* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: March 07, 2023***

Pronounced on: April 19, 2023

\+ W.P.(C) 8155/2021 & CM. APPL. 25298/2021

DILIP KUMAR ..... Petitioner

Through: Mr. Sudarshan Rajan, Mr. Hitain Bajaj, Mr. Ramesh Rawat & Mr. Mahesh Kumar, Advocates

Versus

UNION OF INDIA AND OTHERS .....Respondents

Through: Mr. Vikrant N. Goyal, Ms. Ayushi Garg & Ms. Tesu Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The present writ petition has been filed against the impugned order dated 13.04.2021 passed by the respondents whereby the statutory appeal preferred by the petitioner against the order dated 05.05.2020, whereby he was discharged from the services, has been upheld.

2. The facts, as mentioned in the present petition, are that the petitioner was appointed as Sub-Inspector in the Indo Tibetan Police Force (ITBP) in the year 1993 and was promoted to the rank of Subedar Major and thereafter, Assistant Commandant (Group A) /General diary

duty in the year 2008. Petitioner claims to be in Shape -1 absolute medical fitness as per the Shape system of Annual Medical Examination till the year 2014. On a complaint filed by petitioner's wife alleging petitioner to be an alcoholic, he was sent to Cuttack, Orissa for a period of 28 days and he was placed under Shape-2. Thereafter, petitioner was sent to Base Hospital Tigadi, New Delhi, where based upon the opinion dated 12.06.2013, he was found medically fit in Shape-1. However, again vide opinion dated 25.06.2013, respondents placed petitioner in Shape-3 for six months. Against the opinion dated 25.06.2013, petitioner preferred representations, but those remained unanswered. After expiry of six months period on 14.08.2014, petitioner was declared fit in Shape-1. The petitioner claims to have met with an accident and remained absent from duty for 256 days, which was permitted by the respondents and he was thereafter allowed to join the duties. However, the said period of 256 days was taken as unpaid leaves for not performing any duty and petitioner had not informed about his medical condition.

3. The petitioner has averred that on 16.01.2013 he was placed in Shape 2 and Shape 3 respectively w.e.f. 07.03.2013 to 24.06.2013 and thereafter from 25.06.2013 till 03.01.2014 on the ground that he was allegedly diagnosed with Alcohol Dependence Syndrome (ADS). Petitioner was Shape -1 on 04.01.2014 but was again Shape-2 on 06.08.2015 and also on 20.07.2016. On 11.04.2017 he was recommended to be placed under Shape-5 and to be invalidated from service. The petitioner got himself examined from another hospital and was declared fit. According to petitioner, despite repeated requests he was not granted leaves and after much pursuance he was granted leave and he was about to

leave for his hometown on 03.07.2017, he was informed that his Invalidation Medical Board (IMB) was fixed for 17.07.2017 in 9th battalion and he was directed to report in 9th battalion. Upon reaching there, petitioner was informed that there was no order for constitution of IMB and he accordingly came back and reported his 10th battalion. Thereafter, petitioner remained under observation of doctor from 30.9.17 to 17.10.2017 and on 18.10.2017, wherein though he was found fit but in the medical report he was again kept in Shape-5 category. On petitioner's request, petitioner was sent for re-examination from 30.09.2017 till 18.10.2017, wherein he was found fit for performing his duties. However, respondents in terms of guidelines issued by the MHA vide Ministry UO No. 1-45024/3/2004-Pers-11 dated 31.07.2007, kept the petitioner under observation in Shape-5 and referred him to IMB. The Medial Board constituted on 06.12.2017, recommended that the petitioner should be boarded out from the services of ITBP.

4. Against the aforesaid recommendation of the Medical Board, the petitioner preferred a writ petition before this Court, which was disposed of with liberty to petitioner to reply to Show Cause Notice dated 13.11.2018 issued by the respondents. The petitioner claims to have made a representation dated 14.02.2019 to the respondents. Thereafter respondents vide order dated 05.05.2020 directed discharge of petitioner from his service. The appeal preferred against the order dated 05.05.2020 was rejected by the respondents vide order dated 07.01.2021. Hence, the present petition has been filed.

