IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

Item Nos. 1,2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

OA 228/2012

Sub Lakshimi Kant Mishra .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. K.Ramesh, Adv & Ms Archana Ramesh Adv
For respondents: Col Arun Sharma and Maj Sarika P

with

OA 338/2011

Lance Dafedar Chandra Prakash .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. K.Ramesh, Adv and Ms Archana Ramesh, Adv
For respondents: Col Arun Sharma and Maj Sarika P

with

OA 339/2011

Nk D Rajesh .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. K.Ramesh, Advocate & Ms Archana Ramesh, Adv
For respondents: Ms. Jagrati Singh, Advocate

With

OA 340/2011
Nk Angad Kumar Singh .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. K.Ramesh, Advocate & Ms Archana Ramesh, Adv
For respondents: Mr. Ajai Bhalla, Advocate

With

OA 341/2011

Nk Ramchandra Swami .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. K.Ramesh, Advocate & Ms Archana Ramesh, Adv
For respondents: Ms. Jagrati Singh, adv proxy for Ms. Sangeeta Tomar, Advocate

with

OA 272/2012

Naik Om Prakash Singh .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr Sant Ram, Advocate
For respondents: Mr. Anil Gautam, Advocate

with

OA 236/2012

Ex Nk Naresh Kumar Chaudhary .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr SS Pandey, Advocate
For respondents: Mr. Ajai Bhalla, Advocate

With

OA 220/2012

Sub (Rt) Tri Bhuwan Upadhyay .....Petitioner
Versus
Union of India & Ors. .....Respondents

For petitioner: Mr. S.R.Kalkal, Advocate
For respondents: Mr. Anil Gautam, Advocate

With

OA 362/2012

Nk Pawan Singh .....**Petitioner**
Versus
Union of India & Ors. .....**Respondents**

For petitioner: Mr. K.Ramesh, Advocate & Ms Archana Ramesh, Adv
For respondents: Ms. Jagrati Singh, adv proxy for Ms. Barkha Babbar, Advocate

with

OA 43/2012

Ex Gunner Niraj Kumar Mishra .....**Petitioner**
Versus
Union of India & Ors. .....**Respondents**
For petitioner: Mr SS Pandey, Advocate
For respondents: Mr. Anil Gautam, Advocate

with

OA 255/2013
with MA 493/2013

Nb Sub Balwan Singh .....**Petitioner**
Versus

Union of India & Ors. .....**Respondents**

For petitioner: Mr. K. Ramesh & Ms. Archana Ramesh, Advocates
For respondents: Mr. Anil Gautam, Advocate

With

OA 169/2013

Subedar Davindra Singh .....**Petitioner**
Versus
Union of India & Ors. .....**Respondents**
For petitioner: Ms. Archana Ramesh, Adv & Mr K Ramesh, Adv
For respondents: Col Arun Sharma and Maj Sarika P

with

OA 315/2013

Sub Jung Bahadur Singh .....Petitioner

Versus

Union of India & Ors. .....Respondents

For petitioner: Ms. Archana Ramesh, Advocate & Mr K Ramesh, Adv
For respondents: Ms. Jagrati Singh, adv proxy for Ms. Sangeeta Tomar, Advocate

with

OA 368/2013
Sub Maj Ramesh Singh .....Petitioner

Versus

Union of India & Ors. .....Respondents

For petitioner: None
For respondents: Ms. Jagrati Singh, Advocate

Dated : 24th Sept. 2014

CORAM:

HON'BLE MR. JUSTICE PRAKASH TATIA, CHAIRPERSON.
HON'BLE MR. JUSTICE SUNIL HALI, MEMBER
HON'BLE LT. GEN. S.K.SINGH, MEMBER.

ORDER

By Mr Justice Prakash Tatia, Hon'ble Chairperson

The Petitioner of OA ~~288~~ 228 of 2012 Sub Laxmikant Mishra has challenged the validity and legality of the gazette notification datsed 13.05.2010 as well as Army HQ letter dated 30.09.2010 on the ground that said notification and letter are contrary to Army Rule13 read with Para 421 and 424 (C) of Medical regulations and judgment of the Hon'ble Supreme Court in the case of ***Nb. Sub. Rajpal Singh Vs UOI & ORS [(2009) 1 SCC 216)]*** and the judgment of the Hon'ble Delhi High Court in the case of ***Sub Puttan Lal and Ors Vs UOI*** **[WP (C) 5946 of 2007]** and also are contrary to para 162 of regulations for Army 1987 edition. The petitioners also sought consequential reliefs.

2. Finding this challenge in OA 228/2012 the Bench of the Tribunal vide order dated 23.07.2013 referred the question of validity of notification dated 13.05.2010 to the larger Bench. The question referred by the Bench of the Tribunal is as under:-

"Whether the notification dated 13.05.2010 is violative of Articles 14 or 16 of the Constitution of India.

3. In the other matters, also the same issue is involved, therefore, they also have been connected with above OA No ~~225~~/2012 so that all petitions may be heard on above issue. Therefore, all petitioners were given opportunity to address.

4. Vide notification dated 13.05.2010, in exercise of powers conferred by Sec 191 of Army Act 1950 with enabling powers, the Central Government framed the rules known as "Army (amendment) Rules 2010". By this amending enactment clause (ii)(a) have been inserted under the columns of the Table to the Rule 13 of the Army Rules 1954. The inserted clause (ii) (a) in the Table under Rule 13 with is as under:-

Category	Grounds of discharge	Competent authority to authorise discharge	Manner of discharge
1	(ii) (a) Having been found to be in	Commanding officer	The individual will be

	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 organisation		discharged from service on the recommendations of Release Medical Board.

5. According to learned counsels for the petitioners, Hon'ble Apex court in the case ***UOI & Ors Vs Rajpal Singh reported in [(2009) 1 SCC 216)]*** has considered the law relating to the procedure for the discharge of the Army Personnel on the ground of such person being in low medical category and it has been held in the case of Rajpal Singh and followed by Hon'ble Delhi High Court in the case of **WP(C) No 5946 of 2007 Sub Puttan Lal and Ors Vs UOI** decided on 20.11.2008, that only Invalidation Medical Board is competent to decide whether the Army Personnel can be discharged from service on medical grounds or not. Hon'ble Supreme Court in Rajpal's case (Supra) specifically held, that the officers can be put in various medical categories and which are as under:-

1 A) fit for all duties anywhere in the country,

1 B) fit for all duties anywhere but under medical supervision,

2) fit for all duties but may have limitations regarding duties involving physical/mental stress and required perfect acuity of vision and hearing,

3) Has limitations on employability, job wise as also terrain wise,

4) Temporarily unfit for military duties on account of hospitalisation or sick leave,

5) Permanently unfit for all military duties.

6. In military service a person is examined for various physical and mental attributes which are required to be according to following formula which is in short is called SHAPE:-

S – Psychological (covering all psychiatric illness)

H – Hearing (covering all hearing ailments)

A- Appendages (covering all ailments of hands/legs)

P- Physical (covering all physical ailments)

E – Eye sight (covering all ailments of the eyes)

7. After considering the above medical categories, it has been held, that if the PBOR has reached the last stage of physical unfitness(i.e.P 5) then he may not be retained in service after he is placed in SHAPE 5 and will be medically boarded out through Invalidation Medical Board. It has been also held that no other Medical Board can be relevant for this purpose and according to learned counsel for the petitioner, therefore, it is now settled legal position that persons in the army service cannot be discharged on medical ground by taking opinion of the Release Medical Board. According to learned counsel for the petitioners, said provision is applicable to all in service, he may be officer or he may be a Person Below Officer Rank (PBOR), as per para 162, 421 of Medical regulations. It is submitted that from the time when the Constitution of India came into force till 2010 an officer or a PBOR in medical category

SHAPE 2/3, all were treated alike and they could continue for full service till superannuation and are permitted to remain in service, though with certain limitations. It is submitted that all officers had the inherent protection of their tenure as envisaged in Article 310 of the Constitution of India and also by Section 18 of the Army Act, 1950.

