipulates grant of honorary rank to those who are in their last year of service. Therefore, he could not have served for any longer than 20 years of service (up to 31.12.1998), since he was granted the honorary rank of Havildar on 26 Jan 1998 on the occasion of the Republic Day. He draws our attention to annexure-R6 of his A/O which is a copy of Govt. policy dated 19th June 1980 laying down the criteria that honorary rank

can only be granted in the last year of colour service. Accordingly, the applicant was granted honorary rank in January 1998, having considered that that it would be his last year of colour service. Therefore, the claim of additional service as an entitlement by way of extension is not valid; because that would violate the provision of policy decision as mentioned in the Govt. letter dated 19.6.80 (Annexure-R6). He further submits that the policy with regard to extension of service, though enunciated by the 5th CPC, was actually communicated in September 1998. By that time, the applicant had already been granted honorary rank of Havildar. Therefore, he could not have been given any further extension, which would violate the provision of Govt. policy letter dt. 19.6.80. In this connection he also drew our attention to submissions made on this point in Para 7(f) and (g) (page 8) of his A/O.

12. We have given our thoughtful consideration to the rival contentions. So far as the issue of maintainability on the point of limitation, as raised by the Id. adv. for the respondents, we find that the applicant's prayer for rounding off benefit was last rejected by order dated 9th July 2009 (annexure-A1), thereafter the applicant approached the Hon'ble Patna High Court by filing a writ petition which was rejected on 22.10.10 on the ground of jurisdiction. However, liberty was granted to the applicant approach appropriate forum and the period consumed while pursuing the case before the Hon'ble High Court i.e. from 17.12.09 to 22.10.10, was ordered to be condoned. In our opinion, therefore, the question of limitation will not be applicable; moreover, it is a claim for pension and connected benefits, which is a continuing cause of action.

13. We have heard the learned advocates for the parties at length and have gone through the various documents placed on record. The short point that requires

adjudication is whether the applicant's service in the rank of Naik (Nk) was curtailed or not. In other words, whether the applicant was entitled to extension of service after screening or, whether conferment of honorary rank of Havildar would have debarred him from getting such extension as contended by the respondents?

14. In order to be satisfied, we asked to respondents to answer to the following queries:-

- i) Was the applicant ever screened for his extension of service i.e. from 20th years to 22nd years as per award of 5th CPC?
- ii) If so, the date on which such screening was held and the result of such screening board and the grounds for which the extension was denied by the screening board? We specifically asked whether he was denied extension because of grant of honorary rank or because of being in low medical category. This aspect needs clarification by producing documents through an affidavit.
- iii) Whether all those who were granted honorary rank of Havildar on 26th January 1998 of Indian Army irrespective of their medical category or disciplinary profile, were refused extension of service because they were granted honorary rank; but would be otherwise fit for extension, primarily due to the fact that such orders for extension, subject to screening, were received only in September 1998, as submitted by Mr. Bhattacharyya.

15. In reply, the respondents have produced a written communication dated 14th Aug 2013 from EME Records (EME Records letter No 14531839L/Court Case/Pen dated 14 Aug 2013). It will be relevant to quote the said replies herein as under:-

- (i) The applicant was screened for grant of extension of two yeas of service wef 23 Dec 1998 to 22 Dec 2000, on 13 May 1997 i.e. in his 20th year of service.

- (ii) Screening Board for extension of service in respect of the petitioner was held on 13 May 1997. The Board of Officers had held the applicant as “conditionally fit” for extension of service wef 23 Dec 1998 to 22 Dec 2000, as the applicant was placed in low medical category CEE (Permanent). Casualty to this effect was published vide EMER Records Part II order No. 243/0011/1997 dt. 28th May 1997. But since the applicant continued to be in LMC (Permanent) and extension was applicable subject to his medical category being upgraded to acceptable level before expiry of normal tenure in terms of Integrated HQ of MoD (Army letter No. B/33098/AG/PS-2© dt 04/24 May 1995, the applicant was discharged from service wef 31 Dec 1998. Hence, the applicant was denied the extension of service because of his low medical category and not due to grant of honorary rank of Havildar on 26 Jan 1998 vide EME records Part II order No. 042/1998 dt. 26 Jan 1998.
- (iii) On the occasion of 26 Jan 1998, 10 Naiks were granted Hony. Rank of Havildar including the applicant. In this connection a copy of EME Records Part II order No. 042/98 dt. 26 Jan 1998 is enclosed herewith. Since only the applicant was placed in permanent low medical category, he has not been granted extension of service even after being screened for the same. It is also submitted that there is no connection in between granting of honorary rank and extension of service beyond normal terms of engagement. In this connection Integrated HQ of MoD (Army letter No. B/33098/AG/PS-2© dt 21 Sep 1998 is enclosed herewith..... “

16. In view of the above clarifications given by the respondents, it is quite clear that the applicant was denied extension because of low medical category although he was screened and out of 10 Naiks, who were granted honorary rank on 26 Jan 1998, only the applicant was denied extension. Obviously, therefore, it is a case of curtailment of service in the case of the applicant for being in low medical category. It is also categorically

stated in the clarification that there was no connection between grant of honorary rank and extension of service. Therefore, the contention of Mr. Bhattacharyya in this regard also stands demolished.

