IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)

T.A. No.458 of 2009

WP(C) No.7448 of 2009 of Delhi High Court

IN THE MATTER OF:

HAV (SKG) KARTAR SINGH .....APPLICANT
Through: Mr. D.S. Kauntae, counsel for the applicant

VERSUS

UNION OF INDIA AND OTHERS .....RESPONDENTS
Through: Mr. Anil Gautam, counsel for the respondents

CORAM:

HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

Date: 18.05.2012

1. The case was initially filed before the Hon'ble High Court on 27.02.2009 as WP (C) No.7448 of 2009 and was subsequently transferred to the Armed Forces Tribunal as TA. No.458/2009 on 25.11.2009.

2. Vide this petition the applicant has prayed for quashing and setting aside of the Army order dated 15.03.2000 and discharge order dated 31.08.2006 made effective from 28.02.2007 (Annexure P-1). The applicant has further prayed that he be reinstated in service with all consequential benefits.

3. The applicant was enrolled in the Army on 03.05.1986 in the Bengal Engineer Group and Centre and had claimed to serve the Army for almost 21 years with exemplary service record. On 19.05.2006, the applicant was downgraded to low medical category being a case of "MOVEMENT DISORDER". The applicant was discharged from Army service vide order dated 31.08.2006 which was made w.e.f. 28.02.2007 on the authority of the impugned order dated 15.03.2000 (alleged to be not supplied to the applicant) being permanent low medical category and non-availability of sheltered appointment, though it was submitted that the applicant was willing to continue in service.

4. Learned counsel for the applicant contended that vide Release Medical Board dated 12.10.2006 (Annexure P-2), the OIC Records passed the impugned discharge order prior to recommending the applicant to be invalidated out of service which is mandatory under Rule 13(3)(III)(iii) wherein it is clearly provided that the Commanding Officer is the competent authority to authorise discharge to the personnel below officer rank and the manner of discharge shall be carried out only on the recommendation of an IMB. He submitted that the OIC records was neither competent nor empowered to pass the impugned order against the applicant as has done in the present case.

5. Learned counsel for the applicant further contended that the authority to the CO for discharge only comes after the IMB has recommended discharge of the applicant on medical grounds.

6. Learned counsel for the applicant further stated that the Commanding Officer issued a show cause notice (Annexure P-3) just three days before the applicant was sent to the Military Hospital and the show cause notice was served upon the applicant in the Hospital and the applicant had difficulty in replying the show cause notice within two days. However, the applicant responded to the show cause notice on 30.09.2006 (Annexure P-4).

7. Learned counsel for the applicant further submitted that the applicant approached the Hon'ble High Court of Delhi vide writ petition No.5067/07 which was dismissed as withdrawn by order dated 16.07.2007 (Annexure P-7).

8. The applicant again approached the Hon'ble High Court of Delhi vide writ petition No.8873/2007 which was also dismissed by the Hon'ble High Court vide order dated 30.11.2007 for awaiting the response to the statutory complaint dated 25.10.2007 filed by the applicant. The applicant thereafter, sent a legal notice to the respondents on 01.01.2009 (Annexure P-10). The legal notice was rejected by the respondents vide their response dated 10.01.2009 (Annexure P-11).

9. Learned counsel for the applicant stated that there were several other individuals who were similarly placed under LMC (P) and were not discharged by the Record Office, though he has not impleaded

them in the present petition as no relief has been claimed against them but he has pleaded this point in his petition to show discrimination.

10. Learned counsel for the applicant also argued that he is governed by the judgment of Hon'ble Delhi High Court in case of **Nb. Sub. Rajpal Singh Vs Union of India reported in 127(2006) DLT 470(DB)** wherein the Hon'ble High Court has held that IMB is the pre-requisite condition to discharge on medical grounds. It has further been argued that the said judgment applied to the case of applicant mutatis mutandis as the applicant was discharged on 28.02.2007.

11. Learned counsel for the applicant also argued that he has challenged the policy of 15.03.2000 in which the discharge can be sanctioned without holding the IMB because of non-availability of sheltered appointment. Learned counsel for the applicant also argued that there is no provision in Army Rule 13(3) to discharge a person without holding the IMB.

12. Learned counsel for the applicant also argued that his disability was not considered as due to military service and because of that he has not been able to get any advantage of disability pension. At the same time, he is only drawing pension for 21 years whereas in normal course he would have retired after 24 years of service in the same rank.