8. According to learned counsel Mr K Ramesh, more than 26,000 PBORs were discharged from service on the ground of medical category SHAPE 2/3 without opinion of the Invalidation Medical Board, then large number of writ petitions were filed before the Delhi High Court which were decided by the Hon'ble Delhi High Court along with case of Puttan Lal Vs UOI & Ors (supra)and all those writ petitions were allowed by Hon'ble Delhi High Court and the orders of discharge from service were quashed and direction was issued to re-instate more than 26,000 PBORs. The said judgment was accepted by the UOI and also implemented and all, more than 26000 PBORs were re-instated in service. Therefore, it is settled that the person in low

medical category can be boarded out only if he is in Medical category SHAPE 5 and persons in Medical category SHAPE 2/3 cannot be boarded out on medical grounds. And no one in service can be boarded out from service without such opinion from Invalidating Medical Board. None of the employee can be boarded out from service on the basis of Medical opinion of Release Medical Board or Re-categorisation Medical Board. By amendment impuged, the respondents want to nullify the effect of law laid down by the Courts for ulterior motive and discriminate the PBOR as well as it favours the officers in service, therefore, the amendment is violation of Art 14 of the Constitution of India.

9. It has been submitted that such position of equal treatment of officers and PBORs which were continuing since long and it was violated for more than 26,000 PBORs, the Court intervened and set aside the order of the Government of India discharging the 26,000 PBORs,

therefore, the Government with an ego issue has made an amendment in Army Rule 13 that amounts to malafide interpolation and that too isolatedly discriminating PBORs and give a different treatment to the PBORs from the treatment which is continued for the officers. It is submitted that the officers and PBORs both are Government Servants and are protected by the provisions of Sec 18 of the Army Act 1950 and more by Article 310 of the Constitution of India which protects the right of the PBORs (Govt servants)to remain in service to the period of their tenure. According to learned counsel for all the petitioners, this discrimination has created arbitrary procedure disadvantage to the PBORs who earlier could have been released only upon opinion given by the Invalidation Medical Board and only if such person in low medical category of SHAPE 5 only. Person in medical category SHAPE 2/3 have right to continue in service in regular way as well as by giving him sheltered appointment.

10. All the learned counsel submitted that the respondents *malafidely* amended the Rule 13 and the Commanding Officer, (by his liking or disliking, or by his choice) may recommend the case of any PBOR to Release Medical Board in place of Invalidation Medical Board and after obtaining the opinion from the Release Medical Board in contravention to the judgment of the Rajpal Singh and Puttan Lal, may release a PBOR, who is in category SHAPE 2/3 which also is in contravention to the Medical regulations which specifically says that a person in service who is put in medical category SHAPE – P2 is fit for all duties though he may have some limitations regarding duties involving physical/mental stress and which duty requires perfect acuity of vision and hearing and for a person who is in category SHAPE 3, may have limitation of employability, job-wise as also terrain wise. The law laid down by the Court clearly indicate that such person cannot be discharged from the service on medical grounds. It has been held in above judgments that, the only person un-fit

for military service are those in category SHAPE 5 etc whose discharge has been recommended by Invalidation Medical Board, can be boarded out from service on medical grounds.

11. According to learned counsel Mr K Ramesh, as per para 163 of the Defence Security Regulations it has been provided that a Jawan is authorised, 17 years of colour service, a Naik 22 years, a Havildar 24 years, a Naib Subedar 26 years, a Subedar 28 years and a Subedar major 32 years of military service. In spite of this clear and specific provision in view of the Army Rule 13 and Army HQ Policy Letter dated 30.09.2010 a Subedar in SHAPE 2/3 category can be discharged even before his 28 years of colour service which is the period of authorised service in terms of para 163 of Defence Service Regulations and such Subedar in SHAPE 2/3 category can be granted an extension of service even after 28 years of colour service and thus one Subedar goes out of service on 15 years of

service while another Subedar in the same SHAPE 2/3 category enjoys service up to 28 years colour service and two years of extension also and it thereby created a class within a class which is contrary to and ultra vires article 14 of the Constitution. In support of this argument learned counsel relied upon the judgment of the Hon'ble Supreme Court delivered in the case of UOI Vs PS Vains reported in 2008 Vol 9 SCC 125.

12. It is also submitted that, as has been held by the Apex Court in Rajpal Singh's case, that any personnel in Medical Category SHAPE 2/3 may improve before his next medical re-categorisation by the Medical Board. But after the amendment in the Rule 13, a Commanding Officer may send some personnel of Category SHAPE 2/3 to the Release Medical Board for their discharge denying the persons in category SHAPE 2/3 to have chance of improvement which entitles on to continue in service.

13. Learned counsel Mr SS Pandey also, after adopting the arguments of Mr K Ramesh submitted that as per the Army law there are three Medical Boards, namely Re-categorisation Board, Release Medical Board and Invalidating Medical Board. The Rules of the three Medical Boards are different. If any PBOR will be released on the basis of opinion of Release Medical Board such decision of the Release Medical Board cannot be challenged in appeal which right is available to the PBOR when opinion is given by the Invalidating Medical Board. It is submitted that Rule 15(A) is Rule for release on medical grounds and therefore, the army personnel cannot be released on medical grounds by exercising power under Rule 13.

14. Learned counsel for the petitioner in OA 272 of 2012 Mr Sant Ram raised an objection that one of the Member of the Full Bench is an Administrative Member who was holding the high position in the Military service when he was working as Vice Chief of the Army Staff (VCOAS) and

therefore, the Administrative Member of the Bench cannot hear the matter. Learned counsel Mr Sant Ram submitted that, the Administrative Member was the officer in the Armed Forces therefore, there is likelihood of element of bias as well as the Administrative Member himself may be party in taking decision for amendment in the Rule 13.

15. The arguments of learned counsel for the petitioners challenging the amendment to Rule 13 made by the Gazzette Notification dated 13.05.2010 may summed up that the Courts have already held, that Army personnel can be released from service on medical grounds only on the basis of opinion of Invalidating Medical Board and in order to nullify the effect of the judgments of the Hon'ble Supreme Court delivered in the case of ***Rajpal Singh(Supra)*** and judgment of Hon'ble Delhi High Court delivered in the case of ***Sub Puttan Lal (Supra)*** the amendment has been carried out. The amendment is malafide as the Government found the judgment of the

Hon'ble Supreme Court and Hon'ble Delhi High Court was not acceptable to it particularly, the officers in the Military service. The amendment further deserves to be declared ultra vires of Article 14 as it created Class within Class when there being no such class within class. The amendment divides the service persons of the Army who from the top to bottom are the "service persons" and form "one Class" but after artificially dividing the class of service person in to two artificial classes of officers, the non officers have been given different treatment and put them in disadvantageous position, while continuing the advantage of the unamended provision to the "officers" of the Armed forces. The amendment also cannot be sustained in view of Para 110, 111, 162 of Defence Service Regulations and para 421 and 424 (C) of the Regulations for the Medical services for the Armed Forces. It will affect the rights of the PBOR available to them in view of para 163 of the Defence Service Regulations. The Government's intention behind the amendment was disclosed in Army HQrs Policy letter

dated 30.09.2010 which also indicates that in the name of policy decision it was decided to nullify the effect of the judgments of Rajpal Singh and Puttan Lal and therefore, intention behind the amendment vide Gazzette Notification dated 13.05.2010 came to surface from letter dated 30.09.2010 and it proves the malafide intention of the Government. The power under the amended rule can be abused by the Commanding Officer for which counsels tried to give examples from the facts of individual's cases.

