

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

09/10  
TA 192 of 2010

Thursday this the 25<sup>th</sup> day of October, 2010

“Hon’ble Mr. Justice Janardan Sahai, Member (J)  
Hon’ble Lt. Gen. P R Gangadharan, Member (A)”

Ex. No. 13997730-G Sepoy/Amb.  
Asst. Ashok Kumar, aged about 27  
years, son of Shri Nand Kishore  
Chauhdary, resident of Village &  
P.O. Khirhar, (Balarahi) District :  
Madhubani (Bihar)  
By Legal Practitioner Shri R Chaubey, Advocate.

.....Applicant

Versus

1. Union of India, through Secretary,  
Ministry of Defence, New Delhi.
2. Chief of the Army Staff (COAS),  
Army Head Quarters AHQ, P.O. New  
Delhi – 110011.
3. Officer-in-Charge, Army Medical  
Corps, Records, Lucknow
4. General Officer Commanding, 15,  
Infantry Division, C/O 56 APO.
5. Commanding Officer, 415, Field  
Ambulance C/o 99 APO.

.....Respondents

By Legal Practitioner Shri R N Singh, Ld. Sr. Standing Counsel.

ORDER

“Hon’ble Mr. Justice Janardan Sahai”

1. The applicant, Ashok Kumar was enrolled on 20.11.1997. He was issued a show cause notice dated 10.09.2004 signed by the Lt. Col. Vikram Singh, Commanding Officer in which there is a reference of seven offences said to have been committed by the applicant between May, 2001 and July, 2003 and the petitioner has been asked to show cause by 16.09.2004 why his the services should not be terminated. The petitioner submitted his reply dated 15.09.2004 and was thereafter discharged on 07.10.2004. The petitioner then filed Writ Petition No. 3525 of 2005 in the Lucknow Bench of the Allahabad High Court which has been transferred to the Tribunal in view of the provisions of Section 34 of the Armed Forces Tribunal Act 2007.

2. We have heard Shri R Chaubey, Counsel for the applicant and Col. R N Singh, Sr. Standing Counsel on behalf of the respondents. Shri R Chaubey, Ld. Counsel for the applicant submitted that show cause has been signed by Commanding Officer, Lt. Col. Vikram Singh and not by Sub Area Commander or the Brig. Commander as provided Under Rule 13(3) III (v). It is also submitted that the discharge of the applicant was not sanctioned by the Sub Area Commander/ Brigade Commander. In view of this issue we had directed the respondents to produce the original record relating to the discharge of the applicant. The record has been produced by the respondents before us and has been seen by Shri

R Chaubey, Ld. Counsel for the applicant. The file indicates that the minutes sheet relating to the discharge of the petitioner was initiated on 01.09.2004 and approval of issuance of show cause notice was given by the GOC on 07.09.2004 and thereafter the show cause notice was issued on 10.09.2004. The discharge of the applicant was sanctioned by the GOC on 25.09.2004 and he was discharged on 07.10.2004. Thus this contention of the Ld. Counsel for the applicant that the issuance of the show cause and sanction of the discharge is not the act of the competent authority is not borne out from the record.

3. Ld. Counsel for the applicant then submitted that it was necessary for the GOC/Sub Area Brigade Commander to have signed the show cause notice himself and failure to do so would vitiate the notice. In our opinion the contention does not have any merit. The issuance of show cause notice has been sanctioned by the Competent Authority and the mere fact that the show cause notice was issued under the signature of the Commanding Officer would not vitiate the show cause notice. The rule confers the decision making power upon the Sub Area Commander/ Brigade Commander and if that authority or any higher authority, vide Rule 13 (2) Army Rules has taken the decision, it is sufficient compliance. No prejudice has been caused to the petitioner.

4. It was next contended by the Ld. Counsel for the applicant that the only five days time was granted to the applicant to

show cause which was wholly insufficient. The reply of the applicant has been filed as Annexure CA-3 to the Counter Affidavit. In this reply dated 15.09.2004, the applicant has admitted his mistake and attributed the cause to family problems. Moreover we also find that the applicant was required to give his reply by 16.09.2004 whereas he himself replied on 15.09.2004 even before the time granted in the show cause. In the circumstances, it does not appear that the applicant has in any way been prejudiced for any shortage of time.

5. The Ld. Counsel for the applicant has also submitted that no preliminary enquiry has been held and that the report of the preliminary enquiry has not been annexed with the show cause notice. The original record reveals that a preliminary enquiry was held and a report was also submitted. The Ld. Counsel for the applicant has not been able to refer to any provision whereunder the report of the preliminary enquiry was required to be annexed to the show cause notice. There is another aspect of the matter to which our attention was drawn by Shri R.N. Singh, Ld. Sr. Standing Counsel for the respondents that the applicant had committed seven offences within a short span of two years and had repeatedly overstayed leave and was also once punished for intoxication and that this record of the applicant itself indicates that he was a habitual offender and in the circumstances, there was sufficient material to justify the discharge



and it was not mandatory on the part of the Respondents to hold a preliminary enquiry.