5. During the course of hearing, learned counsel appearing on behalf

of petitioner submitted that while boarding out the petitioner from his service, the respondents have failed to look into the provisions of Rule 23 of ITBP Rules, 1994 which suggest that the officer or the Board passing such an order shall be of the view of that incumbent is physically unfit, whereas from the report of Dr. Bhatnagar it is clearly made out that the petitioner was fit on the date of his examination. Even further report of Dr. Rajendran Akambadiyar suggested that *"subsequent OPD evaluation did not reveal any alcohol seeking behaviour or any oddities* of *behaviour."* The medical report dated 13.04.2017 noted that the petitioner was fit to join his duties. Even the observations of the IMB also suggested that petitioner was alert, well-mannered and responded appropriately to all the questions put by the Board.

6. Learned counsel further submitted that the instructions of MHA dated 31.07.2017 do not suggest that if a person is in Shape-5, he has to be removed from service. The Board took into consideration the period from 2013 to 2016, which included the period of 122 days when he was absent from duty, not because of ADS but because of an accident. No complaint since the year 2013 was made against the petitioner. The material fact is that petitioner had been found fit to perform his duties by both the doctors named above and have not concluded that petitioner was suffering from ADS. It was submitted that the action of respondents is *mala fide,* hence, deserves to be set aside.

7. On the other hand, learned counsel appearing on behalf of respondents submitted that on a complaint made by petitioner's wife on 13.01.2013, petitioner was found intoxicated and was sent for medical

check up, first to Composite Hospital, CRPF, Bhubaneshwar where he was kept in a Low Medical Category; then he was referred to Referral Hospital, ITBP for opinion of Psychiatrist who opined it a case of *"Mental and behavioural disorder due to use of alcohol, Harmful use (F-10.2)"*. The petitioner remained in Low Medical Category from 25.06.2013 to 13.08.2014. On 14.08.2014, petitioner was upgraded to Shape-1. However again on 25.07.2015 relapse of ADS occurred and petitioner was admitted in Field Area Hospital and was placed in Shape 2 w.e.f. 06.08.2015. His condition was reviewed on 20.07.2016, as during the intermediate period the petitioner remained absent from duty. He was placed in Shape 2 category. Thereafter, petitioner was examined by Dr. Rajendran Akambadiyar between the period 02.04.2017 to 11.04.2017 and he was put in Shape 5 category. Thereafter, the petitioner was referred to Departmental Rehabilitation Board, who on 08.06.2017 opined that petitioner was not fit for any kind of duty and recommended his invalidation from service.

8. Learned counsel submitted that before putting the petitioner for the IMB, he was examined by the Psychiatrist from 30.9.2017 to 17.10.2017, who opined that petitioner has already been given more than three years to improve and abstain from alcohol but he failed and he was kept under Shape 5 w.e.f. 11.04.2017. Thereafter, he was brought before the IMB, who after taking into consideration the opinion of the Specialists from 11.04.2017 and 17.10.2017, recommended for boarding out of the petitioner on 06.12.2017.

9. It was next submitted that vide Memorandum No.I-26011/06/2010-

Pers-1305 dated 13.11.2018, the Invalidation Medical Board met on 6.12.2017 along with copy of the Form-23, Psychiatric opinion dated 11.04.2017 & 17.10.2017, petitioner was called upon to make a representation against the error of judgment in the opinion expressed by the Medical Board, but instead he filed W.P.(C) No. 775/2019 before this Court challenging the Memorandum dated 13.11.2018, which was withdrawn by the petitioner.

10. Learned counsel next submitted that in terms of Rule 38(3) of CCS (Pension) Rules, 1972, petitioner was found to be permanently incapacitated and also in terms of Rule 23(3) of the ITBP Rules, 1994, the petitioner was recommended unfit for duty by the IMB and hence, he has rightly been discharged from service.