16. Learned counsel Mr R Balasubramanian appearing on behalf of UOI submitted that, the petitioners have not questioned the competence of the Government in amending the Rule 13, while challenging the validity of the amendment of the Rule made by notification dated 13.05.2010. Therefore, it is admitted case that the Government has competence to amend the Rule. Learned counsel for the UOI submitted that the petitioner's contention that this amendment has created class out of

the one class of "service persons" of army, deserves to be rejected in view of the fact that the Army Act 1950 itself has clearly made distinction between two services one of the officers and another, other than officers which is reflected from the Clause (xvii) of the Section 3 of the Army Act 1950 where under it is mentioned that officers do not include a Junior Commissioned Officer (JCO), Warrant Officer (WO), Petty Officer or non-commissioned officer. JCO, WO and non-commissioned (NCO) have been separately defined in Clauses (xii) (xxiv) and in (xv) of the Section 3 of the Army Act 1950. Not only this but even in un-amended Rule 13, separate provision for discharge of personnel other than officer has been made which is clear from the table annexed to Rule 13. Even un-amended Rule 13 itself provide discharge on medical ground, of JCO, WO and persons enrolled under the Act who have been attested and who have not been attested. Whereas for officers for release on medical grounds Rule is 15(A). The source of recruitment for the different services as well as the service

conditions for the different cadre is different. Further the trade/actual job and duties of the various services are also different with clear object that only young and more healthy persons should remain in the lower cadre of the services and they be retired upon attaining a certain age or period of service to maintain the lower age group of energetic persons in the lowest cadre who can do strenuous physical work which is required for the Army. It is true that earlier personnel could be discharged from Army Service, irrespective whether he is officer or not, through Invaliding Medical Board if such person is unfit for further service. This position is not changed by the amended rule. It is true, in Rajpal Singh case and Sub Puttan Lal's case the issue regarding the discharge of the persons below the rank of officers on medical ground was considered and Courts have held that, when there is rule for discharge of personnel, then in violation to the Rule no one can be discharged. No Judgment or law has been cited by the learned counsel for the petitioners which lays down that

rule cannot be amended for providing a different procedure. It is admitted legal position, that Government is competent to amend the rule. The amendment of the rule which takes away the basis of judgment cannot be questioned merely on the ground that, it is intended to overcome the effect of judgment. Nor such amendment can be termed as malafide on the ground that is has removed the basis of the judgment. It is submitted that rule has not been amended with malafide intention and there is a presumption in favour of legislative bonafide and the validity of the rule. Mere presumptions and apprehensions of the petitioners cannot nullify the rules nor can it make the rule arbitrary unless proved from the facts. It is submitted that rule framing has its own procedure and in process of framing of Rule no one individual can influence the framing of the rule as it is a decision of the Government and further as per the Section 191 read with Section 193(a) the rules and regulations framed by the Government are required to be placed before each House of the parliament and the House may make

modifications and may disagree to framing of the rules. Therefore, it is concurrence of the Parliament which makes the Rule a law.

17. Learned counsel for the UOI then seriously objected to the objection raised by one of the petitioner about the constitution of the Bench and submitted that such objection was never raised by the petitioner in his OA. If such an objection would have been raised at the time of filing of the OA then the petitioner could have objected to the constitution of Bench by stating the facts and reasons for raising such objection, which has not been done by the petitioner in OA 272/2012. However, as submitted above, one person cannot influence framing of the rule. Therefore, the objection about the constitution of Bench deserves to be rejected. It is also submitted that if the regulation is not in consonance with the rule then regulations which are in consonance with rules will survive. The regulations or orders which are not in consonance with the rule they

cannot be applied nor the procedure prescribed by those regulations or orders can be applied to the cases for which the rule provides different procedure.

18. We considered the submissions of the learned counsel for the parties and perused the record, facts and considered the law.

19. The first question for our consideration is whether this Bench can hear the matter as one of the petitioner through his counsel has orally raised objection that one of the member of the Bench (Administrative Member) was holding a high position in the army as a Lt.Gen and Vice Chief of the Army and therefore, such Member cannot hear the matter and consequentially the constitution of the Bench was illegal.

20. It may be appropriate to mention that such plea has not been taken by any of the petitioners except the learned counsel appearing in OA 272 of 2012 orally. The petitioner in OA No 272 of 2012, after the matter was

referred to the larger Bench after its constitution on 13.01.2014 has not raised any objection by submitting a written submission indicating facts and grounds against the constitution of this Bench which was constituted by the order of the Chairperson on 13.01.2014. Even earlier also the full Bench was constituted by order of the Chairperson dated 27.09.2013, had one of the Administrative Member as its Member who was also holding the rank of Lt General and also held the position of VCOAS. Since the objection has been raised orally, therefore, respondents did not have any opportunity to rebut the same. As such no notice can be taken by us in this behalf. The argument is vague. The objection raised by the petitioner deserves to be rejected summarily for lack of particulars.

21. Even otherwise the contention raised by the learned counsel for the petitioner that one of the Member (Administrative) has served in various capacities in the Army which includes Vice Chief of Army Staff could have influenced the decision in promulgating the rule in question.

The argument is not only misconceived but far fetched. The amendment of Rule require various process at various levels. It ultimately has to be issued by the competent authority which in the present case is Union of India. One of the functionaries of Union of India can hardly influence the making of the Rule. In order to sustain such allegations facts have to be clearly stated as how he has influenced the promulgation of rule which admittedly are missing in the present case. Therefore, on that count also the plea cannot be considered by this court.

22. The contention of the learned counsel for the petitioner is that officers and persons who are below the rank of PBOR constituted one class. Therefore, 2 modes for invalidating from service cannot be permitted. What has been contended is that Boarding of officers below the rank of PBOR is being done by release Board while in the case of officers it is by invalidating Board. It is not in dispute that Article 14 forbids classification. It does not forbids a reasonable classification for the purpose of legislation. In

order to pass the test of permissible classification, two conditions must be fulfilled namely; (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. Therefore, it is necessary that basis of the classification must have some nexus with the object to be achieved. In the present context it is necessary to examine the scheme of the Army Act and Regulations which will give us a clear picture as to whether it constitute one class or there are distinct features which make it two different classes. In order to appreciate this, following schemes of the Act and Regulations are enumerated.

23. Section 191 empowers the Government to frame the rule which includes the power to amend the rules. The clause (a) of sub section (2) of Section 191 empowers the

Government to frame the rule for removal, retirement, release or discharge from service of persons who are subject to Army Act 1950. The Government is required to place the rule or proposal for amendment of rule before each House of the Parliament. If both the Houses agree in making any modification in rule or both the Houses agree that rule should not be made, the rule or regulation shall thereafter have affected only in such modified form or be of no affect as the case may be. Therefore, the process of framing of rule is not under challenge then in that situation the petitioner could not have any grievance for hearing of the matter on the ground of any bias on the basis of objection that the Member of the Bench may also have been involved in the framing of the rules. Therefore, also the petitioner's objection is liable to be rejected.

24. From reading of the Clause (iixx) under Section 3 of the Army Act 1950 itself it is clear that JCO, WO, Petty officer and non-commissioned officer are not in the cadre of

officer as such persons have been specifically excluded from the definition of "Officer". Such personnel i.e. JCO, WO, Petty officer or non-commissioned officer have been defined separately in Clause (xii), (ivxx) and (xv). Therefore, the Act of 1950 itself created the two class in the service of the Armed Force, i.e. , in the Army

25. To further examine this issue that whether the officers in the Army and other than officers in Armed Forces form one class, it will be appropriate to examine the scheme of the appointments in the Army which is governed by the "Defence Service Regulations" which govern the Defence Service Personnel. It include "officers" under Chapter III and "other than officers" in Chapter IV. Chapter III of the said Regulations provide various provisions for the "Officers". Under above heading, from the Regulation 55 onwards under Chapter III deals with the subjects of First Appointment, Grading, Posting and Transfers. The Regulation 55 deals with the "Commencement of Service"

and it says unless specifically provided for otherwise, an officer's service commences from the date of his first commission. Such appointment of any nature given in Regulation 55 is required to be published in the orders of sanctioning authority and in the absence of any specified date is to take effect from the date of order in which they appear. Such grant of first commission and promotion to the substantive rank and conferment of local rank is required to be notified in the Gazette of India. Then Regulation 56 deals eligibility and conditions for Appointments in the Regular Army. Regulation 58 deals with appointments to the military nursing service, Regulation 59 deals with the appointments to the Army Medical Corps (non-technical). Regulation 60 deals with appointments to the special list of the officers. Thereafter Regulation 63 provide for basic training or attachment of officer and under this very Chapter III provision for transfers, substantive promotion by time scale up to and including the rank of Major etc have been provided which

includes the provision for substantive promotion by selection under Regulation 67 and provision for various wings in the service. Under Chapter III itself Regulation 110 separate provision has been made for the officer who are reported as permanently unfit for service and it provides that when an officer is reported as permanently unfit for service Medical Board will be assembled to carry out further examination. In Regulation 110 it has also been provided that when officer is declared by Medical Board to be permanently unfit for any form of military service the proceedings of the Medical Board will be submitted through Departmental Channels to the Director Medical Services, DMS(Army) for acceptance and if findings of such Medical Board are accepted by the DMS(Army) the Board proceedings will be disposed off under the normal administrative instructions in force. Regulation 110(b) provides for recommendation of sick leave Medical Board upon seeking leave on medical grounds. Regulation 111 provides disposal of officers declared permanently unfit for

any form of military service. Regulation 110 and 111 are relevant which are as under:-