17. In this connection, we may usefully refer to a recent decision rendered by this Bench in TA 41 of 2011 (**Atul Chandra Karmakar –vs- UOI & Ors**) decided on 17th May 2013. In that case, the applicant, a Havildar was denied two years extension because of low medical category which was attributable to military service. He claimed rounding off benefit because of curtailment of his tenure by two years. However, the contention of the respondents was that he retired after fulfilling his terms of service and therefore, he was not entitled to rounding off benefit. This Tribunal after analyzing the rule position and Govt. orders on the subject has observed as under:-

“16. After analyzing the *ibid* government policy letter of 3.9.1998, as reproduced above, we are of the view to interpret the object and language of the relevant policy letter as that the service limit for a Havildar is 26 years, subject to two years extension granted after 24 years or on attaining 49 years of age whichever is earlier. Only by interpreting in this manner, the object and spirit of two years age extension granted from 1.1.96 to all central government employees including the armed forces is met with due consideration to the peculiar service condition of the armed forces and the need to keep the soldiers young and fit. By interpreting in the manner that the respondents have done, ‘service limit for Havildar remains 24 years which can be extended by two years’ indicates that these two years are a bonus or a privilege that are granted subject to certain conditions. In effect that was never the object of the government when they issued the *ibid* policy subsequent to Vth CPC. Moreover, a military career of a soldier is always subject to remaining fit and disciplined. Whenever he fails to remain within the acceptable limits of such criteria his continuance in service is always curtailed under provisions of rules. A soldier faces such uncertainties from the time he is recruited. That does not mean the laid down term and conditions of service are tampered with. Therefore it reasonable to interpret the rules as done by us that is to say, a Havildar, post 1.1.96, can serve up to 26 years of service subject to grant of extension after 24 years of service or on attaining 49 years of age which ever is earlier.

17. Under such circumstances as discussed above, we are of the view that the applicant’s service was curtailed by two years due to a medical disability that was

attributable to military service; thus putting him in low medical category 'CEE', which was not the 'acceptable medical category' to grant him extension of two years after completion of 24 years of service. Therefore, the RMB held for him at the time of discharge should be considered as IMB and consequential benefits like 'rounding off' of disability pension as per rules need to be made applicable to him.

18. In consideration of our analysis of *ibid* policy letters as made above, we are of the view that the applicant will be eligible for "rounding off" of his disability pension which as per extant rule is 50% since he was in receipt of 30% disability pension. "

18. In arriving at the said decision, this Bench relied on the decision of Hon'ble Supreme court in *UOI & Ors -vs- Raj Pal Singh*, (2009)1 SCC 216 wherein it has been held in para 30 as under :-

"30. A plain reading of the army Order (AO 46/1980) 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, if 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 or service or extended service within the meaning of the Army Order, he has to be discharged as per procedure laid down in Clause 1(ii) in Column 2 of the said Table (Army Rule 13)."

19. It has not been brought to our judicial notice that the decision of this Bench in the above TA 41 of 2011 has been reversed/stayed by any higher court, and, therefore, it is desirable that we should follow our own decisions, especially when the same has been relied upon by Mr. Singh, Id. advocate for the applicant. Accordingly, we hold that the applicant ought to have been invalidated out of service before completion of his terms of service and he ought to have been placed before an Invalidating Medical Board in terms of Rule 13(3)(III)(iii) instead of placing him before a Release Medical Board and discharged under 13(3)(III)(i). Thus, he is entitled to get rounding off benefit as per Govt. policy from the date it is admissible to him.

20. In the result, the original application is allowed on contest but without any order as to cost, by issuing the following directions :-

- a) The applicant be deemed to be invalidated out of service w.e.f. 1.1.1999 before completion of his term of service on medical ground. Consequently, the RMB held in his case be treated as IMB for all intent and purposes.
- b) The applicant is held entitled to rounding off benefit by increasing his present disability pension from 20% to 50% as per extant Govt. policy from the date it is admissible to him. He is also held entitled to get all arrears that will accrue as a consequence thereof, which shall be paid to him within 90 days from the date of communication of this order.

21. Let the original records be returned to be respondents on proper receipt.

22. Let a plain copy of this order duly countersigned by the Tribunal Officer be furnished to the ld. advocates for the parties.

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

(JUSTICE RAGHUNATH RAY)
MEMBER (JUDICIAL)