11. In rebuttal, learned counsel appearing on behalf of petitioner submitted that on one hand respondents have boarded out the petitioner from service on the recommendations of Dr. Rajendran Akambadiyar and Dr. Amit Bhatnagar, however, on the other hand respondents have not taken into consideration their opinion on the health of petitioner. It was submitted that according to medical report dated 13.04.2017, the petitioner was fit to join duties and he was not suffering from ADS and therefore, his boarding out is bad in law and deserves to be set aside.

12. We have carefully considered the respective submissions of the parties and gone through the records of this case.

13. The petitioner had joined ITBP in the year 1993 and has remained Shape 1 till the year 2014. On a complaint made by his wife on 13.01.2013 alleging him to be alcoholic, the petitioner was placed under

Shape 2. However, in his examination at Base Hospital Tigadi, New Delhi on 12.06.2013, petitioner was declared Shape 1. The report dated 12.06.2013 by Dr. Vivek Kumar reads as under:-

> *"For clinical evaluation, the patient was admitted to BHD on 22/04/13. No alcohol withdrawal signs were observed in the ward nor did the patient report symptoms of withdrawal. He denied of craving alcohol and did not consume alcohol during his stay. His initial investigations pertaining to a '"abuse revealed S.bil.- 0.6 mg%, SGOT- 28 IU/L, SGPT-32 IU/L, GGT-29.83 U/L and USG abdomen came to be within normal limits. Patient had been managed by pharmacologic and non-pharmacologic means. He was actively participated in counseling for motivation to quit alcohol and relapse prevention. He had complied with the task given for counseling.*
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> ***OPINION:-***
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> *After examining the individual thoroughly considering history, examination, mental state examination, investigations, ward behaviour and available documents the individual is diagnosed as a case of "Mental and Behavioural disorder due to use of 'Alcohol, Harmful Use {F-10.1)'. Further, individual is not fulfilling the criteria for "Mental and Behavioural. Disorder due to use of Alcohol, Dependence Syndrome (F-10.2)'. The existing SHAPE guidelines for in-service personnel of CAPFs is silent on the above said diagnosis of the individual hence the individual may be placed in S1"*

14. Subsequent upon the aforesaid opinion dated 12.06.2013 of Dr.Vivek Kumar, the respondents vide communication dated 20.06.2013,

declared the petitioner in Shape 1.

15. The petitioner was again sent for medical examination on 25.06.2013, wherein he was diagnosed as a case of 'Mental and Behavioral disorder due to use of Alcohol, Harmful Use (F-10.l)'. Pertinently, while rendering this opinion, Dr. Vivek Kumar took verbatim note of his earlier opinion dated 12.06.2013 and opined as under:-

> *"After examining the individual considering history, examination, mental state examination, investigations, ward behaviour and available documents the individual is diagnosed as a case of "Mental and Behavioral disorder due to use of Alcohol, Harmful Use {F-10.l}. As per the existing SHAPE guideline ·for in service personnel of CAPFs the individual may be placed in S3 (T-24)".*

16. However thereafter, vide communication dated 07.10.2014, the petitioner was declared in Shape-1 on 14.08.2014, translated version whereof reads as under:-

> *"On transfer from this battalion for 20th battalion suspended company No.930150143 assistant commandant/ G.D. Dilip Kumar who was under medical category S2 (T-24) because of suffering from "Mental and Behavioural Disorder due to use of Alcohol harmful use (F-10.1)" from 04.01.2014, in this regard it has been informed by the Medical Officer, 41st Battalion through office comments number 248-49 dated 13.09.2014 that the said officer has been done SHAPE-1 from 14.08.2014"*

17. It is not disputed by both the sides that, thereafter, petitioner had met with an accident and the medical prescription dated 12.12.2015 to this effect has been placed on record. The petitioner had remained absent from his duty for a period of 256 days due to medical reasons and he was declared fit to join duty w.e.f. 18.06.2016. The respondents had granted leave to the petitioner for the said period, but he was not paid having not performed any duties. The petitioner was permitted to join his duties by the respondents.