> ***Regulation 110***
> ***Medical Board proceedings*** *(a)* ***Invaliding Medical Board*** *– When an officer is reported as permanently unfit for service, a Medical Board will be assembled to carry out further examination. When an officer is declared by a Medical Board to be permanently unfit for any form of military service the proceedings of the Medical Board will be submitted through departmental channels to the DMS (Army), for acceptance. If the findings of the board are accepted by the DMS(Army), the board proceedings will be disposed of under the normal administrative instructions in force.*
>
> *(b)* ***Sick leave Medical Board*** *– When an officer is recommended sick leave, the findings of the Medical Board will be reported immediately to the administrative authority at Army HQ, and the normal leave sanctioning authority may, on the recommendation of the Medical Board, grant leave without waiting for information from Army HQ.*
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> ***Regulation 111*** *:**Disposal of officers, Declared Permanently Unfit for any Form of Military Service.-** Officers declared to be permanently unfit for any form of military service by a Medical Board will be invalided out of the Army under the provisions of Amy Rule 15A on the*

proceedings of the said Medical Board being accepted by DMS(Army).

26. From above it is clear that Defence Service Regulations has put the officers separate from the persons below the rank of the officers. After examining the above Defence Service Regulations, now we may look in to the various provisions in the regulations for the personnel other than officer given in Chapter IV of the regulations

27. The Army personnel other than officers are governed by the Regulations under Chapter IV of the Regulations which are applicable to the Junior Commissioned Officers (JCO), Warrant Officer (W.O.) other Ranks (Ors) and non combatant enrolled. Above personnel's Rank Appointment and the Order of procedure is given under Regulation 131. The relevant part of the Regulation 131 is as under:-

***Regulation 131* -The Rank, Appointment and Order of Precedence-** *The rank, appointment and precedence of persons,*

subject to the Army Act (other than officers) are set forth below. The grant, under authority, of any appointment therein detailed confers on the holder the rank specified. Those bracketed together rank with one another according to their date of promotion or appointment. The corresponding ranks in the Indian Navy and Indian Air Force are also shown.

28. As per the Regulation 132, the COAS is vested with the executive control over the recruitment of all personnel included in the sanctioned establishment of the Army. The Regulation 132 is as under:-

Regulation 132 Recruitment *The Chief of the Army Staff is vested with the entire executive control over the recruitment of all personnel included in the sanctioned establishment of the Army. All personnel will be enrolled into corps and not into any special unit of that corps. For the Infantry (including Gorkha regiments) the corps is the Regiment.*

29. Regulation 133 deals with the "Enrolment" and Regulation 134 prescribes the " Terms of Service" for various groups.

30. For the other officers in army service, for Group I Service, term of office is 17 years with colours and 2 years in reserve or till attainment of 40 years of age, which ever is earlier. For Group II service, 20 years service with colour and 3 years in the reserve or till the age of 46 years, whoever is earlier. The recruitment process for the personnel other than the officers also find space under term of office is under the recruitment process for the personnel other than the officers also finds space under Chapter IV of the Regulations. Regulation 142 under Chapter IV allows re-enrolment of ex-serviceman upon fulfillment of certain conditions. Such provision is not under Chapter III for officers. Regulation 143 provides for enrollment of ex-serviceman who was medically boarded out and for such person can be re-enrolled upon fulfillment of the conditions prescribed under Regulation 143 and therefore, the ex-serviceman who have been medically boarded out can be re-employed. Such provision does not exist under Chapter III which deals with the officers service conditions. The Regulation 146 provides that a man enrolled for contractual period of engagement who has completed prescribed service or age limit applicable to his rank and does not wish to extend and may be retained in service compulsorily under certain conditions. Regulation 146 is also relevant because in it, it has been mentioned that under certain

circumstances and when in the establishment to which he belongs is 10% below the strength then such person can be retained in service compulsorily. Under Chapter IV of the Regulations, for Army Persons Below the Rank of Officers pertaining to the Promotion, Appointment and Tenure are given under Regulation 147 to 152 which describes the duties of various persons serving in the Army Below the Rank of Officers. Regulation 162 deals with retirement, resignation, dismissal, discharge and reduction of strength. Regulation 162 provide for retirement of JCOs/ORs who are found medically unfit at the time of release and sending their case to the Medical Board for recording clinical condition of the individual and assess the percentage of disability and for giving opinion regarding attributability /aggravation of the disability and to assess the percentage of disablement of the individual. Regulation 163, 164 deals with the subject of retirement of JCOs and NCOs respectively. In some and substance, the complete service conditions of other than officers is prescribed under Chapter IV of the Regulation.

31. Undisputedly all the persons in Army service elaborated in Class A to I ("L" deleted) are subject to sub section 1 and sub section 2 of Army Act 1950. But Army Act itself placed the JCO [sec 3(xii)] and officer [Sec 3(iixx)]

in different class and therefore, two have been dealt with under different chapter, namely officer under Chapter III and other than officer under Chapter IV of the Service Regulations for the Army.

32. It will be worthwhile to mention here that learned counsels for the petitioner Mr K Ramesh gave a very broad classification for army service and submitted that all in military service are forming one class which appears to be not correct. Such broad meaning cannot be given to include all persons serving in Military Service to be forming one class. Such broad classification will destroy the total working in any service because of the reason that even where the tenure of service is same, prescribed by rules and i.e. on attaining particular age for superannuation irrespective of cadre cannot be treated as one class. That will be just contrary to the service jurisprudence and such interpretation even cannot be given in other services, other than military service. In addition to above, the military service cannot be equated with general service as has been observed by the Hon'ble Supreme Court in the case of Devdutt Vs UOI reported in 2008 Vol 8 SCC 725. Otherwise also after comparing the service conditions of the officers and other than officers in the army service from time of their entry in service to discharge as well as their

liabilities and their procedure for Medical Boarding out from service, we are of considered opinion that it cannot be held that the officers and other than officers in military service form one class.

33. Therefore, it is clear from the Army Act 1950 and the regulations framed there under that two classes are entirely different with different source and method of recruitment with different service conditions and duties which are dealt with separately. PBOR are required to discharge entirely different duties. They are required to do more physical work therefore, they are retired at an early age and their age of retirement is increased as their rank goes higher. Hence, there is no force in the submission that army personnel as a whole form one class.

34. From the aforementioned discussion it clearly appears that reasonable classification is clearly spelt out as the officers and PBOR are two distinct classes. The object of such a classification is to maintain the physical fitness of the persons working as PBORs, as they are a fighting force and are expected to maintain the fitness as described under Army manual. Therefore, keeping in view these facts their medical category assumes importance. We are fortified in the view by the judgment reported in **AIR S.C**

538 (V 45C 80). Shri Ram Krishan Dalmia and others Vs Shri Justice S.R. Tendolkar and others which reads as under:-

> *" It is now well establishment that while Article 14 forbids class legislation. It does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely; (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differntia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of Supreme Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.*

The judgment clearly spells out the principle on which a classification can be justified. It clearly covers the case in hand.

35. Reliance has also been placed on the judgment (1997) 7 Supreme Court cases 334 – Union of India Vs Lieut (Mrs E. Lacats). In the judgment the apex court has observed as under:-

> *" If different nursing services are constituted under separate army instructions carrying their own separate terms and conditions of service, one cannot complain of discrimination if the ages of retirement prescribed under these different services are different. Each will be governed by its own rules and regulations. The respondent is therefore, not justified in claiming that she has been discriminated against, because she was retired at the age of 55."*

36. In exercise of powers conferred by sec 191 of the Army Act 1950 and with the help of enabling power the Army rules 1954 have been framed. Under Rules 1954 various authorities have been empowered to discharge various persons in the service which have been specified in the table in different columns under Rule 13. Rule 13, Sub Rule ii(a) empowers the Central Government or the

COAS to decide that any person or class or persons should be discharged from service under the circumstances referred in sub rule (2A) of Rule 13 and this very sub rule (2A) authorizes the commanding officer to discharge the person from service.

