

**RESERVED**  
**A.F.R**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNON

COURT NO 2

O.A. No. 177 of 2012

Monday this the 31<sup>st</sup> day of August 2015

“Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member  
Hon’ble Lt Gen Gyan Bhushan, Administrative Member”

Suneel Kumar (No 3005566A Ex Sep)  
Son of Shri Mahesh Singh aged about 25 years  
Resident of House No 164, Village Maudha, Post Office, Maudha,  
District : Farrukhabad-206451 (UP) - Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, Government of India, New Delhi.
2. Chief of the Army Staff, Integrated Head Quarters, Ministry of Defence, (Army), DHQ PO, New Delhi-110011
3. The Officer-In-Charge, Records The Rajput Regt PIN-900 427, C/O 56 APO
4. The Commanding Officer, 9 Rajput, PIN-912109 C/O 56 APO

.....Respondents

Ld. Counsel appeared for the Applicant - Shri R. Chandra,  
Advocate

Ld. Counsel appeared for the Respondent - Shri D.K.Pandey  
Central Government  
Counsel

**ORDER**

**“Per se Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member”**

1. This Original Application No 177 of 2012 has been preferred by the Applicant under Section 14 of the Armed Forces Tribunal Act, 2007 seeking the following reliefs:

(a) *The Hon’ble Tribunal may be pleased to quash the Show Cause Notice dated 30.09.2010 (Annexure No. A-1), discharge order dated 31/10/2010 be called and set aside and order of the Brigade Commander 68 Mtn Bde be also set -aside.*

(b) *To direct the respondents to re-instate the Applicant in the service with all consequent benefits, as given to his batch mates with the interest of 24 percent per annum.*

(c) *Any other appropriate order or direction which the Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case.*

2. Shorn of unnecessary details, the facts of the case are that the Applicant was enrolled in the Indian Army on 09 Dec 2002. He was discharged from service on 31 Oct 2010 as undesirable and inefficient soldier under Army Rule 13 (3) III (v). During his over seven years and ten months of service, the Applicant was awarded four red ink entries and three black ink entries under Sec 39 of the Army Act. According to the allegations of the Applicant, the discharge from service wears the taint of illegality, besides being arbitrary and mala fide as the procedures prescribed under the Army Rule and Army HQ letter dated 28 Dec 1988 were not observed in compliance before passing the order of the discharge of the Applicant. Dissatisfied, the Applicant filed this Original Application.

3. The case of the Applicant is that after being enrolled in the Indian Army, he was posted to 09 Rajput Regiment on 09.12.2002. He was dispatched to 23, Rashtriya Rifles where he served upto 14.10.2007. On 14.10.2007, the Applicant was posted back to 9 Rajput (Parent Unit of the Applicant). He was required to report there after availing of six days casual leave on 24.10.2007. The Applicant, it is claimed, absented himself from duty from 25.10.2007 to 30.10.2007 (but according to the punishment chart the applicant absented himself from duty from 23.10.2007 to 30.10.2007) on the ground that his minor daughter had fallen ill. However, the Applicant reported for duty voluntarily in the Unit on 31.10.2007. For his failure to report for duty, the Applicant was punished with award of seven days rigorous imprisonment under section 39 of the Army Act.

4. Ld. Counsel for the Applicant has submitted that the Applicant again absented himself from duty from 10.12.2007 to 07.01.2008 on the ground of ailment of his minor daughter and was punished with seven days' rigorous imprisonment under Sec 39 of the Army Act. The Applicant yet again absented himself from 16.01.2008 to 21.01.2008 and reported for duty to 9 Rajput Regiment on 22.01.2008 but was awarded no punishment on the undertaking that he would not again absent himself from duty.

