

NAND KISHORE MISHRA

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v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 377-378 of 2013)

JANUARY 8, 2013

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[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

*Army Act, 1950:*

*s.9 read with Ministry of Defence Notification dated 29.11.1962 – ‘Active service’ – Army Medical Corps – Short Service Commission – Denied to appellant being categorized under medical category SHAPE-II – Held: Amputation of ring finger of appellant was as a result of injury sustained while on duty – On the basis of Notification dated 29.11.1962, appellant must be held to have received the injury while on active service – His case is fully covered by the medical criterion regarding eligibility as stipulated in Notification dated 29.11.1962 for grant of Commission and his case should have been considered under Medical Category SHAPE-II – Directions given to authorities concerned to consider appellant’s case accordingly and to grant him Commission – Government of India, Ministry of Defence Notification dated 29.11.1962 – Armed Forces – Army.*

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*Balbir Singh & Anr. v. State of Punjab, 1994 (5) Suppl. SCR 422 = (1995) 1 SCC 90 – relied on*

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**Case Law Reference:**

**1994 (5) Suppl. SCR 422      relied on      para 14**

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**CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 377-378 of 2013.**

**From the Judgment & Order dated 05.08.2010 &**

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A 06.10.2010 of the Armed Forces Tribunal, regional Bench, Lucknow in TA 157 of 2009 and in R.P. No. 17 of 2010.

S.G. Hasnen, Varinder Kumar Sharma for the Appellant.

B Ashok Panda, Wasim A. Qadri. D.K. Thakur, Anil Katiyar for the Respondents.

The following Order of the Court was delivered

### O R D E R

C 1. Leave granted.

D 2. The appellant was a candidate for grant of Permanent/ Short Service Commission in the Army Medical Corps(AMC)(Non-Technical) for which applications were invited *vide* Notification No.32433/PC/SSC/AMC(NT)/07/DGAFMS/DG-1A(1) dated January 19, 2007. Though successful in the selection and recommended for the grant of Short Service Commission in the AMC, he was denied the Commission on the ground that he was not eligible being in Medical Category E SHAPE-II.

3. In the counter affidavit filed on behalf of the respondents before the Armed Forces Tribunal, the reason assigned for denial of Commission to the appellant was stated as under:

F “(a) No 13989183K L/NK/HA Nand Kishor Mishra who has been recommended for grant of Short Service Commission in AMC (NT) by 17 SSB was found medically unfit by the SMB, CH(AF) Bangalore on 24 Dec.07 on account of disability ‘Amputation Ring Finger Left Hand’ Individual is in Low Medical Category SIHI A2(P) PIEI since G 1998 for the disability.”

H 4. It may be explained here that the fitness of a person for medical classification is assessed under five factors indicted by the acronym SHAPE. The acronym stands for: S-

Psychological, H-Hearing, A-Appendages, P-Physical Capacity and E-Eye-Sight. A

5. From the counter affidavit of the respondents, it, thus, appears that the appellant was in Category-I under the other four factors but on account of the loss of the left ring finger he was put in Category-II under the factor Appendages and, hence, was assigned the Medical Classification SHAPE-II. B

6. Mr. S.G. Hasnen, learned senior advocate appearing for the appellant, submitted that the respondent-authorities wrongly applied the criterion of medical eligibility and contended that in terms of the Notification for the grant of commission the case of the appellant should have been considered under medical category SHAPE-II. He pointed out that the medical criterion regarding eligibility, as stated in the Notification dated January 19, 2007, was as under:- C D

“(ii) The candidate must be in medical category SHAPE-ONE at the time of final selection for grant of PC. In case of those who possess exceptional merit or *those who have suffered disability owing to active service or a war casualty, the medical category upto grade TWO, under any of the SHAPE factors, except “S”, will be acceptable, on merit of each case, provided it is a result of the same disability.*” E

7. Learned counsel stated that on July 5, 1998, while the appellant was working as a Nursing Assistant in the Army Medical Corps, he was travelling from Lucknow to Allahabad on his motorcycle to join his duty at 181, Military Hospital, Allahabad. On the way he was attacked by some miscreants who wanted to snatch away his motorcycle. He put up resistance whereupon one of the miscreants fired a shot at him causing injury to his left ring finger. As a result of the injury, his left ring finger had to be amputated. F G

8. In the Court of Inquiry, it was found and held that the H

A appellant had received the injury while on duty *vide* Annexure P-2 and the appellant's Commanding Officer had also noted that the injury was caused when the appellant was shot by unknown miscreants while he was coming to join his duty and further that the injury sustained by him was not due to any  
B neglect or misconduct on his part. From the findings of the Court of Inquiry and from the opinion of the Commanding Officer, it is clear that the appellant received injuries while he was on duty.

