GAHC010232342022

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.A No.356 of 2022

No. G/94115K Ex-Hav/GD Rebadhar Joshi
Aged about 61 years
S/O- R.D. Joshi,
Village-Tamli, P.O.-Tamli Tehsil
Dist-Champawati, Uttarakhand

.....Appellant

-***Versus***-

The Union of India,
Represented by the Secretary,
Ministry of Home Affairs,
New Delhi-110011

2 The Director General,
Assam Rifiles
Directorate General of Assam Rifles
Mahanideshalya, Assam Rifles
Shillong, PIN-793011

3 The Commandant
9th Bn. Assam Rifles
C/O-99 APO, PIN-932018

*.....**Respondents***

– B E F O R E –

HON'BLE THE CHIEF JUSTICE (ACTING) MR. N. KOTISWAR SINGH
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the appellant : A.R. Tahbildar, Advocate

Advocate for the respondents : U.K. Goswami, CGC,

Date of Order: 18.01.2023

ORDER

[Soumitra Saikia, J]

Heard Mr. A.R. Tahbildar, learned counsel for the appellant and Mr. U.K. Goswami, learned Central Government Counsel for the Union of India.

2. Being aggrieved by the order dated 28.07.2022 passed by the Learned Single Judge in W.P.(C) No. 547/2018, the present writ appeal has been preferred by the appellant.

3. The appellant was serving as a Havildar in the 9th Assam Rifles. The appellant, however, was prematurely retired in the year 2008 by invoking Rule 48 (1) (b) of the CCS (Pension) Rules, 1972. Being aggrieved by the order 01.11.2008 prematurely retiring the appellant, he preferred a representation dated 08.03.2011 to the respondent authorities praying for reinstatement in service. The same being not considered by the respondent authorities, the appellant who was a resident of the State of Uttarakhand preferred a writ petition before High Court of Uttarakhand being W.P No. 1605/2013. The writ petition, however, came to be dismissed vide the order dated 01.08.2014

on the ground of want of territorial jurisdiction as no cause of action or a part of the cause of action had arisen in the State of Uttarakhand. However, the High Court of Uttarakhand while dismissing the writ petition held that since the writ petition was dismissed on the ground of an alternative remedy, being available, the same would not pre-judice the rights of the appellant/petitioner to file writ petition before the appropriate Court. The appellant, thereafter, engaged a counsel from the State of Meghalaya to file the writ petition before this Court. The same was, however, not filed as per the instructions of the appellant by the counsel who was initially engaged and in that context a complaint against the said counsel had also been lodged before the Bar Counsel of Meghalaya, Nagaland, Mizoram and Sikkim. The appellant subsequently engaged another counsel and filed the writ petition before this Court in the year 2018 challenging the pre-mature retirement as well as seeking directions to reinstate the appellant in service and to allow the appellant to continue in service up to the normal age of superannuation i.e. 60 years and also to grant all benefits of

salary and other service benefits including promotion with effect from the date of premature retirement from service till his reinstatement in service. It was contended before the learned Single Judge that the pre-mature retirement of the appellant/petitioner is contrary to the provisions of Rule 48 (1) (b) of the CCS (Pension) Rules 1972 as the pre-mature retirement of the appellant/petitioner was not made in public interest. The further contention was that the retention of an employee beyond 30 years of service is not automatic, but is subject to approval of Review Board constituted for the purpose. Accordingly, the Review Board while assessing the eligibility of a service man has to not only look into the medical fitness, but also to consider his entire service record including the ACRs. Although the Review Board held that though the appellant/petitioner was medically fit and in SHAPE-1 category, the petitioner was found to be professionally incompetent to perform duties in counter insurgency grid and therefore, his retention beyond thirty years was considered to be detrimental to the national interest and was accordingly ordered to retire from service. The delay of about

nine years that had occurred in filing the writ petition was in view of the appellant approaching the High Court of Uttarakhand and therefore, the same was held to be not deliberate by the learned Single Judge as is seen in the impugned order of the Uttrakhand whereby leave was granted to the appellant/petitioner to approach the appropriate High Court for seeking remedy.

4. Before the learned Single Judge, it was also contended that this Court vide Order dated 15.06.2016 passed in W.P.(C) No, 1250/2015 ***(Sunil Kumar Shahi Vs Union of India and 3 Ors)*** had granted relief entertaining similar grievances relating to pre-mature retirement of Assam Rifles Personnel.

5. The learned Single Judge held that there was nothing in the Review Service Sheet made by the Review Board to show that the retention of the appellant in service would not be in public interest and accordingly held that the impugned order of prematurely retiring the appellant from service did not appear to be sustainable in law. However, the learned Single Judge disposed of the writ petition as being infructuous as the appellant who was 57 years as on 31.01.2018 had crossed the age of 60

years i.e. the age of superannuation on the date of the order by the learned Single Judge. The learned Single Judge held that since he was regularly receiving his pension till date, the writ petition has become infructuous and the prayer for reinstating the appellant into service did not survive at this stage.

6. Before this Court, the appellant reiterated his submissions made before the learned Single Judge. The learned counsel appearing for the appellant relied upon the Order dated 15.06.2016 passed by this Court in W.P(C) No. 1250/2015 ***(Sunil Kumar Shahi Vs Union of India and 3 Ors)*** seeking similar relief from this Court.