13. Learned counsel for the respondents submitted that the applicant is barred by principal of constructive resjudicata from coming before the Hon'ble Court after his case was twice dismissed by the Hon'ble High Court. The Hon'ble High Court has not given liberty to the applicant nor he demanded to file a fresh case when he withdrew his petition on 16.07.2007 i.e. WPC No.5067/07 (Annexure P-7). Therefore, again on the same cause of action he is precluded from filing the fresh petition. Thus, there is no need to go again on merits of the case.

14. Learned counsel for the respondents also stated that writ petition No.8873/2007 which was dismissed by the Hon'ble High Court vide its order dated 30.11.2007 was limited in scope and it only pertain to the disposal of representation made by the applicant. This representation of the applicant was sent back to the applicant vide letter of respondents dated 06.12.2007 (Annexure R-3). Through this letter, it was advised to the applicant to take action as per Rule 26 of the Army Act 1950 and Para 368 of Regulation for the Army 1987 qua petition/complaint and he should submit the same through proper channel.

15. Learned counsel for the respondents also provided the details of 11 personnel in their affidavit. He argued that some of them were discharged and others who were provided sheltered appointment by their respective Cos, were permitted to continue but in case of

applicant, his CO has not recommended for shelter appointment. Thus, there is no question of discrimination at all.

16. As regards the criteria for giving sheltered appointment, AO 46/80 lays down the following pre-conditions:-

(a) Availability of suitable alternative appointment commensurate with their medical category.

(b) Should be justifiable in public interest.

(c) Such retention will not exceed the sanctioned strength of the Regiment/Corps.

17. Learned counsel for the respondents also argued that the above guiding principles are also taken into consideration while giving a sheltered appointment to an individual.

18. Learned counsel for the respondents also argued that Rajpal Singh's case (Supra) is not applicable to the applicant because appeal was preferred against that judgment before the Hon'ble Apex Court and that was decided on 07.11.2008 and the applicant was discharged earlier, the applicant has come to the Court only on 02.02.2009. He further argued that after the decision given in ***Nb. Sub. Rajpal Singh***'s case (supra), the matter came before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court, keeping in view the said decision, passed general order and as per that order the applicant was not entitled to be reinstated. Para 7(iv) of ***Sub. (SKT) Puttan Lal Vs. Union of India &***

Ors. **W.P.(C) No.5946/2007 decided on 20.11.2008** effectively excludes the applicant from getting any benefit from the above case.

19. Having heard both the parties at length and having examined the documents available on record, we are of this opinion that since the case has been transferred to the Hon'ble AFT, we have heard the case on merits.

20. Since the applicant has already gone to the Hon'ble High Court twice, first by way of WPC No.5067/07 in which vide order dated 16.07.2007, the case was withdrawn by the applicant with liberty to file the case afresh based on certain fresh information. Second time, the applicant filed WPC No.8873/2007 which was dismissed by the Hon'ble High Court vide order dated 30.11.2007 as the case was premature and the response to the statutory complaint dated 25.10.2007 was awaited. The order passed on his representation has not been challenged. The applicant thereafter also submitted a legal notice to the respondents on 01.01.2009. The legal notice was rejected by the respondents vide their letter dated 10.01.2009 (Annexure P-11). We noted that the applicant has not impugned the said rejection of the legal notice. Thus, there was no change in circumstances of the case as the applicant filed writ petitions twice before the Hon'ble Delhi High Court. From the perusal of record it is revealed that at the time of withdrawal of writ petitions no permission to file fresh writ petition was neither sought nor granted. Relevant orders passed in those writ petitions are reproduced as under:

"16.07.2007

W.P.(C) No.5067/2007

After arguing the matter at some length, Mr. Kauntae seeks leave to withdraw this writ petition.

Dismissed as withdrawn.

July 16, 2007"

"W.P.(C) 8873/2007

ORDER
30.11.2007

The Statutory Petition is dated 25.10.2007. No doubt it has been refilled. However, since only one month has passed, we do not consider it appropriate to entertain this petition.

The writ petition is dismissed.

November 30, 2007"

21. We have also considered the contention of the learned counsel for the applicant as regards the discharge order having been passed by the OIC Records even before the show cause notice was issued i.e. vide letter dated 28.02.2007. From a close examination of this letter, it is revealed that the letter basically was an advance notice stating the facts of the case and it directs the unit and the CO to take necessary action based on the policies applicable at that point of time. This letter shows that the applicant was LMC P-2(P) and it was directed

that necessary action should be taken as per the policy. It also stated that should he be not granted sheltered appointment, he should be discharged from 28.02.2007.