18. On 11.04.2017 petitioner was examined by Dr. Rajendran Akambadiyar, who recommended to keep petitioner in Shape-5. A perusal of aforesaid report dated 11.04.2017 by Dr. Rajendran Akambadiyar reveals that a detailed note of petitioner's case history, with regard to previous LMC status including the absentee period, history of illness and his condition during the period of observation, were noted. What is noteworthy is the opinion of doctor on petitioner's state of health at the said time, which is noted as under:-

> *"**Condition on present admission and course in hospital***
> *On admission individual was found to have alcohol withdrawal features. Mental examination revealed a kempt anxious individual who was evasive about the alcohol consumption. Due to denial and minimization, he had no insight and was not reliable for further assessment. He reported with his wife. His relevant investigations like CGT. 75 U/L SGOT-67 U/L (10-40) and SGPT 54 U/L (10-42) were supportive of alcohol consumption. He was managed with forced abstinence detoxification and on improvement given benefits of psychotherapy aimed at relapse*

prevention and was also briefed about the consequences of relapse. He promises to abstain. Subsequent OPD evolution did not reveal any alcohol seeking behavior or any oddities of behavior. He was again started for medication for alcohol dependence".

19. Pursuant to the aforesaid opinion, Dr. Rajendran Akambadiyar placed petitioner in Shape5 while relying upon the instructions of Medical Examination and Classification of Personnel in the CFMFs issued vide Ministry /UO No. I- 45024/3/2004-Pers-1I dated 31.07.07. It is relevant to note here the aforesaid instructions dated 31.07.07), which read as under:-

*"(f) **ALCOHOL DEPENDENCE***

Alcohol dependence and drug abuse are recognized as behavioral / psychiatric problems in 1CD-10. These are incompatible with service/ethos in Armed Forces and all such cases should be invalidated/weeded out of service unless the patient shows an unequivocal determination to give up the use of alcohol / drug for good in the shortest time span. There is well laid down procedure for disposal of such patients of Alcohol dependence/ drug abuse. However it does not meet the organizational interests of Forces where a large number of men are alcohol dependent and still continue to stay. In view of the above following instructions for disposal of Alcohol dependence/drug abuse cases may be strictly adhered to:

i. Alcohol dependence/drug abuse cases will be observed in temporary LMC in S-3(T-24) initially if showing favorable response to treatment.

ii. If during the period of such observation vide 2(a) his condition relapses again, he should be placed in S-5 and invalidated out of service.

iii. After six months of observation in LMC in S-3 (T-24), if his behavioral / abstinence report is complimentary and his observation in hospital shows sign of abstinence (There should not be any symptom / sign of withdrawal when no alcohol / drug are allowed during the period of observation in psychiatric ward) he/she should be upgraded to category S-2 (T-24).

iv. During this period of observation in S-2 (T-24) if the Controlling Officer of patient refers him to psychiatrist with adverse behavioral report / remark and patient shows signs of relapse, he should be placed in S-5.

v. After 6 months of observation in S2(T-24) if the report as above is complimentary and patient shows signs of alcohol abstinence he should b e upgraded to S1.

vi. If after up-gradation to S-1, the patient shows any time any sign of relapse and referred by Controlling Officer/AMA to psychiatrist with adverse remarks in his report, then also patient should be placed in S-5.

20. According to the afore-noted clause, the alcohol dependence / drug abuse cases will be temporarily observed in Low Medical Category in Shape 3 and if during the period of observation, the condition relapses, he should be placed in Shape 5 and invalidated from service. However, if the report is complimentary, he should be upgraded to Shape 2 and he should be referred to Psychiatrist. If the patient shows signs of relapse, he should

be placed in Shape 5 and if the report is complimentary, he should be placed in Shape 1. Even if, after up gradation to Shape 1, the patient anytime shows sign of relapse, in view of adverse remarks in his report by the controlling officer or the Psychiatrist, then also he should be placed in Shape 5.

