

A.F.R.

Neutral Citation No. - 2024:AHC-LKO:1113-DB

RESERVED

Court No. - 1

Case :- WRIT - A No. - 8700 of 2023

Petitioner :- No. Jc- 581641m Sub Maj Clk (Sd) Manoj Kumar Pandey

Respondent :- The Armed Forces Tribunal Regional Bench Lko. Court No.2 And Others

Counsel for Petitioner :- Mohd. Murtaza Hasan, Anshuman Srivastava, Manoj Kumar Awasthi

Counsel for Respondent :- A.S.G.I.

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Om Prakash Shukla, J.

(Per Om Prakash Shukla, J.)

(A) Introduction

(1) The challenge in the present writ petition under Article 226 of the Constitution of India is to the impugned order dated 29th of March, 2023 passed by the Armed Forces Tribunal, Regional Bench, Lucknow (hereinafter referred to as '**the Tribunal**') in Original Application No.649 of 2022, whereby, a challenge laid by the petitioner to his discharge from service on May 31, 2022 was dismissed..

(B) Factual Matrix

(2) The petitioner was enrolled in the Indian Army (JAK RIF Regiment) on May 4, 1990. Subsequently, he was granted promotion to the rank of Naik w.e.f. 01st December, 1995; to the rank of Havildar w.e.f. 01st December, 1999; and to the rank of Naib Subedar w.e.f. 01st June, 2013.

- (3) While continuing to work as Naib Subedar in the Indian Army, he was diagnosed “*Coronary Artery Disease-Interior Wall Myocardial Infraction (ICD-121.0)*” by 92 Base Hospital and accordingly, he was downgraded to low medical category P3 (T-24) with effect from 08th October, 2013 to 25th March, 2014. Subsequently, petitioner’s case was reviewed, upon which his medical category was upgraded to P2 (T-24) w.e.f. 25th March, 2014 to 09th September, 2014 and thereafter P2 (Permanent) with effect from 09th September, 2014.
- (4) Apparently, even after placing the petitioner in low medical category P2 (Permanent), he was promoted to rank of Subedar Major w.e.f. 01st August, 2016. Again while he was posted with 119 MC/MF Detachment, he was promoted to the rank of Subedar Major Clerk (Staff Duty) w.e.f. 01st April, 2020. After assuming the rank of Subedar Major Clerk (Staff Duty), the petitioner was required to be screened for extension of service as per the provisions of Integrated Headquarters of Ministry of Defence letter No. B/33098/AG/PS-2(c) dated 20th September, 2010. The procedure and criteria for promotion dated 20th September, 2010 reads as under:-

“PROCEDURE & CRITERIA FOR SCREENING OF PBOR IN THE ARMY”

Aim. To screen PBOR for the grant of extension by two years.

Criteria. The following guiding principles will be adhered to while considering the grant of two years extension in age/service.

(a) **Willingness of the Individual.** An individual will be deemed to be willing for 2 years extension in age/service unless he submits his unwillingness certificate two year before his retirement date duly counter signed by OC unit.

(b) **Medical Classification** The medical criteria for 2 years extn in age/service will be same as for promotion in respect of JCOs and OR as laid down vide IHQ of MoD (Army) letter No. B/33513/AG/PS 2(c) dt 10 Oct 97. They should be in medical category 'AYE'. However personnel in lower medical category (both temporary and permanent) as a result of the circumstances indicated below would be eligible :-

(i) **Eligibility upto Medical Category 'CEE'**

(aa) **Battle casualties** as defined in special Army Order 8/S/85 including those casualties in fighting against armed hostiles shall also be treated as battle casualties.

(ab) Personnel wounded/injured during deployment in '**Op Meghdoot**', '**Op Rhino**', '**Op Rakshak**', '**Op Pawan**', '**Op Bajrang**', '**Op Bluestar**', '**Op Cactus Lilly**' and other similar **CI Operations** involving fighting against Militants/ Terrorists and consequently placed in medical category CEE (Permanent/Temporary) will be treated at par with 'Battle Casualties'.

(ac) JCOs/NCOs Wounded/Injured during **battle inoculation**, field, mine training using live ammunition and while handling/disposing live ammunition, explosives, bombs and Improvised Explosive Devices and placed in Medical Category CEE (Permanent/Temporary) will also be treated as battle casualties.

