

(2017) 02 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : LPASW No. 177 of 2010

Union of India	Vs	APPELLANT
Makhan Singh		RESPONDENT

Date of Decision : 01-02-2017

Acts Referred:

Army Act, 1950 — Section 191

Citation : (2017) LIC 1959

Hon'ble Judges : N. Paul Vasanthakumar, C.J. And Dhiraj Singh Thakur, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, C.J.—This appeal is preferred against the order of the Writ Court made in SWP No. 1679/2001 dated 23.07.2010

allowing the writ petition of the respondent and giving directions to the appellants to re-consider the case of the respondent for shifting him to

Tradesman Category in the light of the recommendations made by senior Advisor Ophthalmology, Command Hospital, Central Command,

Lucknow.

2. The case of the respondent before the Writ Court was that he was recruited as infantry soldier (General Duty) on 16.02.2000 through

Branching Recruiting Office Jammu and allotted No. 2695936 and was deputed for undergoing one year- s basic training course at Jabalpur. In

January, 2001, while undergoing training the respondent was subjected to second medical examination and found to be suffering from colour

blindness and boarded out of military service. According to the respondent, at the time of his enrolment in Indian Army he was not suffering from

any ailment including the ailment detected during his second medical examination and after undergoing the Martin Lantern Test, the Ophthalmologist at Command Hospital, Central Command, Lucknow opined that respondent was not fit for General Duty and he could be transferred to

Tradesman category. It is the further case of the respondent- before the Writ Court that without taking into account the opinion of the Eye

Specialist of Command Hospital, Central Command Lucknow the appellants boarded out the respondent and he was relieved without any formal

discharge.

3-4. The writ petition was opposed by the appellants by contending that after the respondent was enrolled, he was later found to be suffering from

Colour Perception CP-IV assessed at 11-14% permanent disability and the said ailment was not detected by the Recruiting Medical Officer at the

time of enrolment of the respondent as the Recruiting Medical Officer was not a specialist. On second medical examination of the respondent, the

respondent was found to be suffering from colour perception CP-IV and was referred to Military Hospital Jabalpur and thereafter to the Senior

Advisor Ophthalmology Command Hospital Central Command Lucknow which confirmed that respondent was suffering from Colour Perception

and found unfit for General Duty and recommendations were made for invalidating him or shifting him to Tradesman Category. It was further stated

that as the disability detected did not arise out of military service and was not attributable to the service, the respondent was rightly boarded out.

5. The learned single Judge having noticed the fact that the Senior Advisor of the Command Hospital having recommended the case of the

respondent for his adjustment in the Tradesman Category and the disability assessed being between 11-14%, as also the fact that appellants were

duty bound to find as to whether having regard to the disability, the respondent could have been shifted to some other duty on the policy of

changing in a recruits trade where the disability may not come in his way to perform his duties, allowed the writ petition and directed the appellants

to re-consider his case for shifting to Tradesman Category in the light of the recommendations already made by the Senior Advisor. Aggrieved by

the said order this appeal is preferred.

6. The contention of the appellants in this appeal is that the learned single Judge

has not considered para 135 (e) of the Regulations for the Army

Vol. I, Revised Edition, 1987 stating that when a recruit is found suffering from disability likely to prevent him to become an efficient soldier he will

be medically examined and if found unfit be discharged from service. Learned counsel appearing for the appellants also submitted that the learned

single Judge while relying on the judgments, namely, Mil LJ 2006 All 9 : (2006 (4) ALJ 18) Mohd Yasin Ansari v. Union of India and Union

of India v. Pishora Singh (LPA (SW) 72/2009) has not appreciated the fact that in those cases the writ petitioners were permanent employees

and their cases were with regard to shelter appointments and, therefore, the judgments were not applicable to the facts of the case of the

respondent as he was only undergoing training.

7. The learned counsel appearing for the respondent, on the other hand, submitted that the disability assessed by the medical Board being between

11 to 14 %, the respondent was very much fit to continue in service and even assuming that he was not fit to continue as a Soldier, he ought to

have been given an alternate job as the disability has occurred after he was enlisted. Hence the respondent was entitled to get alternate

appointment till his normal age of retirement particularly when he was denied the disability pension on the ground that his disability was assessed

between 11 to 14% alone. Learned counsel also submitted that discharging the respondent only on the ground of low medical category, without

giving alternate employment was found fault with by the learned single Judge and the learned Single Judge directed the appellants to re-consider the

case of the respondent for shifting him to Tradesman Category in the light of the recommendations made by the Senior Advisor Ophthalmology,

Command Hospital, Central Command, Lucknow, and there is no illegality in the order of the Writ Court.

8. We have considered the rival submissions of the learned counsels appearing for the parties.

9. The respondent was recruited on 16.02.2000 as an infantry soldier (General Duty) through Branch Recruiting Office Jammu and sent for

training, he was subjected to second medical examination and was found suffering from Clour Perception CP-IV assessed at 11-14%. He was

discharged from service on the ground of medical disability. The disability of the

respondent was admittedly between 11 to 14% and the Senior

Advisor Ophthalmology, Command Hospital, Central Command, Lucknow recommended his case for shifting him to the Tradesman Category. The

contention of the appellants that as the respondent was found low medical category which resulted in his discharge, cannot be countenanced as the

scheme contemplated change of trade (alternate employment) giving alternate employment which the Senior Advisor has recommended. No effort

was made to give change of trade to the respondent as per the scheme which clearly states that ordinarily permanent low medical category

personnel will be retained in service till completion of 15 years in case of JCOs and 10 years in case of OR (including NCOs) and such persons

may continue to be retained in service beyond the above period until such person becomes due for discharge in normal manner subject to his

willingness and fulfilment of the stipulations. Without ascertaining the said facts and considering the scheme, a summary order of discharge was

issued to the respondent.