Validity of Amendment vide Notification dated 13.05.2010

37. It will be worthwhile to mention here that in Rule 13, provision has been made for discharge of Army personnel for various reasons including on the ground of becoming medically unfit for further service in military. At the cost of repetition, because of the reason that arguments may confuse that Rule 13 deals and cover the cases of discharge of personnel on the ground of medical disability, it is reiterated that Rule 13 deals with subject of discharge of a personnel for all reasons including on medical ground. In contrast, for release of an army officer on medical ground is Rule 15(A) which is separate provision and therefore, for release of the officer and persons other than officer on medical ground different provision applies and both are not dealt under one rule only.

38. It has been projected in the arguments by the learned counsel for the parties that, by the impugned amendment by insertion of clauses (ii) (a) in the Table under Rule 13, the change has been made with respect to

the Medical Board which can opine for discharge of personnel other than officers. Earlier discharge of personnel from service on medical grounds for "persons other than officers", opinion could have been given by only the Invaliding Medical Board. After amendment such person can be boarded out from service on the basis of the recommendations of "Release Medical Board." The serious objection of all the petitioners is about the change in procedure and i.e. the release of individual on the basis of recommendation of Release Medical Board in place of recommendation of Invaliding Medical Board. Second Serious grievance is against the provision provided by newly inserted provision clause (ii) (a) under column 2 of the Table which empowers the commanding officer to recommend the discharge of the persons in low medical category; SHAPE 2/3. Before insertion of clause (ii) (a) the person other than officer could not have been discharged from service is such person would have been in Medical category SHAPE 2/3. In the case of Rajpal Singh and in the case of Sub Puttan Lal (Supra) when persons who were in medical category SHAPE 2/3 were discharged from service, such orders were set aside by the Hon'ble Supreme Court and Hon'ble Delhi High Court. Said judgments (Rajpal Singh and Sub Puttan Lal's cases) are

heavily relied upon by the learned counsel for the petitioner.

39. Learned counsel for the petitioners in their arguments projected that in above judgments, it has been held that, a personnel in service can be discharged from service only if such person is found medically unfit for further service and whether, one is medically unfit or not is required to be decided only by the Invaliding Medical Board and none of the other Medical Board is competent to declare a person medically unfit for further service. We carefully considered the judgments referred above of the Hon'ble Supreme Court delivered in the case of Rajpal Singh and Hon'ble Delhi High Court in the case of Sub Puttan Lal.

40. We may consider the case of Rajpal Singh (supra). Learned counsel for the petitioner have heavily relied on the judgment of the Hon'ble Supreme Court delivered in the case of Rajpal Singh reported in 2009 (I)SCC 216 (Supra). In said case one JCO enrolled in the army on 09.03.1980 fell ill and admitted in hospital and was discharged on 07.11.2000 and was placed in low medical category HI AI P2 EI wef 06.11.2000 for 6 months. He had disability namely ischaemic heart disease and he continued in low medical category for another 6 months and therefore he

was to be in permanent low medical category from 10th October. Before expiry of two years a show cause notice was served on the petitioner on 27.02.2002 stating that since he was placed in permanent low medical category why he should not be discharged from service as no sheltered appointment was available as his unit was deployed in a field area. In reply to the show cause notice, the petitioner expressed his willingness to continue in service but the release medical board was constituted which recommended petitioner's discharge from service and therefore, petitioner was discharged from the service w.e.f. 31.08.2002. The petitioner challenged the said order of discharge on various grounds. Hon'ble Supreme Court after considering the army rule 13 (3) (I) (II) rule 13(3) (I) (III) (C) read with rule 13(ii) (a) as well as army order, AO 46 of 1980 and upheld the judgement of the Hon'ble High Court whereby the Hon'ble High Court quashed the discharge order. Hon'ble Supreme Court found that in said case pre-dominant reason for discharge of petitioner was medical ground and in the rules which were in existence (prior to amendment) there was only one provision for discharge of army personnel on medical ground and that was the clause (ii) and that is ; "(ii) having found medically unfit for further service". Therefore, Hon'ble Supreme Court in the facts of the case, in view of the law which was

there at that time, held that the employee Rajpal was sought to be discharged on the ground of "Medically unfit for further service' (though "low medical category permanent P- 2)" Therefore, Hon'ble Supreme Court held that:- ".....irrespective of fact whether he is or was in low medical category, his order of discharge can be made only on the recommendations of an Invalidating Board. The said rule being clear and unambiguous is capable of only interpretation and no other". Then Hon'ble Supreme Court held that the respondent cannot invoke the residual clause (iii) when petitioner's case is covered under specific head i.e., clause (ii) in the Table. Hon'ble Supreme Court in para 19 observed that an army personnel who is categorized as SHAPE 5 is not considered to be fit for normal services of the Army such person is mandatorily brought before the Invaliding Board in terms of rule 13(3) whereas an army personnel who is in SHAPE 2 and 3 is to undergo Medical Boards apart from annual medical examination. The Hon'ble Supreme Court observed that the said personnel obviously falling in medical category SHAPE 2 and 3, are not medically unfit but at the same time they are not fit for all the army duties and therefore they are retained for 15 years or 20 years as the case may be on the sheltered post mandatorily. The said view was taken because of the reason that at that time clause (ii)(a) in the Rule-3 was not

there and therefore, clause (a) of para-2 of Army Order, i.e., AO 46/80 could not have been invoked. Taking help of above decision of the Hon'ble Supreme Court, learned counsel for the petitioner submitted that the persons in medical category SHAPE 2 or 3 (P) cannot be discharged from service through Release Medical Board and they are required to be retained further in service. However, the arguments appear to be attractive but missing the important point that Hon'ble Supreme Court in para 14 took note of the earlier decision of the Hon'ble Supreme Court in the case of Nazir Ahmed Vs King Emperor in the case of state of UP Vs Singh Hara Singh AIR 1964 SCC 358 and wherein it has been held that where power is given to do certain things in a certain way the things may be done in that way or not at all and that other methods of performance are necessarily forbidden. The case of Rajpal Singh was decided in view of the existing Rule 13 and clauses under the Table of Rule 13, which were in existence at a relevant time and where under, the only provision for discharge of an army personnel upon his being found medically unfit was clause (ii) in the Table under Rule 13 and there was no other provision. Thereafter the Hon'ble Supreme Court in case where the person discharged from service due to his low medical category of P-2 (permanent) held that he is discharged only

on medical disability ground and to deal with such discharge is only clause (ii) in the Table under Rule-13. Therefore, in view of the absence of the rule as is available in the rules by insertion of the clause (ii) (a) referred above, said decision was given by the Hon'ble Supreme Court, ratio of which cannot be applied to the cases when Rule 13 with Clause (ii) (a) is available. Therefore, the judgment of the Rajpal Singh applies to the case only when one is sought to be released from service when he is found "medically unfit for further service" in army. The clause (ii) (a) is not a clause for discharge of a person on the ground of "medical unfitness for further service" but clause (ii) (a) is to keep the staff within the strength limit and that is the pre-dominant reason. Clause (ii) (a) will maintain the strength of the sheltered appointment post which will allow the discharge of persons who is in excess to the sanctioned strength and at the same time giving benefit the persons who are medically fit and in SHAPE P-2 and P-3 within permissible limit of the service strength. It needs little emphasis that fitness of the personnel of armed forces at all levels is of peramount consideration and there cannot be any compromise at that score. It is with this object in view, the legislature has enacted the Army Act 1950, the Armed Forces Medical Service Act, 1983 and framed the army

rules. In Rajpal Singh case itself in para 17 Hon'ble Supreme Court held as under:

> *"It needs little emphasis that fitness of the personnel of Armed Forces at all levels is of paramount consideration and there cannot be any compromise on that score. It is with this object in view, the legislature has enacted the Army Act, 1950; he Armed Forces Medical Services Act, 1983, and framed the Army Rules. Army orders are also issued from time to time in order to give effect to these statutory provisions in letter and spirit. As per the procedure detailed in the written submissions, filed on behalf of the appellants, annual or periodic medical examination of the army personnel is done on certain specific norms."*

It appears from the newly inserted clause (ii) (a) at various places in the table appended Rule 13, to over come the difficulty created by the persons in service in excess to the sanctioned strength and also who cannot be accommodated in sheltered appointment clause (ii) (a) has been inserted. Provision has been made to encourage the young persons serving in the armed forces in the ranks of JCO/WO and persons enrolled attested to remain in fit medical condition. We are conscious of the fact that the disability/disease of one is not by choice but it is forced by the various reasons and i.e beyond control of a person.