(ad) JCOs and NCOs who sustain injuries or are wounded as a result of accidental explosion of mines caused while laying operationally oriented mine fields or lifting or negotiating mine fields laid by the enemy or own forces in operational areas, near the international borders or the Line of control and consequently placed in Medical Category CEE (Permanent/Temporary) will also be treated as battle casualties.

(ae) JCOs/NCOs, who are wounded/injured during **UN Mission**, where such a deputation is to count as active service in field, will also be treated as battle casualties.

(iii) In exceptional cases, such as distinction achieved by an individual in War or Peace, the GOC-in-C Command, on the recommendation of the OIC Records, may waive the stipulations given in Sub Para (i) & (ii) above.

Note : This criteria will be applicable to all Regt/Corps less DSC, in whose regards orders issued separately vide letter No. B/33513/AG/PS-2 (c) dt 18 Jun 2009 will be applicable.

Method of Screening. Screening of the affected PBOR for the grant of extension should be carried out 24 months prior to their reaching the current laid down service limits. It should be conducted by the same boards which are constituted and assembled for the purpose of deciding promotions, should also undertake the following additional tasks, whenever required :-

- (a) Screen affected PBOR for the grant of extension.
- (b) Consider PBOR for continued retention during the extended tenure in case there is drop in any criteria as mentioned at Appx 'B' to this letter.
- (c) Consider Ris Maj/Sub Maj who do not complete 34 yrs pensionable service or 4 yrs tenure by the time they reach 52 yrs of age, for screening for extn in service up to the age of 54 yrs to 34 yrs of pensionable service or 4 yrs of tenure whichever is earlier.

Note : In exception to the above, the PBOR who could not be screened for extn of service under the existing policy as per the laid down screening schedule given at Para 4 below due to the LMC, court cases or any other circumstances beyond his control, will be screened by the Screening Board before retirement.

4. **Scheduling of Screening** Shall be regulated on attaining the following service limits :-

<u>S/No.</u>	<u>Rank</u>	<u>Service of years</u>
(a)	Sub/Ris	26 th year
(b)	Nb Ris/Nb Sub	24 th year
(c)	Dfr/Hav	22 nd year
(d)	Nks	20 th year
(e)	L/NK/Sepoy/TSLNk/TS Nk	15 th year/18th year

5. **Board Proceeding** On completion, one copy of the board proceeding shall be forwarded to the concerned OIC Records. Necessary casualties will, however, be published by units concerned.

6. **Applicability.** The revised policy will be made applicable with effect from 01 Apr 2011.

- (5) In view of the aforesaid letter dated 20th September, 2010, the petitioner among other affected personnel were requested to submit their willingness/unwillingness certificate for extension for service vide Records JAK RIF letter 1428/S/C/RA-2 dated 08th June, 2020, however, even thereafter required certificate was not submitted by the petitioner and as such, reminders were issued for the same vide letter dated 26th June, 2020 and 07th July, 2020. Apparently, even after the issuance of the aforesaid reminder, the required certificate for extension of service was not submitted.
- (6) In the meantime, due to country wide lockdown on account of pandemic 'Corona', all the offices were closed, hence Screening Board for grant of two years extension of service in respect of centrally controlled category was not held during the month of April, 2020 and May, 2020.
- (7) Thereafter, Integrated Headquarters of Ministry of Defence had issued certain amendments in the procedure and criteria for screening of personnel for grant of extension of service by two years vide letter No. B/33098/AG PS 2(c) dated 05th May, 2020, by which it has been stated that the personnel placed in permanent low medical category would be screened with a view to assess their suitability for grant of extension of service, if they are due for re-categorization medical board prior to commencement of their extension and such personnel can be

declared provisionally fit for extension subject to their medical category being upgraded to acceptable level before expiry of normal terms of engagement. It is also stated that if the personnel are not assessed fit by screening board or not upgraded to acceptable category prior to commencement of extension, these personnel shall be disposed of in normal manner and not be granted benefit of extension of time.

(8) Thereafter, the petitioner was posted to Records JAK RIF w.e.f. 09th July, 2020 and on physical reporting at Records JAK RIF, the petitioner submitted his willingness certificate for extension of two years of service on 29th July, 2020. After receipt of said willingness certificate, re-categorization Medical Board of the petitioner was conducted at Military Hospital, Jabalpur on 08th February, 2021, wherein he continued to remain in the same medical category i.e. P2 (permanent) for another two years w.e.f. 05th February, 2021 to 05th February, 2023.