10. Instructions were issued on 31.01.2000 as to how change of trade of recruits was to be considered which were communicated to all

Regiments/Corps Training Centers. Paras 4 to 9 is the relevant portion which reads thus :

Circumstances warranting a change in a recruits- trade:

4. Since a recruit is to be allotted a trade by a centre Commandant during the period of his basic military training and only then to be put on trade

training, there can be occasions either during basic military training or during trade training of recruits when a centre commandant may wish to

reallocate a new trade to a recruit. This cannot be construed as re-mustering as it is really a change of trade while a recruit is still under training.

This aspect is dealt with by the Directorate of Recruiting and is the subject of this policy instruction.

Procedure:

5. General: Change of trade of recruits can be carried out either at the request of a recruit or by the centre commandant himself depending on the

aptitude of the recruit. In either case a centre commandant should agree to the change of a recruit- s trade only if it serves the overall interest of the

service or to prevent discharge of a recruit which may have to be otherwise

resorted to.

Change of Spl(GD) trade to another:

6. In case of centre commandant agrees to change the trade of a recruit, he may do so from among the vacancies already available with him against unit HQ quota. Should, however, an alternate trade not be available, a recruit is required to be put on training for trade which was initially recommended for him by the Enrolling Officer. Discharge under the provisions of Army Rule 13 (3) Item IV is only to be implemented if such a recruit still fails to show promise. It is however, left to the discretion of a Centre Commandant to demand an appropriate vacancy from this HQ against Unit HQ quota for a subsequent quarter for absorption of such recruits in lower trades. During the normal intervening period a recruit may continue his training at the discretion of the Centre Commandant. Policy instructions on demand procedure as far as Unit HQ quota is concerned, will remain unaltered. Any vacancy arising due to a change of trade will be considered a wastage and will be left unfilled. It will be included in the subsequent demand of manpower. If such a situation is sought to be avoided. This preferable to inter-change trades within a group of two or more recruits.

7. Change of Trade from Spl (GD) to Sol Tech category and from one Tech category to another:

(a) Change of trade from Sol (GD) to Sol Clk/SKT categories is not permissible.

(b) Centre Commandant of Sigs, AMC, EME and AD Arty can demand vacancies for Sol Tech categories against their overall Unit HQ quota.

Any change of trade from Sol (GD) to Sol Tech categories (other than Clk/SKT) in respect of these centres should, therefore, be possible.

However, when such a change of trade is implemented the Sol (GD) vacancy thus falling vacant will remain unfilled and included in the subsequent manpower demand.

(c) Training centres other-than Signs, AMC, EME and AD Arty will complete form at Appk " A- attached in triplicate and forward the same to

this HQ (AG/Rtg 5(GR) (C) in case a change of Sol (GD) to Sol Tech trade (other than Clk/Skt) is desired in the public interest. If the request of

a Centre Commandant is accepted, this HQ will allot the requisite Sol of a recruit from Sol (GD) to Sol Tech category, the Sol (GD) trade falling

thus vacant will be considered a wastage, then vacancy left unfilled and included in the subsequent demand of manpower.

(d) Change of trade from Sol Tech to Sol (GD) is also permissible provided the vacancies exist in the Sol (GD) categories in Unit HQ quota and

the individual is willing for the change.

Examination

In the extent of a change of trade from Sol (GD) TO Sol Tech categories, it is necessary for a recruit to pass a written qualification prescribed by

the Recruiting Organization. Centre Commandants will however satisfy themselves as to the requirements:

(a) The recruit possesses the necessary educational qualification laid down in SAO 4/S/71 as amended from time to time, through the issue of

letters by this Directorate.

(b) The recruit is within the age limit prescribed for Sol Tech categories of Signs, AMC, EME and AD Arty from time to time.

(c) The recruit has demonstrated an aptitude for the Sol Tech trade for which he is being considered.

(d) That the reallocation of the new Sol Tech trade is to be treated as final.

(e) Willingness certificate must be obtained from the concerned recruit and filed with the enrolment form.

9. In case this HQ either rejects the request of a Centre Commandant on good grounds or is unable to allot a Sol Tech vacancy, the recruit

concerned may either continue in a Sol (GD)/Sol Tech trade previously allotted to him or discharged at the discretion of the Centre Commandant"

11. It is not the case of the appellants that there was no scheme to give alternative employment to Infantry personnel. Change of trade of recruits is

mentioned in the recruitment policy and such being the position and having regard to the fact that the percentage of disability of the respondent,

even according to the appellants as assessed by the 2nd Medical Board was between 11-14%, it was all the more necessary for the appellants to

give change of trade to the respondent without discharging him, particularly based on the recommendations of the Senior Advisor of the Command

Hospital. Hence the learned Single Judge was perfectly right in allowing the writ petition with a direction to re-consider the case of the respondent

for his shifting to the Tradesman Category.

12. The L.P. appeal is dismissed with a direction to the appellants to consider the case of the respondent for alternate employment i.e. to

trademen- s category within a period of three months from, the date of receipt of copy of this order. No costs.