

SUPREME COURT OF INDIA

Ex-Sepoy (Washerman) Ram Khilawan

Vs.

Union of India

C.A.No. of 2019

(L.Nageswara Rao and Hemant Gupta,JJ.,)

02.09.2019

JUDGMENT

Hemant Gupta.,

1. Delay condoned. Appeals admitted.
2. The challenge in the present appeals is to orders passed by the *Armed Forces Tribunal*¹, Regional Bench, Lucknow on October 21, 2011, May 28, 2013 and June 30, 2014 whereby, challenge to the discharge of the appellant from service on August 31, 1993 remained unsuccessful.
3. The appellant was enrolled in the Army as a Washerman on October 23, 1987. He was discharged from service on medical grounds on August 31, 1993 due to "CNS (IN) Seizure" when he was put in Low Medical Category BEE on August 27, 1992. Appellant, aggrieved against the discharge, submitted statutory complaint on August 11, 2007 wherein, the stand of the appellant was that no show-cause notice was given to him by the Commanding Officer who sanctioned discharge under Rule 13(3) Item III (v) of the *Army Rules, 1954*². Such statutory complaint was declined on October 12, 2007, inter alia, on the ground that though the appellant has given his option to serve in the sheltered appointment but no sheltered appointment was available commensurate with the trade to suitably employ in the public interest. Therefore, he was discharged under the provisions of Army Order 46 of 1980 read with Rule 13(3) Item III(v) of the Rules.
4. The appellant filed writ petition before the High Court of Judicature at Allahabad but subsequently on commencement of Armed Forces Tribunal Act, 2007, the writ petition was transferred to the Tribunal, Regional Bench, Lucknow. The learned Tribunal found that the appellant was placed in permanent Low Medical Category BEE and was discharged from service on August 31, 1993 with only 05 years 11 months and 08 days of service. The Classified Specialist has put the following restrictions on the appellant:

"not be allowed to swim or work near fire or moving machinery and also to handle

firearms to ensure seizure precautions." Therefore, he could not be employed in other sheltered appointment in public interest. The Tribunal found that the appellant has been given disability pension @20% for five years.

5. Some of the relevant provisions of the Rules need to be reproduced:

"13. Authorities empowered to authorize discharge. - (1) Each of the authorities specified in column 3 of the Table below shall be the competent authority to discharge service person subject to the Act specified in column 1 thereof on the grounds specified in column 2.

TABLE

Category	Grounds of discharge	Competent authority to authorise discharge	Manner of discharge
1	2	3	4
Junior Commissioner Officers	xx	xx	xx
Warrant Officer	xx	xx	xx
Persons enrolled under the act who have been attested	(III) (i) xx	xx	
	(ii) xx	xx	xx
	(iii) Having been found medically unfit for further service.	Commanding Officer	To be carried out only on the recommendation of an invaliding Board.
	(iii)(a) Having been found to be in permanent low medical category SHAPE 2/3 by a medical board and when:- (i) no sheltered appointment is available in the unit, or (ii) is surplus to the organization.	Commanding Officer	The individual will be discharged from service on the recommendations of Release Medical Board.
	(iv) At his own request before fulfilling the conditions of his	Commanding Officer	The Commanding Officer will exercise the power only

	enrolment.		when he is satisfied as to the desirability of sanctioning the application and the strength of the unit will not thereby be unduly reduced.
	(v) All other classes of discharge.	Brigade/Sub - Area Commander.	The Brigade or Sub-Area Commander before ordering the discharge shall, if the circumstances of the case permit give to the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge.

(iv) At his own request before fulfilling the conditions of his Commanding Officer The Commanding Officer will exercise the power only enrolment. when he is satisfied as to the desirability of sanctioning the application and the strength of the unit will not thereby be unduly reduced.

(v) All other classes of discharge. Brigade/Sub – Area Commander. The Brigade or Sub-Area Commander before ordering the discharge shall, if the circumstances of the case permit give to the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge.

6. Another relevant provision is Army Order No. 46 of 1980, which reads as under:

"AO 46/80 Disposal of Permanent Low Medical Category Personnel Other Than Officers Aim

1. The aim of this Army Order is to lay down implementation instructions for the disposal of permanent low medical category JCOs/OR in terms of Ministry of Defence Letter No. A/32395/VIII/Org 2 (MP) (c)/713-S/A/D (AG) dated 10-5-1977 as amended vide Corrigendum No. A/32395/X/Org 2 (MP) (c)/7167/A/D (AG) dated 26-11-1979, reproduced as Appendices A and B respectively to this Order.
Retention

2. General principles

(a) The employment of permanent low medical category personnel, at all times, is subject to the availability of suitable alternative appointments commensurate with

their medical category and also to the proviso that this can be justified in the public interest, and that their retention will not exceed the sanctioned strength of the regiment/corps. When such an appointment is not available or when their retention is either not considered necessary in the interest of the service or it exceeds the sanctioned strength of the regiment/corps, they will be discharged irrespective of the service put in by them.