(9) Based on the fact that the petitioner was not upgraded to medical category 'SHAPE-1', his claim for extension was not accepted in terms of the revised policy letter dated 05.05.2020 and consequently, since his extension was not granted, he was discharged from service on completion of terms of engagement w.e.f. 31.05.2022 (AN) under Rule 13 (3) item 1 (i) (a) of Army Rules, 1954 having rendered 32 years and 28 days of service.

(10) Feeling aggrieved by the order of discharge dated 31.05.2022, the petitioner preferred Original Application No. 649 of 2022 before the Tribunal. The Tribunal, after appreciating the fact that the petitioner had submitted his willingness for extension on 29.07.2020 and the revised policy dated 05.05.2020 came into existence w.e.f. 01.06.2020, had returned a finding that the case of the petitioner for grant of extension could not be considered in accordance with old policy as the applicant submitted his willingness for extension only on 29.07.2020, by which time the new policy was in force. The learned Tribunal also gave a passing reference, in as much as it observed that had the old policy been in force, the applicant would have been benefitted for service extension of eleven months as by that time he would have attained the age limit of 54 years. In this backdrop, the learned Tribunal has dismissed the original application vide judgment/order dated 29.03.2023. It is this judgment/order dated 29.03.2023, which has been challenged in the instant writ petition.

(11) Heard Shri Manoj Kumar Awasthi, learned Counsel representing the petitioner and Shri S.B. Pandey, learned Senior Advocate/Deputy Solicitor General of India assisted by Shri Varun Pandey, representing the Union of India/respondents.

C. Contentions of the parties

(12) Learned Counsel representing the petitioner drawing our attention to reasoning given by the learned Tribunal while dismissing the original application, has submitted that the learned Tribunal has not appropriately considered the issues involved in this matter inasmuch as the petitioner was promoted to the rank of Subedar Major w.e.f. 01.04.2020 and at that relevant time, the petitioner was governed by the procedure and guidelines enumerated in the letter of Integrated Headquarter of Ministry of Defence Army 20.09.2010, from which willing for two years extension in age/service is deemed unless the officer may submit his unwillingness certificate two years before his retirement date duly counter signed by authority concerned. Learned Counsel has submitted that admittedly, the petitioner was promoted to the rank of Subedar Major on 01.04.2020 i.e. during the lockdown period w.e.f. 25.03.2020 to 31.05.2020 and at that relevant time, the petitioner was not screened due to complete lockdown under old policy i.e. dated 20.09.2010. In the meanwhile, the amended policy dated 05.05.2020 came into existence by which the individual who have been under the permanent low medical category prior to commencement of extension would be discharged on completion of normal terms of engagement without extension which was not available in the old policy. Submission of the learned Counsel, therefore, is that once the promotion of the petitioner to the rank of Subedar

Major was made w.e.f. 01.04.2020 and the petitioner's case is covered under policy dated 20.09.2010, therefore, the amended policy dated 05.05.2020, which was applicable w.e.f. 01.06.2020, would not be made applicable in the case of petitioner. However, while considering the claim of the petitioner for extension of service, the respondents have erroneously applied the amended policy 05.05.2020 and declined the claim of the petitioner for extension of service, which according to him, is *per se* illegal and arbitrary. In this backdrop, learned Counsel submits that the learned Tribunal has erroneously returned a finding that the petitioner's case for grant of extension could not be considered in accordance with old policy, therefore, the impugned judgment/order as well as impugned rejection of extension of service are not sustainable and the same are liable to be set-aside.

- (13)** On the other hand, learned Senior Counsel representing the respondents has submitted that the learned Tribunal has taken into account all relevant aspects of the matter and has returned a finding that the petitioner's case for grant of extension could not be considered in accordance with old policy and further the petitioner could not be granted service extension due to extant policy which specifically provides that service extension cannot be granted to personnel placed in low medical category, which medical category the petitioner was holding and it could not be upgraded in re-categorization medical board. In this backdrop,

learned Senior Counsel submits that the Tribunal has rightly dismissed the original application preferred by the petitioner. The instant petition lacks merit and is liable to be dismissed.