22. We have also examined the provisions contained in Rajpal Singh's case (supra) decided by the Hon'ble Delhi High Court, against which an appeal was filed that was decided by the Hon'ble Apex Court vide order dated 07.11.2008 in **Union of India Vs Rajpal Singh, Civil Appeal No.6787/2008**. We are of the opinion that the said case attained finality on 07.11.2008. Thereafter, keeping in mind the said case, general directions were given in Puttan Lal's case (Supra) as regards the implementation process. Para 7(iv) of Puttan Lal's case effectively excludes those applicants whose case is not pending before any of the Court at that point of time as on 20.11.2008 nor he was discharged under the policy letter dated 12.04.2007.

23. Our opinion as regards the applicability of Puttan Lal's case in this case also fortified by the judgments of AFT(PB) in **OA No.262/2010 Nk Narendra Kumar Vs Union of India** decided by this Tribunal on 08.11.2010. In a similar case in **TA No. 229/09 Risaldar Ram Karan Singh Vs Union of India** wherein person was discharged in 2006 filed a petition in the AFT. The AFT dismissed the petition and this decision of the Hon'ble Tribunal is upheld by the Hon'ble High Court of Delhi in WP(C) No.548/12 in the case of **Risaldar Ram Karan Singh Vs Union of India** decided on 25.01.2012.

24. Our view is further supported from the Judgment of Hon'ble Apex Court in the matter of **Bharat Sanchar Nigam Ltd Vs Ghanshyam Dass & Ors., dated 17.02.2011** wherein the Hon'ble Apex Court has held as under:-

> *"On the other hand, where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others. In Jagdish Lal and others v. State of Haryana and others [(1997) 6 SCC 538], the appellants who were general candidates belatedly challenged the promotion of Scheduled Caste and Scheduled Tribe candidates on the basis of the decisions in Ajit Singh Januja v. State of Punjab [(1996) 2 SCC 715], Union of India v. Virpal Singh Chauhan [(1995) 6 SCC 684] and R.K. Sabharwal v. State of Punjab [(1995) 2 SCC 745] and this Court refused to grant the relief saying: "....this Court has repeatedly held, the delay disentitles the party to the discretionary relief under Article 226 or Article 32 of the Constitution. It is not necessary to reiterate all the catena of precedents in this behalf. Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from Virpal Chauhan and Ajit Singh ratios. But Virpal Chauhan and Sabharwal cases, kept at rest the promotion already made by that date, and declared them as valid; they were limited to the question of future promotions given by applying the rule of reservation to all the persons prior to the date of judgment in Sabharwal case which required to be examined in the light of the law laid in Sabharwal case. Thus earlier promotions cannot be reopened. Only those cases arising after that date would be examined in the light of the law laid down in Sabharwal case*

and Virpal Chauhan case and equally Ajit Singh case. If the candidate has already been further promoted to the higher echelons of service, his seniority is not open to be reviewed. In A.B.S. Karamchari Sangh case a Bench of two Judges to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ. were members, had reiterated the above view and it was also held that all the prior promotions are not open to judicial review. In Chander Pal v. State of Haryana a Bench of two Judges consisting of S.C. Agrawal and G.T. Nanavati, JJ. considered the effect of Virpal Chauhan, Ajit Singh, Sabharwal and A.B.S. Karamchari Sangh cases and held that the seniority of those respondents who had already retired or had been promoted to higher posts could not be disturbed. The seniority of the petitioner therein and the respondents who were holding the post in the same level or in the same cadre would be adjusted keeping in view the ratio in Virpal Chauhan and Ajit Singh; but promotion, if any, had been given to any of them during the pendency of this writ petition was directed not to be disturbed.

Since the respondents preferred to sleep over their rights and approached the Central Administrative Tribunal only in 1997, they cannot get the benefit of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 and will only be entitled to the benefit of the circular dated 13.12.1995 which was in force in 1997."

25. We have also noted that his representation dated 25.10.2007 was returned unactioned because it was sent directly to the Army HQ. It was supposed to be initiated through the CO (respondent No.3). The applicant did not file a second representation thereafter but instead preferred a legal notice that was finally disposed off vide Annexure R-1 on 10.01.2009. That has again not challenged before us.

26. In view of the foregoing, we do not find any merit in the present matter. The TA is hereby dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 18th day of May, 2012