

**A.F.R.**

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

**RESERVED**  
(Court No. 3).**Transferred Application No. 21 of 2009**Friday the 25<sup>th</sup> day of April, 2014

“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”

Smt. Annapurna Shukla wife of Late Ashutosh Shukla No.  
13992430X Sep/NA, Village Khairhani, Post Office Kundanganj,  
P.S. Bachhrawan, Dist Rae Bareli.

..... Applicant  
Shri Rakesh Johri, Amicus Curiae.

Versus

1. Union of India through Chief of Army Staff, New Delhi.
2. Commanding Officer, Headquarters, A.M.C. Centre & School, Lucknow.
3. Commanding Officer, Administrative Battalion, A.M.C. Centre & School, Lucknow.

..... Respondents  
By Mrs. Veera Bahadur Srivastava, Standing Counsel.

**ORDER****Hon’ble Lt. Gen. A.M. Verma.**

1. In this transferred application the applicant has prayed the following reliefs :

*“(a) That by issuing a writ, order or direction in the nature of certiorari, the impugned order dated 21.3.2007 and 19.3.2007 as contained in Annexure No. 1 and 1(a) respectively alongwith entire proceedings including Show cause notice dated 11.1.2007 as contained in Annexure No. 11 to the writ petition be quashed as illegal and against the spirit and order of Hon’ble High Court and the Army Rules, 1954 and the circular issued under the same.*

*(b) That by issuing a writ, order or direction in the nature of mandamus, the opposite parties be commanded to continue the reinstatement order vide dated 19.12.2006 as contained in Annexure No. 10 and to continue on the rolls of the army and to make payment of salary etc, in accordance with law regularly without any break.*

*(bii) That the applicant be given all consequential benefits as admissible to late No. 13992430 X Sep/NA Ashutosh Shukla and the applicant be granted Special Family Pension.*

*(c) That the cost of the writ petition be also awarded with to the petitioner.”*

2. The factual matrix of the case is that the applicant's husband was enrolled on 23.8.1995 in Army Medical Corps as Nursing Assistant and was attested as Sepoy on 9.10.1996. Thereafter, he was sent to Command Hospital, Pune for technical training on 19.12.1996. On 11.2.1997, he was awarded 28 days R.I. and 14 days confinement to lines for an offence under Section 63 of the Army Act for trespassing family lines. On 08.07.1997 he was awarded punishment of 28 days R.I. under Section 39(a) of the Army Act. On 3.9.1997, he was awarded 7 days pack drill for being absent without leave. On 4.9.1997, respondent no. 2 served a show cause notice to the applicant's husband for showing cause as to why he should not be discharged from service since he had two red ink entries and 7 days' pack drill. On 14.10.1997, the applicant's husband was discharged under Rule 13(3)III(v) of the Army Rules. The reason assigned for this discharge was "service is no longer required". On 16.10.1997 Headquarters A.M.C. Centre & School, vide their letter dated 16.10.1997 informed the applicant's husband that "The Commandant ordered your

discharge from service as undesirable soldier vide Army HQ letter No. A/13210/159/AG/PS-2(C) dated 28 Dec 88 and Army Rule 13 (3) Table III (v) of 1954". The applicant's husband filed Writ Petition No. 2380 of 1998 on 26.5.1998. This writ petition was allowed on 5.4.2005 by the Allahabad High Court. The relevant part of the order is quoted below :

*"The opportunity of hearing was denied to the petitioner to meet his case effectively. The order is violative of principles of natural justice. The impugned order amounts to dismissal, removal of an army personnel, principles of natural justice at least require that fair opportunity of submitting the reply to the show cause notice should have been afforded to the petitioner before passing the impugned order.*

*In view of above, the writ petition is allowed. A writ of certiorari is issued quashing the impugned orders dated 4.9.1997, 15.10.1997 and 16.10.1997. The petitioner shall be treated to be in continuous employment. Consequences shall follow,"*

On 12.7.2006, the respondents filed Special Appeal, on which the Hon'ble Division Bench of the High Court passed an order on 12.7.2006. The relevant part of the order is as follows :

"Hon. Jagdish Bhalla, J.  
Hon. Umeshwar Pandey, J.