(b) Ordinarily, permanent low medical category personnel will be retained in service till completion of 15 years' service in the case of JCOs and 10 years in the case of OR (including NCOs). However, such personnel may continue to be retained in service beyond the above period until they become due for discharge in the normal manner subject to their willingness and the fulfilment of the stipulation laid in sub-para (a) above."

7. Learned counsel for the appellant relied upon judgment of this Court in *Union of India & Ors. v. Rajpal Singh*³ wherein, this Court has held that if a person is to be discharged on the ground of medical unfitness, such discharge cannot be passed without subjecting him to the Invalidating Board as per procedure laid down in Rule 13. The Court held as under:

"30. A plain reading of the Army Order shows that it comes into operation after an opinion has been formed as to whether a particular personnel is to be retained in service or not, 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 of service or extended service within the meaning of the Army Order, he has to be discharged as per the procedure laid down in Clause I(ii) in Column 2 of the said Table."

8. In the present case, the order of discharge is on the ground that the appellant has been placed in Low Medical Category. The extract from the order of communication of discharge reads as under:

"1. The personnel mentioned in Appendix 'A' to this letter have been placed in Low Medical Category lower than 'AYE' and become due for x discharge from service as per policy on discharge of permanent low medical category personnel laid down in Army Order 46/80. They will report to Depot Coy HQ Wing ASC Centre (South), Bangalore-7 and SOS from service w.e.f. the dates shown against their names. No joining time is admissible."

9. The argument of learned counsel for the respondents is that the discharge of the appellant was under clause III(v) of Rule 13(3) of the Rules and, therefore, the question of subjecting the appellant to Invalidating Medical Board does not arise. It is argued that such is the case admitted by the appellant in his statutory complaint as well.

10. We have heard learned counsel for the parties and find that the discharge of the appellant was only under category 13(3)(III)(iii) as he has been found medically unfit for

further service. Clause (v) of Rule 13(3)(III) would be applicable in respect of all other classes of discharge which do not find mention in Rule 13(3)(III). The communication of discharge from the service is on the ground that he has been placed in the Low Medical Category. Once he has been put in Low Medical Category, clause (iii) of Rule 13(3)(III) would be applicable as such clause alone deals with discharge if any personnel is found medically unfit for further service. There is no reference to sub-clause (v) of Army Rule 13(3)(III) in the order of discharge. Still further, it is not the recital of a provision which is relevant to determine as to whether the personnel is discharged under clause (v) or clause (iii) of Rule 13(3)(III) of the Rules. It is the object, language and the purport of the discharge which will be relevant to determine whether an army personnel had been discharged under clause (iii) or clause (v). Clause (v) is the residual clause when other clauses are not applicable to such personnel. Since the discharge of the appellant is covered by clause (iii) of Rule 13(3)(III) of the Rules, as the discharge of the appellant was only on the ground of his medical unfitness for further service, therefore, he could not be invalidated out of service without the recommendation of the Invalidating Board.

11. This Court in *Smt. Sulekha Rani v. Union of India and Ors.* held that when the discharge was on the ground of medical unfitness, the Rule prescribes a particular procedure for discharge. Thus, an order of discharge passed without subjecting the officer to an Invalidating Board would be contrary to the statutory rule. The Court held as under:

"10. After considering the facts and material before us, we are of the view that the discharge of the appellant's spouse without convening an Invalidation Medical Board suffers from an illegality. The respondents have relied upon the response purportedly addressed by the Jawan to the notice to show cause issued to him. The provisions Rule 13(3)(III)(v) upon which reliance has been placed had no application to the case. It would not operate in an area which is covered by medical unfitness."

12. Therefore, we find that discharge of the appellant was not under the residual clause (v) but under clause (iii) of Rule 13(3)(III) of the Rules. Since the discharge has proceeded without reference to Invalidating Medical Board, such discharge is not legally sustainable.

13. Having said so, in terms of clause (b) of General Principles of Army Order 46 of 1980, he is entitled to be retained for ten years being in the rank of personnel of Other Ranks. Since, he joined the service on October 23, 1987, he would be deemed to be discharged only on October 22, 1997.

14. As a consequence thereof, the appellant became entitled to pension in addition to disability pension which was granted to him for a period of five years. However, the appellant will not be entitled to arrears of salary for the period up to the date of discharge inter alia on the ground of no work no pay but he shall be entitled to arrears of pension for a period of three years prior to filing of Writ Petition No. 61717 of 2007 which was transferred to the Tribunal. The arrears of pension be paid to the appellant within a period of six months from the date of receipt of copy of this order.

15. In view of the above, the appeals are allowed.

Judgment Referred.

¹*Tribunal*

²*Rules*

³*(2009) 1 SCC 0216*

⁴*C.A.No.1280 of 2019 decided on July 16, 2019*