But at the same time *even on the ground of sympathy there cannot be compromise in fitness of a personnel of armed forces which is of paramount consideration as held by the Hon'ble Supreme Court.*

41. There cannot be any dispute about the laws laid down in above two judgments. It appears that the amendment has been understood by the petitioners, as empowering the Release Medical Board to take decision about the "Medical unfitness for further service" for personnel, and therefore, learned counsel for the petitioner vehemently submitted that, only if Invaliding Medical Board gives opinion against a person's fitness and decides that such person is medically unfit for further service, then only such person can be discharged from service on medical ground. Apparently, argument as presented appears to be quite attractive but if it is examined in the light of the above two judgments i.e. judgment of Rajpal Singh and Sub Puttan Lal's cases the argument is a misplaced argument. If we look into the rule, we may find that the rule has not been amended affecting the above clause in the Table of the Rule 13. To put emphasis we would like to quote here the relevant para of the said clause which was there before the impugned amendment and which is as it is even after amendment.

Category	Grounds of discharge	Competent authority to authorize discharge	Manner of discharge
Junior Commissioned officers	Having been found medically unfit for further service	Commanding officer	To be carried out only on the recommendation of an Invaliding Board.

42. Confusion may have been created because of insertion of clause (ii) (a) (at different places in the Table) which is the impuged. The clause (ii) (a) is as under:-

Category	Grounds of discharge	Competent authority to authorise discharge	Manner of discharge
1	(ii) (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 organisation	Commanding officer	The individual will be discharged from service on the recommendations of Release Medical Board.

The confusion may have been because of the reason that the above clause II(a) has not been given a separate number and it has been given a number as a part of clause (ii) whereas the (ii) (a) deals with entirely different subject than the subject of persons "medically unfit for further service" which is covered and governed by only clause (ii) under Table of Rule 13. Though AO 46 of 1980 was already there but source of power to discharge of Army Personnel was not there in the Army Rules, 1954,

therefore, the clause (ii) (a) has been inserted which could have been inserted only under Rule 13 because Rule 13 of Rules of 1954 deals with all eventualities of discharge of the persons in service who are not in the officers rank. Rule 13 covers the discharge of personnel for various reasons like; on completion of period of service or tenure specified under regulation for his rank or appointment, or on reaching the age limit whichever is earlier, unless trainee on the active list for further specified period with the sanction of the Chief of Army Staff or on becoming eligible for release under Regulation and also deals with the subject and discharge of a person at his own request on transfer to the base establishment. Since one of the reason for discharge is one becoming "medically unfit for further service", therefore, said subject is also dealt with and is covered by Rule 13. Rule 13 is not the rule empowering authorities to discharge personnel only on ground of medical unfitness for further service. It may be true that earlier (Sub Puttan lal's case) the respondents tried to discharge all persons in medical category SHAPE 2/3 by one order. That was not permissible. Such discharge was not provided in any rule, and therefore, such orders were set aside by the Delhi High court inPuttan Lal's case. Above judgments decided the cases which were before the courts, on the basis of the Rules which were in

existence at relevant time. These judgments nowhere deal with the power of the Government in amending the rule and prohibited the Government from making the rule impugned. It appears that after the Puttan Lal judgment, Government looked into the issue afresh and therefore, it has been mentioned in the communication dated 30.09.2010, that difficulty has arisen due to the Sub Puttan Lal's case and therefore, the Government is required to amend the Rule and consequently the clause (ii) (a) has been inserted in the Table appended to Rule 13 providing for the discharge of personnel who are surplus to the organization or where no shelter appointment is available for them in the unit. While doing so the government tried to accommodate all persons who are in SHAPE 2/3 and are within sanctioned strength and for whom sheltered appointment is available. By this mode, difficulty of keeping person, where shelter appointment is not available or where number of sick persons is in excess to the strength of the unit has been addressed. This rule nowhere provided that all persons falling in category SHAPE 2 and SHAPE 3 will be discharged from service. Therefore, the clause (ii) (a) in fact gives full respect to Rajpal Singh's case and Sub Puttan Lal's case and did not provide for discharge of all persons who are in medical category SHAPE 2 and 3. The discharge of the persons in medical category SHAPE 2 and

3 requires two mandatory conditions and those are mentioned in sub clause (ii) (a). For discharge of a person in medical category SHAPE 2 and 3 it is essential that no shelter appointment should be available in the unit or such person is surplus to the organization. Predominant reason for the discharge under clause (ii) (a) is not the Medical disability but it is non-avilability of sheltered appointment or such person being surplus to the organization. From the arguments of the learned counsel for the petitioner we could not find any legal right whereby a person in service can claim that even when there is no shelter appointment available in the unit he is required to be kept in service nor we find any of the argument that any person in service is surplus to the strength of organization then also he has a right to the post. At the cost of repetition, we may observe that person who becomes eligible for shelter appointment but there is no place available in the shelter appointment and a person who is surplus to organization cannot claim his continuation in the service as a matter of right. The employer, the Government cannot give more appointment to the persons in the category of shelter appointment than feasible and required by the service. Nor any one in, any armed service personnel can claim his **continuation/extension** in armed service when he is not in fully fit medical category and particularly when fully

medically fit to the extent of strength are available. If the Government takes a decision to give benefits to some surplus persons by discharging the other persons in low medical category, who cannot be accommodated, such policy cannot be questioned. At this very juncture we may recapitulate that Defence services are not an ordinary service as has been held by Hon'ble Supreme Court in the case of ***Devdutt Vs UOI reported in 2008 Vol 8 SCC 725.*** We have already taken note of difference in service conditions for various cadres in the armed services which are governed by the Defence Service Regulations and from the terms of service as given in Regulation 134 of the Defence Service Regulations. The minimum period of service in Group I is 17 years and that may go to the age of 40 years. For Group II service, the maximum period of service is 20 years for age of 46 years whichever is earlier. This clearly indicate that in Armed services in the lower cadre more physical fitness and the strength of a person is given high weightage and as one goes higher in rank he gets more benefit of service by serving in more years in the army. Therefore, keeping more physically fit persons in service and releasing the persons in lower medical category which is a medical category specified by rules then in that situation the Government policy to manage the service strength cannot be condemned. As we have

already noticed that by this amendment it has not been provided that the SHAPE 2 and 3 persons will be released from service irrespective of the fact that shelter appointment is available and irrespective of the fact that they are not surplus in the organization. Therefore, clause ii(a) is in the Table under Rule 13 is not a clause for discharge of person from service only on the ground of his being "medically unfit for further service". It is a strength management of the cadres mentioned in the Table of the Rule 13 by giving some benefits to the persons who can be given sheltered appointment. Learned counsel for the petitioners tried their best to equate the cases of personnel in medical category SHAPE 2 and 3 with the persons who are "medically unfit for further service" and comparison of which may be to take benefit to come under Clause (ii) which is provided for those persons who are "medically fit for further service" but the persons in medical category SHAPE 2 and 3 cannot come under clause (ii) which requires the recommendation of Invaliding Medical Board for discharge.