6. Shri R. Chaubey, Ld. Counsel relied upon the decision of the Division Bench, Delhi High Court in Surendra Singh Sihag Vs. Union of India 2003 (1) SCT, 697 in which the discharge was quashed on the ground that the procedure under the policy letter dated 28.12.1988 which envisages a preliminary enquiry was not followed. On the other hand, Shri R.N. Singh, Ld. Sr. Standing Counsel relied upon the decision of Division Bench of Punjab and Haryana High Court in Mohinder Singh Vs. Union of India in the CWP No. 3109 of 2007 dated 14.12.2007 in which it has been held that if on the facts on record i.e. the red ink entries it can be concluded that the officer is undesirable, no preliminary enquiry is required to be carried out. The decision of the Delhi High Court in Surendra Singh Sihag Vs. Union of India 2003 (1) SCT, 697 was considered by the Punjab and Haryana High Court and it was observed that although Surinder Singh Sihag has dealt with the policy dated 28.12.1988 but what kind of preliminary enquiry can be envisaged in respect of red ink entries in the service records of the official has not been examined. The Learned Judges then observed:

*“In our opinion, the preliminary enquiry which is required to be carried out in terms of the Instructions circulated vide Circular dated 28.12.1988 is in respect of the facts which require to be determined to return a finding that the official is*



Act and Rules in Union of India and Ors V. Corporal A K Bakshi and another (1996) 3 SCC 65. It was held 'This action for discharge is not by way of punishment for the misconducts for which he has already been punished. The basic idea underlying the policy for discharge is that recurring nature of punishments for misconduct imposed on an airman renders him unsuitable <sup>for</sup> the further retention in the Air Force. Suitability <sup>for</sup> the retention in the Air Force has to be determined on the basis of record of service. The punishments that have been imposed earlier being part of the record of service have to be taken into consideration for the purpose of deciding whether such person is suitable for retention in the Air Force. Note to the Policy letter dated 28.12.1988 itself provides the manner in which discharge consequent to red ink entries is to be considered. The said Note 2 reads as under.

*"Discharge from service consequent to four red ink entries is not a mandatory or legal requirements. In such case Commanding Officer must consider the nature of offences for which case red ink entry has been awarded and not to harsh with the individuals, especially when they are about to complete the pensionable service Due consideration should be given to the long service hard stations and difficult living conditions that the OR has been exposed to during his service, and the discharge should be ordered only when it is absolutely necessary in the interest of service. Such discharge should be approved by the next higher commander."*



The consideration mentioned in the Note can be done on the basis of the service record of the soldier and from his reply to the show cause notice. In cases where the opinion that the retention of a soldier is not desirable is to be formed on the basis of complaints and material which requires investigation, a preliminary enquiry must be held. In every case the issuance of the show cause notice envisaged in Rule 13 (3) III (v) of the Army Rules is however essential. <sup>b/s</sup> Before ordering discharge.

8. In our view, the Red Ink Entries in this case are sufficiently indicative that the applicant is a habitual offender. The relevant portion of the show cause notice is being quoted as under :

*"1. On perusal of your records of Army Service, it has been observed that during the span of your Army Service, you have committed the following offences under the Army Act 1950, for which the punishments were awarded to you as mentioned against each of offence as under :*

Ser No.	Date of Offence	AA sec	Punishment Awarded	Remarks
(a)	04 May 2001	39(b)	14 days RI	Without sufficient cause overstaying leave granted to him.
(b)	18 Jun 2002	39(a)	7 days pay fine	Absenting himself without leave
(c)	20 Aug 2002	39(b)	7 days RI	Without sufficient cause overstaying leave
(d)	16 Oct 2002	48	7 days RI	Intoxication
(e)	28 Oct 2002	63	7 days RI	An act prejudicial to good order and mil discipline
(f)	30 Jan 2003	39(b)	7 days pay fine	Without sufficient cause overstaying leave granted to him

*(Signature)*

(g) 08 Jul 2003

39(a)

28 days RI

Absenting himself without  
leave

And 14 days  
Detention in  
mil custody”

9. In our opinion the material mentioned in the show cause notice was sufficient for the competent authority to draw a conclusion that the applicant was undesirable for retention in service. The applicant had himself admitted his mistake in the reply to the show cause notice. No other contention has been raised by the counsel for the applicant. We, therefore, do not find any illegality in the discharge. The petition is dismissed.

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

(Justice Janardan Sahai)  
Member (J)

usp