5. Ld. Counsel for the Applicant has submitted that the fourth time, the Applicant absented himself was on 24.03.2008, when personnel of Applicant's Company were given out-pass for Holi celebration for three days. He reported voluntarily on 06.05.2008 in the Unit but he was not allowed to join his duty. Thereafter, it is submitted, the Applicant repeatedly made endeavours with the solicitation to allow him to join duties but he was not allowed to do so. On 28.08.2008, when the Applicant again approached the Unit, this time, he was permitted to join. However, he was put behind the bar in the Unit Prisoner Cell. On 03.09.2008, the Applicant was admitted in Military Hospital, Jaipur with A.F.M.S.F.-10, where he was diagnosed as a case of psychiatric

disorder and was transferred to Base Hospital Delhi Cantt. After two days' treatment, the Applicant made good his escape from Base Hospital, Delhi Cantt. On 06.10.2008, Applicant reported to Rajput Regimental Centre. On 21.11.2008, Rajput Regimental Centre issued a Movement Order and Railway Warrant to the Applicant to report in his Unit. He reported in the Unit but was not allowed to join the Unit and was declared a deserter.

6. In the month of Jan 2009, the Applicant filed a Writ Petition No.804 (SS) of 2009 before Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, attended with a prayer to allow him to join the Unit. The decision of the Hon'ble Court leaned in favour of the Applicant allowing him to join the Unit on 05.07.2009. The Applicant was permitted to join the duties but he was punished with award of 28 days rigorous imprisonment and punishment of 14 days pay fine under the Army Act.

7. Ld. Counsel for the Applicant has submitted that it would appear that on 19.11.2009, the Applicant applied for 30 days leave from 23.11.2009 to 22.12.2009 which was allowed. On 17.12.2009, the Applicant received a call from Mobile No 09622345313 from Company Clerk to report to 255 Transit Camp, he reported to the transit camp but could not get air lift, for which he was awarded 07 days rigorous imprisonment under the Army Act for offence vide punishment order dated 23.12.2009, i.e. after eight months from the date of offence.

8. On 06 Sep 2010, Commanding Officer, 9 Rajput sent a missive to the Commander 68, Mountain Brigade commending removal of the Applicant terming him as being undesirable soldier. As a consequence of the recommendation as contained in Annexure 10 A, a Show Cause Notice was issued which was served to the Applicant on 30.09.2010. The Applicant was discharged from service by order of Commander 68 Mountain Brigade with the blemish of being undesirable, inefficient soldier under Rule 13 of the Army Rules as stated supra.

9. The precise submission of the Learned Counsel for the Applicant is that the Applicant was discharged from service on the ground that he had incurred four red ink entries and three black ink entries. It brooks no dispute from a close scrutiny of the Counter Affidavit filed by the Respondents that before forwarding the case of the Applicant for discharge to the Commander, 68 Mountain Brigade, no preliminary inquiry was held. It is a case on behalf of the respondents that after making recommendations for discharge of the Applicant and before it was acted upon, preliminary inquiry was held. Learned Counsel for the Applicant repudiated the aforesaid submission on the ground that if any preliminary inquiry was at all held it was a mere eye wash and it was done after realization was borne in on the authority concerned that the discharge without preliminary inquiry would vitiate the order of discharge. It is suggested that in the circumstances, it may be deemed that no preliminary inquiry was held. It would thus transpire that before making recommendation for discharge, no preliminary inquiry was held. The Show Cause Notice issued was not accompanied with the copy of the preliminary inquiry report. By this reckoning, the procedure prescribed under the Army HQ letter dated 28.12.1988 was not adhered to. It has been conceded by the Learned Counsel for the Respondents that the Show Cause Notice ought to have been served with a copy of the inquiry report attached to it which was not done in his case.

10. **Per contra**, Learned Counsel for the Respondents contended that the Applicant was enrolled in the Army on 09.12.2002 and was discharged from service on 31.10.2010 after being adjudged as undesirable soldier in terms of Army Rule 13 (3) (III) (V) and policy letter dated 28 Dec 1988. He further contended that during his approximately 8 years of service, the Applicant was awarded four red ink entries and three black ink entries under Section 39 (a) and (b) of the Army Act. The Applicant had repeatedly absented himself and had developed the tendency of overstaying the leave granted to him on some

pretext or the other. He further contended that each time he overstayed the leave granted to him, he, by way of habit, reported to Rajput Regimental Centre. He further contended that the Applicant was admitted and found to be a patient of Psychiatric (INV) in Base Hospital Delhi Cantonment and that he absconded from the hospital too and had to be discharged in absentia.