*The special appeal arises out of the judgment and order dated 5.4.2005 passed by Hon'ble Single Judge deciding the writ petition of the petitioner Sri Ashutosh Shukla on the ground that show cause notice was not served and the impugned order was passed against the petitioner, who was in imprisonment and further that the impugned order does not speak about the show cause notice. The opportunity of hearing was also denied to the petitioner to put forth his version. Learned counsel for the appellant submits that on 4.7.1997, 28 days of imprisonment was awarded to the petitioner. The learned counsel for the petitioner states that it was not 28 days imprisonment but in fact three days pack drill punishment which was awarded on 8.7.1997. In these circumstances,*

*when the impugned order was passed on 4.9.1997, the respondent-petitioner was not in the military custody as is evident from the perusal of the record.  
Heard learned counsel for the parties.*

*We are of the considered opinion that from perusal of the writ petition and other affidavits filed in the court, it does not reveal that the petitioner was in military custody when the show cause notice was served. Accordingly, the judgment and order dated 5.4.2005 passed by Hon'ble Single Judge is set aside and the appeal is allowed.*

*Registry is directed to fix 26.7.06 in the writ petition. Neither of the parties shall seek adjournment before the Hon'ble Learned Single Judge. The Hon'ble Single Judge is requested to hear the matter and decide it afresh."*

3. The Hon'ble Single Judge heard the case again and passed an order on 26.7.2006 allowing the writ petition and quashing the respondents' letters dated 4.9.1997, 15.10.1997 and 16.10.1997.
4. The respondents filed a review petition, which was disposed of on 17.10.2006 ordering reinstatement of the applicant's husband. The operative part of the order is as follows :

*"Hon'ble Ajoy Nath Ray, C.J.  
Hon'ble Jagdish Bhalla, J.*

*We are in respectful agreement of the reasoning recorded and the orders passed by Hon'ble Mr. Justice Rakesh Sharma both on 26.07.2006 when his Lordship passed an ex parte order in favour of the writ petitioner/respondent and on 17.10.2006 when his Lordship disposed of the matter on merits after hearing both sides, on a review application being made by the appellants.*

*However we make it clear that if on a hearing given to the writ-petitioner any adverse order is passed against him and it becomes final and binding, then and in that event the writ petitioner will not be entitled either to receive or retain any benefits which might be received by him under the impugned orders or which might be so receivable by him.*

*Excepting for the above clarification the above appeal is dismissed.*

*No orders as to costs.”*

5. The respondents issued reinstatement order to the applicant's husband on 19.12.2006 and the applicant's husband served in AMC from 20.12.2006 onwards. On 11.1.2007, a Show Cause Notice was served to the applicant's husband which was based on punishment awarded to him in 1997. The applicant's husband replied to the Show Cause Notice on 27.1.2007, in which he also requested for examination of some documents. The respondents provided those documents which the applicant's husband requested for, and thereafter the applicant's husband sent a letter dated 17.3.2007 to the respondents highlighting discrepancies in the documents. In the meantime, the applicant's husband on 4.2.2007 was served with a Movement Order, LRC and Railway warrant for proceeding on posting to 408 Field Ambulance. The father of the applicant's husband received a message from the respondents asking him to send the applicant's husband to report to the respondents and the applicant's husband was not allowed to proceed to 408 Field Ambulance. On 19.3.2007 the applicant's husband was discharged from service. He filed Writ Petition No. 2306 of 2007 on 12.4.2007. On 22.5.2009, the applicant's husband died and through a substitution application the name of the applicant was substituted in the writ petition. This case was then transferred from the Lucknow Bench to this Tribunal and was numbered as Transferred Application No. 21 of 2009.