D. Findings & Analysis

(14) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court in the instant writ petition, it is required to be noted herein that a bare perusal of the impugned judgment/order passed by the learned Tribunal, what we find is that the learned Tribunal, after analyzing the facts of the case, has drawn an inference that had the old policy would have in force, the petitioner could have been benefitted for service extension of 11 months as by that time he would have attained the age of limit of 54 years. Meaning thereby if the old policy would have applied to the case of the petitioner, apparently, the petitioner's service would have extended by the respondents. Therefore, to test the correctness of the impugned judgment/order passed by the learned Tribunal, we deem it apt to consider first the issue 'whether the petitioner's case for grant of extension of service is to be considered under the old policy dated 20.09.2010 or the new amended policy dated 05.05.2020 w.e.f 01.06.2020

(15) Apparently, the petitioner was enrolled in Army on 04.05.1990 and being placed in low medical category P2 (permanent), he was promoted to the rank of Subedar Major w.e.f. 01.04.2020.

It is an admitted fact that in normal course of service, a Subedar Major can serve up to four years in the rank or 54 years of age, whichever is earlier. At the relevant time i.e. on 01.04.2020, when the petitioner was promoted to the rank of Subedar Major, the procedure and criteria for screening of Personnel Below Officer Rank (hereinafter referred to as '**PBOR**') for grant of extension of service by two years was the letter dated 20.09.2010. Para-4 of the letter dated 20.09.2010 stipulates that all PBOR will be screened for extension by two years by Screening Board to be held on Unit/Regiment/Corps/Records Office basis, as applicable to assess their suitability for extension. The procedure and criteria for screening is laid down in Appendix 'A' to the letter dated 20.09.2010. Para 2 (a) of Appendix 'A' of the letter dated 20.09.2010 deals with willingness of the individual, which stipulates that an individual will be deemed to be willing for 2 years extension in age/service unless he submits his unwillingness certificate two years before his retirement date duly counter signed by the OC unit. Thus, unwillingness certificate was required to be submitted rather than a willingness certificate under the old regime

- (16)** At this juncture, it is significant to notice that the conditions enumerated in para 2 (a) of the Appendix 'A' of the letter dated 20.09.2010 (hereinafter referred to as '**old policy dated 20.09.2010**') are coached with deeming provisions and also

with non-obstante clause having overriding effect upon the other provisions of the Act, therefore, full effect of the provisions has to be given by the Courts.

- (17) In **Kamraj Nadar Vs. Kanju Thevar** : (1959) S.C.R. 583(602) = A.I.R. 1958 SC 687, the Apex Court has held that a deeming provision creates a legal fiction. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under certain circumstances. For ready reference the pertinent observation made by Apex Court in para 28 of the decision is reproduced as under:-

“28. The provision is therefore made in Section 55-A (5) that any person who has given a notice of retirement under Section 55-A (2) is deemed not to be a contesting candidate for the purposes of Section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances.....”

- (18) Thus, it is well settled that a deeming provision is an admission of the non-existence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow therefrom, and give effect to the same.

(19) In the instant case, undisputedly, after getting promotion to the rank of Subedar Major on 01.04.2020, the petitioner has not submitted unwillingness certificate of two years before his retirement date as is mentioned in the letter/policy dated 20.09.2010. Meaning thereby as per para-2 (a) of the Appendix 'A' of the letter/policy dated 20.09.2010, the petitioner will be deemed to be willing for two years extension in age/service. It is also an admitted fact that after getting promotion to the rank of Subedar Major, the screening of the petitioner for extension by two years by the Screening Board has not been done due to country wide lockdown during the month of April, 2020 and May, 2020. However, apparently, when the lockdown was removed w.e.f. 01.06.2020 in a phased manner, amendment in the procedure and criteria for screening of PBOR for grant of extension of service by two years was made vide letter dated 05.05.2020 (hereinafter referred to as '**amended policy dated 05.05.2020**'). For ready reference, the relevant para 2 (b) and para-4 of the amended policy dated 05.05.2020 is reproduced as under :-

"2 (b) Med Classification The Med Criteria for grant of two yr extn in age/service limit will be as follows :

(i) Must continue to remain in Med Cat SHAPE-1

(ii) **Tem LMCs**

(aa) Those pers who are in temp Low Med Cat at the time of screening bd/prior to commencement of extn will continue to be in service. **If downgraded to permt. Low Med Cat during recat prior to commencement of extn**

pd indl would be disch on completion of normal terms of engagement (without extn). Those downgraded to permit low med cat during extn pd will be disposed of in accordance with procedure for drop in med criteria.

.....