7. *Per contra*, the learned counsel representing the respondents disputes the contentions raised by the appellant. The learned counsel for the respondents submits that there is no infirmity in the order passed by the learned Single Judge inasmuch as the appellant had attained the age of superannuation in the meantime and therefore, there is no scope for reinstatement in service. Consequently, even if, the impugned order of pre-mature retirement is interfered with, then no useful

purpose will be served as the appellant/petitioner has crossed the age of 60 years.

8. The learned counsels for the parties have been heard. Pleadings on record have been carefully perused. The Judgment under appeal has also been duly perused.

9. We find that the learned Single Judge in Paragraph-16 of the Judgment had categorically returned the finding that there is nothing in the Review Service Sheet made by the Review Board to show that the retention of the petitioner/appellant in service would not be in public interest. The learned Single Judge had categorically held that in such view, the impugned order of prematurely retiring the petitioner/appellant from service do not appear to be sustainable in law. The relevant paragraph is extracted below:

> *"16) Thus, there is nothing in the Review Service sheet of the petitioners to show the reason as to why the petitioners need to be prematurely retired from service or that the retention of the petitioners in service would not be in public interest. Further, the petitioners have been categorised as SHAPE-1 with regard to their medical conditions and as such, it cannot be said that the petitioners are physically unfit. However, prior to the Review Service sheet being made by the Review Board for the petitioners, the Commandant of the 19 Battalion*

Assam Rifle had come to a finding that all the petitioners were unfit to serve in counter insurgency operation grid. Though the Commandant has held that the petitioners were unfit to serve in counter insurgency operation grid, there is nothing in the Review Service sheet made by the Review Board to show that the retention of the petitioners in service would not be in public interest.

On that ground, this Court is of the view that the impugned orders, prematurely retiring the petitioners from service, do not appear to be sustainable in law."

10. This Court during the course of the hearing made a query to the learned counsel appearing for the respondents as to whether any appeal or review had been preferred against the findings returned by the learned Single Judge in Paragraph-16 of the impugned order dated 28.07.2022. The learned Central Government Counsel appearing for the respondent fairly submitted that no such appeal or review has been preferred against such findings.

11. The findings of the learned Single Judge in Paragraph-16 of the impugned order had categorically held that there were no materials in the Review Service Sheet made by the Review Board to show that the retention of the appellant/petitioner in service would not be in public interest. The learned Single

Judge held that such view is not sustainable in law. We also find that a certificate of merit issued by the Commandant, 9th Assam Rifles to the effect that the appellant has performed very well in all kinds of adventure activities in the force while fighting with insurgents in an extreme counter-insurgency environment. The merit certificate certifies that he is an honest, dedicated, well behaved soldier and he will make a positive impact. The said certificate has not been disputed by the respondents in their affidavit filed before the learned Single Judge. However, the respondents have stated that such a certificate has got no relevance with a service review as the certificate was issued to the appellant as a token of remembrance and good-will at the time of his retirement from service and that these type of certificates are being issued to all soldiers at the time of their retirement.

12. Be that as it may, the fact remains that the learned Single Judge had categorically held that the Review Service Sheet did not bear any adverse remarks nor were there any disciplinary

proceedings was pending against the appellant or any penalty imposed. The column against the vigilance clearance is also endorsed with the remark "NIL" (where detailed reasons are to be given for non recommending the case) and that the appellant has been categorized as SHAPE-I with regard to medical conditions. Such being the findings of the learned Single Judge and which findings are against the Department and further there being no appeal or review having been preferred against such findings by the respondents, these findings against the Department cannot be ignored. If these findings of the learned Single Judge are sustained then the premature retirement of the appellant cannot be held to be as per provisions of law. Consequently the impugned order of prematurely retiring the appellant ought to have been interfered with by the learned Singh Judge. However, the same was not done as in the meantime, the appellant had crossed the superannuation age of 60 years. We are of the considered view that in the absence of reasons in the Review Service Sheet by the Review Board that the appellant is required to be retired

in Public Interest, as held by the learned Single Judge, the impugned order directing premature release of the appellant cannot be sustained in law and the same is ordered accordingly.

13. Considering the fact that the appellant had attained the age of superannuation in the meantime, no useful purpose will be served by directing reinstatement in service of the appellant. This Court is of the considered view that ends of justice will be served, if the order of the learned Single Judge is suitably modified and the respondent authorities are directed to calculate the pay and service benefits payable to the appellant with effect from the date he was prematurely retired till the date he would have been superannuated. It is ordered accordingly. The respondents will calculate the pay and service benefits attributable to the appellant from the date of his premature retirement till the date he would have ordinarily superannuated from the service. It is however made clear that the appellant will not be entitled to any salary from the period he was prematurely retired till the date he attained the age of superannuation on the principle of "no work,

no pay". However, the pay and service benefits as directed above would be entitled to the appellant.

14. Accordingly, we set aside the impugned order dated 28.07.2022 of pre-maturely retiring the appellant from service. The impugned order of the learned Single Judge is also set aside to the extent indicated above. The directions for release of pay and service benefits to the appellant will be carried out within a period of four weeks from the date of receipt of certified copy of the order by the respondents.

15. The writ petition is, accordingly, allowed to the extent indicated above. No order as to costs.

JUDGE **CHIEF JUSTICE (ACTING)**

Comparing Assistant