21. In the present case, the petitioner was declared Shape-1 on 20.06.2013; on 25.06.2013 he was placed in Shape-3; and on 07.10.2014 petitioner was again placed in Shape-1. On 11.04.2017 he was placed in Shape-5 by Dr. Rajendran Akambadiyar. A perusal of aforesaid opinion dated 11.04.2017 by Dr. Rajendran Akambadiyar reveals that petitioner had alcohol withdrawal features and pursuant to abstinence detoxification, he was made to undergo psychotherapy to avoid relapse and he had promised to abstain from alcohol. He was prescribed medicines to avoid alcohol dependence. The aforesaid noting dated 11.04.2017 by Dr. Rajendran Akambadiyar shows that petitioner was under treatment for alcohol dependence and was responding positively.

22. This Court now examines the opinion of the Specialist- Psychiatrist in respect of petitioner. As already noted above, Dr. Vivek Kumar rendered his first opinion on 12.06.2013 wherein it is noted that petitioner's liver function test and ultrasound abdomen was found to be normal and within normal limits. It is also noted that the patient has actively participated in counseling for motivation to quit alcohol and relapse prevention and motivated to quit alcohol. Accordingly, he was advised to further follow up with a Psychiatrist. The petitioner was kept in Shape 1.

23. Thereafter, again on 25.06.2013 petitioner had followed up before a Psychiatrist, wherein the opinion and conclusion rendered on 12.06.2013 were verbatim repeated, except the fact that the petitioner was placed under Shape-3. No different reasoning had been assigned in the report dated 25.06.2013 to place petitioner in Shape -3 within less than 15 days of placing him in Shape-1 on 12.06.2013. However, thereafter vide communication dated 07.10.2014, petitioner has once again been placed under Shape- 1 w.e.f. 14.08.2014 by the respondents.

24. We have also gone through the Discharge Summary Slip dated 18.10.2017 issued by Dr. Amit Bhatnagar at the Indo Tibetan Border Police Base Hospital, which notes as under:-

> *"officer admitted, observed and reviewed. He is being discharged in stable condition and the opinion is being sent to Bn in sealed envelope. Individual, advised discharge on 17.10.2017 but as officer submitted an application requesting for discharge on 18.10.2017 his discharge was withheld on 17.10.2017."*

25. We have also gone through the confidential report by Dr. Amit Bhatnagar, submitted along with Discharge Summary Slip dated 18.10.2017, relevant part whereof notes as under:-

> *"**Examination***
> *During his hospital stay and close ward observation pt. was conscious cooperative, Kempt, tidy, anxious, EDT (I) in hands, no craving illegible easy to establish,* ***illegible*** *maintained for long, PMA was initially slightly increased but later on average, speed moderate volume, coherent, goal directed with no*

deviations, attention and concentration well maintained, all the three modalities of memory intact no fornication. Patient denies to be deluded or hallucinated, Denial with rationalization and minimization were alcohol related defence used by the pt. no suicidal intent/ideation present, sensorium was clear with well preserved insight. No over psychopathology."

26. Despite having rendered the afore-noted favourable opinion in respect of petitioner, Dr. Amit Bhatnagar relying upon para No. 235 (f) (vi) of MHA guidelines dated 31.07.2007, recommended that the patient was given 08 years to improve and abstain from alcohol, i.e. in August, 2015; in July, 2016 and in April, 2017 he was awarded Shape-5. In our considered opinion, in terms of para-No. 235 (f) (vi) of MHA guidelines dated 31.07.2007 the Controlling Authority is required to observe if there are any signs of relapse, but in the present case we do not find any mention of relapse of ADS in the petitioner and rather, different report at different times by different Doctors and Psychiatrists noted that the petitioner was in normal physical and stable condition.

27. What is beyond belief in the present case is that while passing the impugned order dated 05.05.2020 terminating the services of petitioner on the basis of physical unfitness, the respondents have taken the stand that petitioner had failed to reply the Show Cause Notice dated 13.11.2018 despite opportunity given under the provisions of Section 23(3) of ITBP Rule, 1994. During pendency of the present petition, this Court was taken aback to find out that on the basis of opinion rendered on 11.04.2017, the

petitioner has been terminated from the services in the year 2020, after a lapse of almost four years.