6. The applicant, through her affidavit and pleadings of Shri Rakesh Johri, Amicus Curiae, submitted that the punishment has been awarded illegally to the applicant's husband. Shri Johri stated that no one identified the applicant's husband. No witness spoke about involvement of the applicant's husband in this case. The punishment awarded, therefore, was totally illegal. In the case where the applicant's husband was awarded 28 days' R.I. for being absent without leave, learned Amicus Curiae stated that the sister of the applicant's husband was married on 24.5.1997 for which leave was requested. The applicant's father-in-law, Sub. J.P. Shukla (Retd.) had sent a registered letter to the Commandant, Commanding Hospital, Pune, requesting for leave to attend the wedding. Learned Amicus Curiae produced the invitation card for the said marriage and pointed out that the invitation card carried the name of the applicant's husband. After the marriage the applicant's husband rejoined the Unit.

7. Learned Amicus Curiae stated that in January, 2007 a fresh Show Cause Notice was served on the applicant's husband which is based on punishments awarded in 1997. The applicant's husband had not been punished after 1997 and he had been allowed no time to improve. The replies sent to the Show Cause Notice served in January, 2007 were only interim and without waiting for final reply to the Show Cause Notice the applicant's husband was illegally discharged from service.

8. Alluding to the process of discharge, learned Amicus Curiae stated that the entire process of discharge was done by the Commandant, AMC Centre & School. Under the quoted rule, i.e. Army Rule 13 (3) III (v), the competent authority is Brigade or Sub Area Commander. Without application of mind by the competent authority, the respondents discharged the applicant's husband relying on a Gazette notification giving powers of G.O.C. to the Commandant, AMC Centre & School. Learned Amicus Curiae stated that these powers can only be exercised by a Brigade/Sub Area Commander and not by any officer having powers of Brigade or Sub Area Commander. These powers have to be given under the authority of Section 8 of the Army Act which does not permit absolute delegation of powers under the Army Rules. The discharge is dealt with under Section 22 of the Army Act wherein there is no mention of "by others" and, therefore, learned Amicus Curiae stated that the Commandant, AMC Centre & School did not have the authority to discharge the applicant's husband from service.

9. Referring to policy letter dated 28.12.1986 quoted above, learned Amicus Curiae has stated that Note 2 to Para 5 of the letter says that it is not mandatory to discharge a person even after four red ink entries. In this policy letter it has been laid down that the process of discharge has five stages, i.e. Preliminary Examination, Forwarding of Recommendation, Action by Intermediate Authorities, Action on Receipt of Reply to Show

Cause Notice and Final Orders. In the instant case learned Amicus Curiae stated that no preliminary examination was carried out. All other actions were carried out by the Commandant, AMC Centre & School himself with a preconceived mindset. Referring to posting of the applicant's husband to 408 Field Ambulance, learned Amicus Curiae has stated that the applicant's husband had been "struck off strength" from AMC Centre & School and was on his way to the Unit to which he was posted. Before he could board the train, he was asked to report back to the AMC Centre and was then discharged from service, which shows that respondent no. 2 had a vindictive mindset and had made up his mind to discharge the applicant's husband from service. Learned Amicus Curiae has cited the case of **Surinder Singh Sihag v. Union of India** reported in 2003 (1) SCT 697 in which it has been held that reasonable opportunity must be allowed to put forth his case in the reply to show cause notice. He also cited the case of **Ex. Rifleman Tilak Raj v. Union of India** reported in 2009(4) SCT 645 in which it was held that in case of four red ink entries preliminary examination must be carried out and Commanding Officer must ensure that the punishment is not too harsh. Learned Amicus Curiae also cited that Sepoy A.K. Singh, who had been punished along with the applicant's husband for the alleged trespassing of family lines in February, 1997 was still in service. Learned Amicus Curiae



prayed that justice be done and the applicant's husband be given the relief which she has prayed for.