43. Learned counsel for the petitioners submitted that a person in medical category SHAPE 2 and 3 may have some temporary disease which can be cured and therefore, provision for sheltered appointment has been made for the

service in the army and therefore, the SHAPE 2 and 3 persons cannot be discharged from service. It is true that a person in medical category SHAPE 2 and 3 may improve his health and may become fit and can come again in medical category SHAPE I. There may be tendency of some persons to falsely claim low medical category for taking advantageous posting by avoiding hard duty and to claim some other benefits which are not available to person in higher medical category but that is not relevant and we cannot presume that doctor will give false certificate of disability. However, it is true that a person in medical category SHAPE 2 and 3 undisputedly cannot get entry in the service and merely because one coming into medical category SHAPE 2 and 3, after his entry in the service, he cannot be discharged from service. But at the same time no person in low medical category SHAPE 2 and 3 has vested right to claim his continuity in service when he is surplus to the strength of the organization and he cannot be even given sheltered appointment in the unit. It is duty of the country to keep the healthy persons in the military service in preference to the medically week persons and who even cannot be given sheltered appointment commensurate to their disease or who are surplus to the organization. It appears such situation was already in mind when the Defence Service Regulations were framed and

therefore, provision has been made under Regulation 143 specifically applicable to the persons below the rank of officers which provides that ex-servicemen, medically boarded out without any disability pension or those whose disability pension has been stopped because of their disability having been reassessed below 20% by the Resurvey Board will be eligible for re-employment either in combatant or non-combatant (enrolled capacity in the army) provided they are medically boarded and declared fit by the medical authorities. Therefore, the right of persons falling in medical category SHAPE 2 and 3 and who are discharged from service, their right to come in service is protected by Regulation 143 of the Defence Service Regulations for the Army.

44. Sheltered appointment in service in particular cadre cannot have un-limited number of posts so as to accommodate all the persons in the category SHAPE 2 and 3. Further, it is for the Government to take a decision that how many number of sheltered appointment posts can be made available for the persons of the permanent medical category of SHAPE 2 and 3. This cannot be left unmanageable and therefore, restricting sheltered appointment to a number of posts in cadres, which in fact

has not been questioned by the petitioners, cannot be left uncontrolled.

45. Whether, discharge of a person on recommendation of Release Medical Board is impermissible under Rules of 1954 or under any other Government orders has also been one of the issue seriously raised by the learned counsel for the petitioners. We have taken note of the Defence Service Regulations and Regulation for the Medical Services of the Armed forces. It is clear from the regulation 419 of Regulation of Medical services of Armed Forces 1983 that for a person who is suspected to be "medically unfit for further service" only is required to be examined by the Invaliding Board. For deciding about the category in which sick person is to be placed, no opinion of invalidating board is required. Therefore, even after amendment in the Rule-13, the sick person's placement in medical category is decided by the same Board which was and is competent to decide, whether, before or after amendment of Rule-13. The persons covered under clause (ii) (a) are not falling in said category of "medically unfit for further service". Therefore, the persons in medical category SHAPE 2 and 3 are not required to be examined by the Invaliding Medical Board as medical regulations nowhere provide that the persons in permanent medical category of SHAPE 2 and 3

are required to or can be sent to examination by the Invaliding Medical Board. It appears that petitioners understood from discharge from service under clause (ii) (a) to be a discharge of a person on the ground of his being medically unfit for further service whereas category of persons who can be declared "medically unfit for further service" is a different persons of different disability and are not the persons in permanent low medical category of SHAPE 2 and 3. The judgment of the Hon'ble Supreme Court delivered in the case of Rajpal Singh has considered the various disabilities in detail of which we have taken note in preceding para of the judgment and as per the arguments of learned counsel for the petitioners and fully supported by the judgment of the Hon'ble Supreme Court, in the case of Rajpal Singh, a person in low medical category of SHAPE 5 alone can be declared "medically unfit for further service" and since the persons in permanent low medical category SHAPE 2 and 3 are not such persons, therefore, they are not covered under the clause (ii) of the Table under Rule 13. In fact clause (ii) (a) covers only the surplus or the persons for whom sheltered appointment is not available.

46. Learned counsel for the petitioner tried to submit

that the Commanding Officer may arbitrarily send a person to release medical Board and discharge the person from the service. We do not find that can be a ground to challenge the rule which is very specific and clear and un-ambiguous and it clearly provides that permanent low medical category person of SHAPE 2 and 3 can be boarded out only when there is no sheltered appointment or such person is surplus to the organization. So arbitrarily choose and pick and offer sheltered appointment can be examined by the courts in individual case and wrongly declaring one surplus also can be examined by the Tribunal in individual case which is the protection available to those, who are subjected to discrimination or malafide action of the officer in implementing the rule. A possibility of mis-use of power by one individual cannot make the rule invalid. Rules are framed with full faith that, that shall be implemented legally, bonafidely and without any discrimination. Because of some isolated cases of abuse of power by any individual cannot affect the law framed within the power of framing of law by the competent Government.

47. It will be appropriate to consider the Army Order – AO 46/1980 which provides for continuation of the the employment of permanent low category personnel and their

discharge upon completion of the term mentioned in the said Army Order. The sub-para (a) and (b) of Para 2 of AO 46/1980 are as under which are relevant for our purpose.

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 fulfillment of the stipulation laid in sub-para (a) above.

48. Hon'ble Supreme Court considered said AO 46/80 in the judgment of Rajpal Singh and held, that said order has been issued for disposal of permanent low medical category personnel and it contemplates that the employment of permanent low medical category personnel at all times, is subject to availability of suitable alternative appointments commensurate with their medical categories and also subject to the conditions that such a sheltered appointment can be justified in the public interest.

49. Hon'ble Supreme Court has not declared the Army Order 46/80 illegal nor the said order has been quashed. Prior to present amendment, the source of power to discharge of surplus and for whom sheltered appointment was not available. therefore, the Hon'ble Supreme Court in para -30 of the judgment held that AO 46/80 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. Subjecting the army personnel in medical category SHAPE 2/3 to invalidated Medical Board does not arise, is the law laid down by the Hon'ble Supreme Court. The

observation made in para -30 of the Rajpal Singh's case applies to the army personnel covered by clause (b) of para -2 of the AO 46/80. Since at the time when Rajpal Singh's case was decided there was no rule permitting discharge of personnel in excess to the sanctioned strength being surplus or because of non-availability of sheltered appointment, no one was covered by clause (a) of para -2 of the AO 46/80. By insertion of clause (ii) (a) in Table appended to the Rule-13, the army personnel who are not required to be examined by Invalidating Medical board, only are required to be examined by Release Medical Board and the army personnel who are not in excess to the sanctioned strength or for whom sheltered appointment is not available cannot claim their examination by the Invalidating Medical Board when there is specific rule for such person's discharge and for examination by a different Medical Board. Once army personnel is not liable to be discharged in view of the availability of sheltered appointment or who is not in excess of strength, then he is entitled to have his service according to clause (b) of para (ii) of the AO 46/80. Therefore, even after amendment of the Rule-13 and insertion of clause (ii) (a) in the Table under the Rule-13, the ratio of the judgment of Rajpal Singh as well as of Subedar

(SKT) Puttan Lal fully applies to all Army personnel who are found "medically fit for further service" and can be discharged only on the basis of Invalidating Medical Board opinion of their being of "Medically unfit for further service."

50. Therefore, if the Government has removed the gap which made the clause (a) of para-2 of AO 46 of 1980 workable, it cannot be condemned and such insertion of clause (ii) (a) is not to overcome the declaration of the Hon'ble Supreme Court and the Hon'ble Delhi High Court in the cases of Rajpal Singh and Subedar (SKT) Puttan Lal.

51. We may sum up as under:-

(i) Hon'ble Supreme Court in Rajpal Singh case and Hon'ble Delhi High Court in Puttan Lal Case held that army personnel "medically unfit for further service" can be released on recommendation of an Invaliding Medical Board. Said position has not been altered by the newly inserted clause (ii) (a) at various places in the table appended to Rule 13.

(ii) Clause (ii) (a) is applicable to army personnel for whom no sheltered appointment is available in the unit or

is surplus to the organization and who is also in medical category SHAPE 2/3. Placing the army personnel in medical category SHAPE 2/3, the procedure has not been changed by newly inserted clause (ii) (a). The personnel in medical category SHAPE 2/3 is not required to be examined by the Invaliding Medical Board.

(iii) Predominant reason for discharge under Clause (ii) (a) is not the medical ground as was in the cases of Rajpal Singh and Sub Puttan Lal. The clause (ii) (a) is a new provision inserted by the impugned amendment with an object to maintain the strength in service within the sanctioned strength as well as to accommodate SHAPE 2/3 army personnel in sheltered appointment to the required strength and to discharge the army personnel who cannot be accommodated in the sheltered appointment and who is surplus to the organization.