(iii) **Permt. LMC** The pers in **Permn LMC** would be screened with a view to assess their suitability for grant of extn in service. If pers are due to recat med bd prior to commencement of extn the screening bd can declare such pers as provisionally fit for extn subject to med cat being upgraded to acceptable level before expiry of normal terms of engagement. If not assessed fit by screening bd or not upgraded to acceptable med cat prior to commencement of extn. these pers will be dispose of in normal manner and not be granted benefit of extn. in service.”

4. Applicability. The changes to criteria for grant of extn in service issued vide this letter would be applicable for screening bds conducted on or after 01 Jun 2020. Indis screened for extn in service prior to this dt would continue to be governed by the provisions contained in our letter No.B/33098/Screening/AG/PS-2 (c) dt. 20 Sep 2010.”

(20) Apparently, when the petitioner was promoted to the rank of the Subedar Major on 01.04.2020, the petitioner had not submitted any certificate, however, when willingness certificate was sought from the petitioner after removing the countrywide lock down, the petitioner had submitted his willingness certificate for extension of service on 29.07.2020 and thereafter, screening for extension of service of the petitioner was carried out on 25.08.2020, whereby it was found that petitioner was still in P2 (permanent) medical category, therefore, his extension was not accepted in terms of the amended policy letter dated 05.05.2020. Consequently, since his extension was not granted,

he was discharged from service w.e.f. 31.05.2022 (AN).

Thereafter, the petitioner had filed original application before the learned Tribunal, seeking to grant him for extension of tenure i.e. upto 30.04.2023 i.e. till he completes 54 years age.

(21) A bare perusal of old policy dated 20.09.2010 reveals that this policy on willingness/unwillingness for extension of service categorically states that unless an individual explicitly gives ‘unwillingness for extension’, he will be deemed as willing. The petitioner was promoted to the rank of Subedar Major on 01.04.2020 even he being placed in low Medical Category P2 (Permanent) i.e. before coming into force the amended policy dated 05.05.2020 as the amended policy dated 05.05.2020 came into force on 01.06.2020. It appears that the petitioner submitted his willingness for extension of service for two years on 29.07.2020 on being sought by the respondents after coming into force the amended policy dated 05.05.2020.

(22) Considering the facts and circumstances of the case, particularly the deeming clause enunciated in para 2(a) of the Appendix ‘A’ of the Old Policy dated 20.9.2010 coupled with the fact that the petitioner was promoted to the rank of Subedar Major on 01.04.2020 i.e. before coming into force the amended policy, we are of the considered that the petitioner’s case for extension of service for two years comes under Old Policy dated 20.09.2010 and the action of the respondents in considering the

willingness of the petitioner under the amended policy dated 05.05.2020 is contrary to 'deeming clause' of para 2(a) of the Appendix 'A' of the Old Policy dated 20.9.2010.

(23) From perusal of the impugned judgment/order dated 29.03.2023, what we find is that the learned Tribunal, while adjudicating the issue, has not considered the para 2(a) of the Appendix 'A' of the Old Policy dated 20.9.2010 in the aforesaid aspect of the matter and has erroneously come to the conclusion that the petitioner's case for extension came under amended policy dated 05.05.2020. Thus, the impugned judgment/order passed by the learned Tribunal is not sustainable and the same is liable to be set-aside.

E. Conclusion

(24) In view of the aforesaid, the instant writ petition is **allowed**. The impugned judgment and order dated 29.03.2023 passed by the learned Tribunal in Original Application No. 649 of 2022 is hereby set-aside. The impugned order of discharge dated 31.05.2022 is also quashed.

(25) Having said so, since in terms of para 2 (a) of Appendix 'A' of Old Policy dated 20.09.2010, the petitioner is entitled to be retained for two years being in the rank Subedar Major. Since, he joined rank of Subedar Major on 01.04.2020, he would be deemed to be discharged only on 30.04.2023 i.e. till he

completed 54 years of age, however, 30.04.2023 has already been passed.

(26) As a consequence thereof, the petitioner became entitled to pension in addition to other benefits which was granted to him. However, the petitioner will not be entitled to arrears of salary for the period up to the date of discharge inter alia on the ground of 'no work no pay' but he shall be entitled to arrears of pension for a period of two years prior to filing of original application before the Tribunal. The arrears of pension be paid to the period within a period of six months from the date of receipt of copy of this order.

(27) For the facts and circumstances of the case, there shall be no order as to costs.

(Om Prakash Shukla, J.) (Attau Rahman Masoodi, J.)

Order Date :- 5th January, 2024
Ajit/-