10. The respondents through their counter affidavit and arguments put forth by Mrs. Veera Bahadur Srivastava, learned Standing Counsel, as well as Major Narender Singh, Departmental Representative, have confirmed the dates of enrollment, attestation and that the applicant's husband was sent to Command Hospital, Pune, for class III technical training. The respondents have stated that the applicant's husband was awarded 28 days R.I. and 14 days confinement to lines for trespassing after due investigation in which he was found to be guilty and an offence to which the applicant's husband pleaded guilty. Even after this, there was no improvement in the general behavior of the applicant's husband and he absented himself without leave for which he was awarded punishment under Section 39(a) of the Army Act. Consequent to this, the applicant's husband was returned to AMC Centre where again he absented himself without permission wherein he went to Rae Bareli, which is home town, and returned the same day for which he was awarded seven days pack drill. Since the applicant's husband did not mend his ways, his case was taken up with the Commandant, AMC Centre & School on 15.7.1997 to discharge him as an undesirable soldier, which was sanctioned by the Commandant on 15.10.1997. A Show Cause Notice was served to the applicant's husband on 4.9.1997 and he was discharged from service with effect from

17.10.1997 under the provisions of Rule 13 (3)III (v) of the Army Rules. The respondents have stated that the applicant's husband was an undisciplined soldier and did not show any improvement in his behaviour and conduct. Before discharging him from service, the applicant's husband was given every opportunity to be heard and he was dealt with in a fair and reasonable manner. All actions in this regard were legal. The Commandant has full power to sanction discharge under the Army Rules. Learned Standing Counsel has produced a Gazette notification dated 2.7.1983 wherein it has been mentioned that the Commandant, AMC Centre has been given powers of the G.O.C. Following the Court order the applicant's husband was reinstated vide AMC Centre & School's letter dated 19.12.2006. Thereafter a Show Cause Notice, signed by the Commandant, AMC Centre & School, dated 11.1.2007 was served to the applicant's husband. His replies were considered in detail. The applicant's husband was given every opportunity to examine the documents that he wished to examine and thereafter he was given every opportunity to submit his point of view. After taking into consideration all these replies, the Commandant, AMC Centre & School signed the discharge of applicant's husband and he was accordingly discharged from service. The respondents have stated that there was no illegality in the manner of discharge and have requested that the case be dismissed being devoid of merit.

11. Heard both sides and perused the record.

12. We have perused the Gazette notification dated 2.7.1983 whereby the Commandant, AMC Centre & School has been given the powers of General Officer Commanding and we are satisfied that the Commandant, AMC Centre & School has the requisite powers and authority to sanction discharge under Rule 13 (3) III (v) of the Army Rules.

13. On the issue of punishment awarded for trespassing, the respondents have stated in their counter affidavit that the applicant's husband was in a drunken state. In the statement of witnesses produced by the respondents, one of the witnesses states that the applicant's husband was drunk. However, the Doctor, who provided treatment to the applicant's husband immediately after the alleged trespassing incident, stated that the applicant's husband was not under the influence of alcohol. Thus, the factum of drunkenness is not corroborated. Also the point made by the applicant that there was no positive identification of the applicant's husband has not been irrefutably denied by the respondents. We are, however, not inclined to interfere with the punishment awarded for this alleged offence of trespassing since this punishment was after summary trial and Section 3(o)(iii) of the Armed Forces Tribunal Act, 2007 stipulates that service matters include "summary disposal and trials where the punishment of dismissal is awarded".

14. Army Headquarters' letter No. A/13210/159/AG/PS2(c ) dated 28.12.1988 lays down the procedure for removal of

undesirable and inefficient JCOs, WOs and OR. Para 2(a) of the letter reads as follows :

*“2.(a) An individual who has proved himself undesirable and whose retention in the service is considered inadvisable will be recommended for discharge/dismissal. Dismissal should only be recommended where a court Martial, if held, would have awarded a sentence not less than dismissal but trial by court martial is considered impracticable or inexpedient. In other cases, recommendations will be for discharge.”*

15. No tangible criterion has been laid down in this policy letter for declaring a person undesirable. However, discharge/dismissal is to be recommended only where a court Martial would have awarded sentence of dismissal. In the instant case it appears that a Court Martial was not considered as an option and that for discharge was recommended for the applicant's husband was considered undesirable.