9. The issue for consideration now is, whether being on duty would satisfy the terms of the Notification where the  
C expressions used are '*active service*' or '*war casualty*'. The appellant does not claim to come under the expression '*war casualty*', but he claims to be covered by the expression '*active service*'.

D 10. The expression '*active service*' is defined in Section 3(1) of the Army Act, 1950 as under:

"3. Definitions. - In this Act, unless the context otherwise requires. -

E (i) "*active service*", as applied to a person subject to this Act, means the time during which such person -

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

F (b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

G (c) is attached to or forms part of a force which is in military occupation of a foreign country;

xx xx xx"

H Section 9 of the Act empowers the Central Government to declare persons to be on active service. Section 9 reads as under:

“9. Power to declare persons to be on active service. - A  
Notwithstanding anything contained in clause (l) of section  
3, the Central Government may, by notification, declare that  
any person or class of persons subject to this Act shall,  
with reference to any area in which they may be serving  
or with reference to any provision of this Act or of any B  
other law for the time being in force, be deemed to be on  
active service within the meaning of this Act.”

11. In exercise of the power under Section 9, the Ministry  
of Defence issued a Notification dated November 29, 1962, C  
which was published in the Gazette of India (Extra.) Part II –  
Section 4 No.6. The Gazette Notification reads as follows:

“S.R.O. 6.E – New Delhi, the 28th November 1962 – In  
exercise of the powers conferred by section 9 of the Army  
Act, 1950 (46 of 1950), the Central Government hereby D  
declares that all persons subject to that Act, who are not  
on active service under clause (l) of section 3 thereof, shall,  
wherever they may be serving, be deemed to be on active  
service within the meaning of that Act for the purposes of  
the said Act and of any other law for the time being in E  
force.”

12. It is to be seen that the Notification is in very wide terms  
and covers all persons wherever they may be serving.

13. It may further be noticed that a similar Notification F  
issued under Section 9 of the Air Force Act, 1950 came under  
consideration before this Court in *Balbir Singh & Anr. v. State  
of Punjab*, (1995) 1 SCC 90. In that case this Court held that  
by virtue of the Notification issued under Section 9 of the Air  
Force Act, a person, even while on casual leave, would be G  
deemed to be on ‘active service’. In paragraphs 13 and 14 of  
the judgment, it was held and observed as follows:

“13. Thus, the effect of the notification is that whether or  
not a person is covered by the definition of “active service” H

A as spelt out in Section 4(i) of the Act they still would be deemed to be so wherever they may be 'serving'. Can a person governed by the Act be deemed to be "on active service" while on casual leave? The answer to the question can only be found by a reference to the leave rules governing the armed forces read with the provisions of the Act.

B  
C 14. The Central Government has framed certain rules regarding the conditions of leave of the persons subject to Army Act and it would be profitable to refer to some of the relevant rules dealing with "casual leave". Relevant portion of Rule 9 of the Rules of the service provides as follows:

D "9. Casual leave counts as duty except as provided for in Rule 10(a)."

E Rule 9 of the Rules (*supra*) thus specifically states that casual leave counts as duty except as provided for in Rule 10(a). It therefore follows that a person subject to the Act would be deemed to be "on active service" even when he is on *casual leave*. Learned counsel for the parties, in view of this legal position, did not dispute that the appellant, though on casual leave, would be deemed to be on "active service" in view of the notification dated 5-12-1962 (*supra*)."

F 14. On the basis of the Notification dated November 29, 1962, therefore, the appellant must be held to have received the injury while on active service.

G 15. He was undeniably in Medical Category SHAPE-II and, therefore, his case ought to have been considered by the authorities under that category for having received the injury while on active service.

H 16. We have carefully gone through the order of the Tribunal and it appears to us that the attention of the Tribunal was not

drawn to the Notification, dated November 29, 1962 issued by the Government of India under Section 9 of the Army Act and it was on account of that omission that the Tribunal did not accept the appellant's case and rejected his application. A

17. On hearing counsel for the parties and on a careful consideration of the materials on record, we are satisfied that the appellant's case is fully covered by the medical criterion regarding eligibility, as stipulated in the Notification for the grant of Commission dated January 19, 2007 and his case ought to have been considered under Medical Category SHAPE-II. B

18. We, accordingly, allow the appeals, set aside the order of the Tribunal and direct the concerned authorities to consider the case of the appellant under Medical Category SHAPE-II and since he was otherwise selected for the grant of Commission, to grant him the Commission in terms of the Notification. C D

19. No costs.

R.P.

Appeals allowed.