(iv) Insertion of above Clause (ii) (a) by impugned amendment cannot be held to be malafide nor it has created two classes or gives discriminatory treatment to similarly situated persons and is not in violation to Art. 14 of the Constitution of India.

(v) The clause (ii) (a) has been added in the rule within legislative competence is admitted legal position as has been admitted by the learned counsel for the parties and we found that so has been done as per the legal position.

(vi) Consequently, the validity of the gazette Notification dated 13.05.2010 is upheld and therefore, the communication dated 30.09.2010 suffers from no illegality.

52. We are making it clear that we have decided the issue referred for consideration and we have not decided any of the individual case on its facts. The individual's cases will be decided according to the facts of the individual cases in the light of the facts and grounds of the individual cases.

Reference is answered accordingly. All the matters be placed before the appropriate Bench for hearing.

(PRAKASH TATIA)
Chairperson

(SUNIL HALI)
Member (J)

(S.K. SINGH)
Member (A)

New Delhi
Dated the 24th Sept 2014
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COURT NO.3, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

OA 228/2012

...Petitioner

Sub Lakshmi Kant Mishra
Versus
UOI & Ors **...Respondents**

For petitioner : Mr. K Ramesh, Advocate
For respondents : Mr. KS Bhati, Sr CGSC
Mr.YP Singh, Advocate

CORAM:
HON'BLE MR. JUSTICE R.C. MISHRA, MEMBER
HON'BLE LT GEN S.K SINGH, MEMBER

O R D E R
11.02.2016

This is an OA, under Section 14 of the Armed Forces Tribunal Act 2007, challenging, in substance, legality and validity of the order dated 30.12.2011 discharging the petitioner from service w.e.f. 30.06.2012 under Rule 13(3) I (ii)(a)(i) of Army Rules,1954(for short 'AR') read with Army Order 46/1980 as well as that of Government of India, Ministry of Defence Gazette Notification dated 13 May 2010 and Army HQ Letter dated 30 Sep 2010 on the ground that the same run contrary to A R 13 read with Para 421 and 424 (c) of Medical Regulations and the Judgments in the cases of **Rajpal Singh (2009) 1 SCC 216** and **Puttan Lal and Ors** [WP(C) No5946/2007 decided by the Delhi High Court].

2. The constitutional validity of AR 13(3) item I (ii)(a) read with AR 13 (2A), the Gazette Notification and the Policy Letter, whereunder the impugned order of discharge was issued, have already been upheld by a Full Bench of this Tribunal, to which one of us (Lt Gen SK Singh) was a party, by way of a common order dated 24.09.2014

passed in this and other connected matters. The operative para of the order reads:-

> *"(i) Hon'ble Supreme Court in Rajpal Singh case and Hon'ble Delhi High Court in Puttan Lal case held that army personnel "medically unfit for further service" can be released on recommendation of an Invaliding Medical Board. Said position has not been altered by the newly inserted clause (ii)(a) at various places in the table appended to Rule 13.*
>
> *(ii) Clause (ii)(a) is applicable to army personnel for whom no sheltered appointment is available in the unit or is surplus to the organization and who is also in medical category SHAPE 2/3. Placing the army personnel in medical category SHAPE 2/3, the procedure has not been changed by newly inserted clause (ii)(a). The personnel in medical category SHAPE 2/3 is not required to be examined by the Invaliding Medical Board.*
>
> *(iii) Predominant reason for discharge under Clause (ii)(a) is not the medical ground as was in the cases of Rajpal Singh and Sub Puttan Lal. The Clause (ii)(a) is a new provision inserted by the impugned amendment with an object to maintain the strength in service within the sanctioned strength as well as to accommodate SHAPE 2/3 army personnel in sheltered appointment to the required strength and to discharge the army personnel who cannot be accommodated in the sheltered appointment and who is surplus to the organization.*
>
> *(iv) Insertion of above Clause (ii)(a) by impugned amendment cannot be held to be malafide nor it has created two classes or gives discriminatory treatment to similarly situated persons and is not in violation to Article 14 of the Constitution of India.*
>
> *(v) The clause (ii)(a) has been added in the rule within legislative competence is admitted legal position as has been admitted by the learned counsel for the parties and we found that so has been done as per the legal position.*

(vi) Consequently, the validity of the Gazette Notification dated 13.05.2010 is upheld and therefore, the communication dated 30.09.2010 suffers from no illegality."

4. Coming to the facts of the instant case it may be observed that the petitioner was enrolled in the Army on 27.05.1991. He was placed in Permanent Low Medical Category w.e.f. 03.02.2001 for the disability LARGE INCISIONAL HERNIA. However, suitable sheltered appointment was provided to him in public interest, under the provision of Special Army Instruction 2/S/1976. On 03.08.2011, the Re-categorisation Board again placed him in Low Medical Category(Permanent) for two years. Thereafter, on 03.12.2011, Commanding Officer 6 RAJRIF issued notice to the petitioner to show cause as to why he should not be discharged from service under the provisions of AR 13 (3) item 1(ii)(a)(i), on the ground that no sheltered appointment commensurate with his medical category was available in the Unit. In his reply dated 05.12.2011, the petitioner expressed willingness to continue in the service in view of financial distress.

5. In the counter affidavit as well as in the additional counter affidavit filed in this case, the respondents have highlighted the background and aims and objectives of the Policy Letter No.B/10201/Vol/MP-3(PBOR) dated 30.09.2010. Making reference to Para 7 & 10 thereof and AR 13(3) item 1(ii)(a)(i), they have further averred that the Commanding Officer, being the best judge to decide the issue after taking into consideration the relevant factors including the interests of the individual, maintenance of the desired operational efficiency of the unit, public interest as well as security of the nation. According to them, by virtue of clause 10 of the letter, although the Commanding Officer is the final authority to sanction discharge of a JCO/OR, who is in shape 2/3 if no sheltered appointment is available in the unit or the individual is surplus to the Organization yet approval

of the Authority mentioned in clause 7 has to be obtained prior to sanction of the actual discharge. Attention has also been invited to the safeguards to prevent any arbitrariness or subjectivity in exercise of the discretion by the Commanding Officer in the matter of discharge of a Low Medical Category personnel.

6. As explained by the respondents, in terms of Army Order 46/80, retention of the petitioner in service was not recommended due to non-availability of sheltered appointment commensurate with his medical category and rank in the Unit. According to them, the petitioner's discharge from service w.e.f. 30.06.2012 (AN) was approved by the Officer-in-Charge Records on 26.12.2011 and in pursuance of this approval, the discharge order in question was issued on 30.12.2011.

7. Still, learned counsel for the petitioner while making reference to the decision of the Punjab & Haryana High Court in **Sub Manjit Singh Vs UOI & Ors** [CWP 988/2012 decided on 19.05.2014] has strenuously contended that the Show Cause Notice as well as order of discharge is not sustainable in law because as per the mandate of AR 13, petitioner could be discharged only after being examined and recommended for such an action by a Release Medical Board. In reply, it has been submitted that as per the stipulated procedure in terms of Army Order 3/1989, Release Medical Board has to be carried out only after issuance of order for discharge from service. As further pointed out by learned counsel for the respondents, the petitioner was subjected to examination by a Release Medical Board on 30.04.2012 so as to ascertain the nature and extent of the disability before his actual discharge from service w.e.f 30.06.2012. This aspect of the matter has already been discussed at length in **Sub (RT) Tribhuwan Upadhyay Vs UOI & Ors** (OA 220/2012,

decided on 11.09.2015) in the light of the position of law as it obtains today. Accordingly, the contention is not worthy of acceptance.

8. We are also not inclined to reconsider the aforesaid or any other aspect of the matter already dealt with by the Full Bench.

9. To sum up, the respondents have been able to show as to why the sheltered appointment could not be provided to the petitioner any further. Moreover, he has already been discharged from service after having completed more than 21 years of service which is much more than the minimum pensionable service.

10. In the light of the facts and circumstances highlighted above, the impugned order of discharge under AR 13 (3) I (ii)(a)(i) was in consonance with the guidelines laid down in Army Order 46/80 and the Policy dated 30.09.2010. The order, therefore, does not call for any interference.

11. The OA, accordingly, stands dismissed with no order as to costs.

(R.C. MISHRA)
MEMBER (J)

(S.K. SINGH)
MEMBER (A)

11.02.2016/Chanana