28. It is pertinent to mention here that this Court vide order dated 22.12.2022 directed the respondents to get the petitioner examined to manifest as to whether, as of date, petitioner is suffering from ADS or not. Consequently, a Medical Board was constituted and petitioner was examined by Dr. Virendra Vikram Singh in the Base Hospital, Delhi Cantt. A copy of opinion dated 30.01.2023 rendered by Dr. Virendra Vikram Singh has been placed on record, wherein it is noted as under:-

> *"5. On present evaluation AC Dilip Kumar claimed that he had not consumed alcohol since 2017. examination found no symptoms or signs of current alcohol use, alcohol withdrawal or evidence of target organ damage. Relevant investigations (MCV-90.5fL, GGT-19 (U/L) are within normal limits. AST-44 U/L ALT-55U/L are marginally above the normal limits and USG abdomen found no abnormality. Urine drug screen was negative for Benzodiazepine and other substance use.*
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> *6. Overall based on medical records and current evaluation we are of the opinion that AC Dilip Kumar is a patient of Alcohol Dependence Syndrome. Currently abstinent (ICD10, F10.20). However, giving congnisance to raised AST/LFT and the nature of his illness which has possibility of lapse and relapse, a sustained full remission cannot be documented with absolute certainty."*

29. Apparently, vide aforesaid opinion dated 30.01.2023, Dr. Virendra Vikram Singh has opined that *giving congnisance to raised AST/LFT and*

the nature of his illness, which has possibility of lapse and relapse, a sustained full remission of petitioner cannot be predicted with full certainty. It is settled position that while sitting in appellate or writ jurisdiction, it is unjust to interfere in the matters pertaining to opinion of the Medical Board, especially if the opinion is rendered by the Experts in the field.

30. The Supreme Court in ***Veer Pal Singh Vs. Ministry of Defence*** (2013) 8 SCC 8, the appellant wherein was downgraded and on the recommendations of the IMB, was discharged from service; was denied pensionary benefits on the grounds that the disease suffered by him was not attributable to his military service and his request for review medical board was rejected by the competent authority; allowed the appeal and observed that:-

> *"10. Although, the courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasised is that the opinion of the experts deserves respect and not worship and the courts and other judicial/quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release/discharge from the army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable."*

31. There is no doubt to the position that fitness of personnel of armed forces is of prime importance and to ensure their physical and mental well

being, periodic medical checkups are being conducted. In the present case, a perusal of different opinions rendered by the Experts, we find that in different medical examinations, petitioner has been placed in Shape 1, Shape 2 and Shape 5. However, what is relevant is the latest opinion rendered on 30.01.2023, whereby he has been found to be a patient of ADS. In our considered opinion, if at this stage petitioner is shown to be suffering from ADS, with a possibility of lapse and relapse; he may not be able to perform his duties upto the required satisfaction. However, we also find that the previous reports categorically note that the petitioner has also shown withdrawal symptoms from alcohol influence. As per report dated 18.10.2017, petitioner was conscious, cooperative, kempt, attention and concentration well maintained and was clear with well preserved insight. In view of the aforesaid report dated 18.10.2017, the appropriate course for this Court would have been to direct the respondents to reconsider the punishment imposed upon the petitioner. But in the peculiar circumstances of the present case; where based upon the medical opinion rendered in 2017, petitioner was removed from service in the year 2020 and his current medical condition has been re-evaluated in the year 2023 pursuant to directions of this Court; and thereby he has been made to undergo agony of long trial, in the interest of justice, we do not deem it fit to relegate him to respondents for any further decision. In the considered opinion of this Court, petitioner may be unfit to perform duty for the post he was appointed but certainly punishment of "removal from service" inflicted upon him is too harsh. This Court finds that interest of justice would be met if petitioner is inflicted with lesser punishment.

32. Accordingly, the impugned orders dated 13.04.2021 and 05.05.2020 passed by the respondents are hereby set aside. The petitioner shall be treated as "compulsorily retired from service" and shall be entitled to pensionary and other benefits from the date he was relieved from the service. The respondents are directed to pass necessary orders to this effect and grant consequential benefits within four weeks.

33. With directions as aforesaid, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 19, 2023
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