ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 922 of 2010

Thursday this the 3rd day of March, 2011

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'ble Lt. Gen. P R Gangadharan, Member (A)"

Arjun Singh, S/o Shri Surendra Singh Parihar, Aged about : 42 Years, R/o : Village – Budiya, Dist. Rewa (M.P.)

.....Applicant

By Legal Practitioner Shri S.P. Tiwari, Advocate.

Versus

1. Union of India, Through : Secretary, Ministry of Defence, South Block, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. Commander, M.P.C. & A. Sub Area, Pin-900479.
4. Lt. Col. M A Alam, OC 406 DSC Platoon, Attached to GCF, Jabalpur (M.P.)
5. Sub Major Vikram Singh
6. Sub Ranveer Singh
7. Nb Sub R S Chauhan,

Resps. 5 to 7 of 406 DSC Platoon, attached to G.C.F. Jabalpur (M.P.)

.....Respondents

By Legal Practitioner Shri K.D. Nag, Sr. Standing Counsel.

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1 The petitioner was enrolled in the Indian Army in the year 1987 and was discharged therefrom in 2004. He was re-employed in DSC as a Sepoy and he has been discharged on the basis of four red ink entries on 17.03.2009. He filed a Writ Petition No.3224 of 2009 in the High Court of Madhya Pradesh at Jabalpur. In the writ petition a counter affidavit was filed. The papers of the writ petition have been transferred to the Tribunal in view of the provisions of section 34 of the Armed Forces Tribunal Act,2007.

2 We have heard Sri S.P.Tewari, learned counsel for the applicant and Sri K.D.Nag, Sr.Standing Counsel on behalf of the respondents.

3 Learned counsel for the applicant placed reliance upon the averments made in para 4 of the petition. It has been averred therein that respondent no.4 is not now accepting any correspondence about progressing of his statutory complaint and also about compliance of the procedure laid down in policy letter dated 28.12.88 which mandates holding of an enquiry before order of discharge of the individual from service. In para 6.7 it has been averred that no enquiry/investigation of any type has been ordered. In the counter affidavit it has not been denied that no preliminary enquiry was held. Rather it has been alleged in para 4 of the counter affidavit that it was not necessary to hold any departmental court of enquiry. The respondents have stated that a show cause notice dated 13.12.2008 was issued to the applicant in which there is a reference of four red ink entries, namely:

"Sl No	Offences	Punishment with date	Unit/Platoon (PL)
1.	AA Sec 48	07 Days RI-04.02.06	54 PL, DSC, 663 Army Aviation Squadron
2.	AA Sec 48	(a) 28 days RI & 14 Day Detention 04.08.06	54 PL DSC 663 Army Aviation Squadron
3.	AA Sec 39(d)	07 days RI... 11.01.08	406 DSC PL GCF
4.	AA Sec 48	10 days RI... 17.10.08	406 DSC PL GCF"

4 Learned counsel for the applicant has drawn our attention to the photostat copy of the show cause notice which was issued to the applicant, which indicates that two of the offences are under section 48 of the Army Act, one under section 39(d) and one under section 68 of the Army Act. Learned counsel for the respondents Sri K.D.Nag submitted that section 68 mentioned in the show cause notice is merely a clerical error and that the applicant was actually punished for the offence under section 48 of the Army Act. The fact, however, remains that in the show cause notice which was issued to the applicant, the last offence mentioned is not section 48 but under section 68. The purpose of issuing show cause notice is to give opportunity to the person to put forward his explanation. If wrong particulars are mentioned in the notice he may be prejudiced depending upon the facts of each case. If the documents relating to the offence are annexed with the notice or there are other particulars indicating the offence however there may be no prejudice. The show cause notice in this case does not indicate that any other papers were

annexed with it. In ***Ram Narayan Singh vs. Union of India,*** T.A. 161 of 2010, decided on 30.07.2010 by Regional Bench,Lucknow,relied upon by the learned counsel for the applicant, it has been held " *It is for this reason it appears that para 5(d) of the policy letter dated 28.12.1988 requires that the show cause notice must cover full particulars of the cause of action against the individual and the allegations must be specific and supported by sufficient details to enable the individual to understand and reply to them. Non compliance with the requirement would vitiate the show cause notice.*"

The fact that a preliminary enquiry was not held has also not been disputed. The copy of the policy letter dated 28.12.1988 has been placed before us. Para 5(a) of the policy reads as under:

> *"5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below :-*
> *(a) Preliminary Enquiry, before recommending discharge or dismissal of an individual the authority concerned will ensure: -*
> *(i) that an impartial enquiry (not necessarily a court of Inquiry) has been made into the allegations against him and that he has had (adequate opportunity of putting up his defence or explanation and of adducing evidence in his defence..*
> *(ii) That, the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case."*

5 This policy has been the subject matter of interpretation in various judicial decisions. The Delhi High Court has in several cases taken the view that holding of preliminary enquiry, as is envisaged in the policy letter dated 28.12.1988, is necessary vide ***Surinder Singh Sihag vs. Union of India and others, 2002 Delhi***

Law Times 705 and ***Rajesh Kumar vs. Union of India and others, Mil LJ 2005 Delhi 48***. The J & K High Court in a recent decision has also taken a similar view, vide ***Ex.Rifleman Tilak Raj vs. Union of India, 2009(4) SCT 645***. However, the Punjab & Haryana High Court in Mohinder Singh vs. Union of India (W.P.No.3109 of 2007, decided on 14.12.2007 has held that where the record itself clearly indicates that the applicant is a habitual offender, non holding of a preliminary enquiry would not vitiate the discharge. In this case, however, the show cause notice does not indicate the facts and circumstances in which the offences were committed and only the provisions under which the applicant was punished are mentioned and from the sections under which the applicant was punished itself it cannot be concluded that a preliminary enquiry could have been dispensed with. Where an executive authority sets out the standard it would follow for taking a particular action in respect of its employee, its action would be judged by such standard. So it was held by the U.S Supreme Court in ***Vitarelli v. Seaton*** (1959) 359 US 535 :

> *"An executive agency must be rigorously held to the standards by which it professes its action to be judged. .....Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. .....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."*

6 In the present case the preliminary enquiry has not been held, as such the impugned order discharging the applicant cannot be sustained.

7 In the result, we allow the Transferred Application and set aside the discharge order. The applicant will be reinstated in service with consequential benefits. However, it will be open to the respondents to proceed in accordance with law.

Sd/-

(Lt. Gen. P R Gangadharan)
Member (A)

Sd/-

(Justice Janardan Sahai)
Member (J)

RPS/-