16. Para 5 of this policy letter lays down the procedure, which 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.*

- (b) Forwarding or Recommendations. *The recommendation for dismissal or discharge will be forwarded, through normal channels, to the authority competent to authorize the dismissal or discharge as the case may be, along with a copy of the proceedings of the enquiry referred to in (a) above.*
- (c) Action by Intermediate Authorities. *Intermediate authorities through whom the recommendations pass will consider the case in the light of what is stated in (a) above, and make their own recommendations as to the disposal of the case.*
- (d) Action by Competent Authority. *The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is warranted, he should direct that a show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings of the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.*
- (e) Action on Receipt of the Reply to the Show Cause Notice. *The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorize his dismissal/discharge together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.*
- (f) Final orders by the competent Authority. *The authority competent to sanction the dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. If the competent authority considers that termination of the individual's service is not warranted but any of the actions referred*

*to in (b) to (d) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactory, he will pass orders accordingly.*

*Note:- 1. As far as possible, JCO, WO and OR awaiting dismissal orders will not be allowed to mix with other personnel.*

*2. Discharge from service consequent to four red ink entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be 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.”*

17. The action before recommending discharge has been listed in detail. The respondents, however, have not produced the details of the Preliminary Enquiry and, therefore, we are inclined to infer that only perfunctory enquiry, if any, was held. According to Note 2 of para 5, discharge after four red ink entries is not mandatory. Though there is no tangible criterion for considering a person ‘undesirable’ is laid down this Note leads us to infer that a minimum of four red ink entries would qualify a person as an ‘undesirable’. In the instant case, the applicant’s husband had only two red ink entries. Therefore, the grounds on which he was considered to be ‘undesirable’ are not made clear by the respondents. In the case of **U.O.I. & Others v Naik Gulshan Singh** reported in *2011 LIC 1519* the Hon’ble Jammu & Kashmir

High Court on 15.12.2010 held that *“It does not make it compulsory for the Competent Authority to invariably order discharge where four red ink entries are awarded to an Army personnel.”* There is nothing on record to show that the authorities competent to sanction discharge followed the procedure laid down in the letter, particularly the nature of offence for which red ink entries were awarded. We are of the view that the applicant’s husband was young and needed to be given time and guidance to improve himself. He was not afforded any such opportunity and was discharged in 1997 without making an effort to examine any option other than discharge which should be the last option when it is absolutely necessary in the interest of service rather than the first option. While discipline under no circumstances can be compromised, particularly in the Armed Forces, yet concern for discipline must not prompt the competent authority not to follow the laid down procedure.

18. Following Court orders in 2006, the applicant’s husband was reinstated. His posting order to 508 Field Ambulance was issued and all relevant documents were provided to him. We also note that during this period of reinstatement the applicant’s husband did not incur any red ink entries or was not punished for any act of indiscipline. The respondents also have not stated that his behaviour and conduct during this period was less than satisfactory. Consequent to receipt of documents for moving on posting, the applicant’s husband was making arrangements for his

move. Before he could actually move, he was recalled and a Show Cause Notice was served leading to discharge from service. The sequence of events leads us to conclude that the respondents had made up their mind to discharge the applicant's husband from service even though there was no fresh input to warrant such an action. We also detect a trace of vindictiveness on the part of the competent authority in discharging the applicant's husband in March, 2007.

19. In the backdrop of the foregoing, this Transferred Application is allowed. The discharge with effect from 21.3.2007 is held to be not in consonance of the laid down policy and, therefore, illegal and the discharge orders dated 19.3.2007 and 21.3.2007 are hereby quashed. The applicant's husband will be notionally treated to be in service till the time of his death, i.e. 22.5.2009 and will be entitled to pay and allowances from 21.3.2007 to 22.5.2009 which shall be paid to the applicant. From 23.3.2009 onwards the applicant will be paid family pension as provided in Section 212(2) of Pension Regulation for the Army, 1961. The respondents will pay a sum of Rs. 50,000/- to the applicant towards cost of the Transferred Application. Time for implementation of this order is three months from the date of receipt of a certified copy of this order.

(Lt. Gen. A.M. Verma)  
Member (A)

(Justice Abdul Mateen)  
Member (J)

PG.