11. The Learned Counsel opined that if viewed in entirety, the Applicant was all along awarded lenient punishments with the avowed object of giving opportunity to him to improve himself and to afford deterrent to avoid his aberrant behavior. However, by his repeated aberrant behavior, it crystallized that repeated leniency was not likely to improve his conduct. Since leniency was likely to have adverse effect on over all morale and motivation of others in the Unit, the Commanding Officer was left with no alternative but to make recommendation for discharge of the Applicant as undesirable soldier as per Army Rule 13. The Learned Counsel for the Respondents further submitted that a preliminary inquiry was held on 28 Sep 2010 which found the Applicant as habitual offender and it was commended that he be discharged from service under the provisions of Army Rule 13.as his further retention in service was detrimental to good order and military discipline.

12. It was further contended by the Learned Counsel for the respondents that in approximately 8 years of service, he was awarded as many as seven punishments; and it thus logically followed that the Applicant had no temperament for working under stress and strain. He further submitted that discipline is the hallmark of an organization particularly in the Armed Forces and that discipline and commitment towards duty cannot be compromised at any cost. The Applicant was given number of opportunities in the fond hope that he would not repeat his intemperate performance and indiscipline but it did not have any sobering effect on him and it was in this perspective that he was found unsuitable for continuing in the Army.

13. Lastly the Learned Counsel for the respondents submitted that keeping in view the facts and circumstances, the Original Application of the Applicant deserves to be dismissed.

14 We have heard Shri R. Chandra, Learned Counsel for the Applicant and Shri D. K. Pandey, Learned Central Government Counsel at considerable length and perused the relevant documents available on record.

15. As stated supra, the Applicant entered the service of Army in Rajput Regiment on 09.12.2002 and was discharged from service on 31.10.2010 as undesirable soldier as per Army Rule 13 (3) III (v). During his service of approximately 8 years, he was punished seven times. The summary of absence as enumerated in the Chart annexed in the Counter reply by the respondent.

Sl No	From	To	From Location	Overstaying/absence	Remarks
(a)	27 May 2007	01 June 2007	23,RR (Rajput)J&K	06 days	Awarded 14 days pay fine.
(b)	14 June 2007	16 June 2007	23 RR (Rajput) (Jammu and Kashmir)	02 days	-do-
(c)	14 August 2007	08.09. 2007	23 RR (Rajput) (J&K)	26 days	14 days pay fine
(d)	26.09.2007	01.10.2007	23 RR (Rajput) (J&K)	06 days	
(e)	23.10.2007	31.10.2007	09 Rajput Jaipur	29 days	07 days R.I
(f)	10.12.2007	07.01.2008	09 Rajput Jaipur	29 days	No punishment . Pardoned
(g)	17.01.2008	21.01.2008	The Rajput Regiment	05 days	-do-

			Centre Fatehgarh		
(h)	24.03.2008	05.05.2008	9 Rajput (Jaipur)	43 days	-do-
(i)	07.05.2008	26.05.2008	9, Rajput Jaipur	20 days	-do-
(k)	21.06.2008	20.08.2008	The Rajput Regiment Centre Fatehgarh	61 days	-do-
(l)	9.11.2008	6.10.2008	Base Hosp Delhi Cantt	28 days	28 days R.I
(m)	21.11.2008	04.07.2008	The Rajput Regiment Centre Fatehgarh	226 days	-do-
(n)	23.11.2009	09.02.2010	9, Rajput J & K	49 days	7 days RI
(o)	12.02.2010	01.04.2010	170, Movement Control/Mov ement Detachment (J & K)	49 days	14 days RI
(p)	02.04.2010	04.04.2010	213 Transit Camp J&K	03 days	-do-
(q)	06.04.2010	14.05.2010	Rajput Regiment Fatehgarh	39 days	-do-

The details of punishment inflicted on the Applicant are enumerated below :-

(a) Red Ink Entries

- (i) 07 days Rigorous Imprisonment under AA Sec 39 (a) on 14.11.2007.
- (ii) 28 days Rigorous Imprisonment under AA Sec 39 (a) on 06.07.2009.



- (iii) 07 days Rigorous Imprisonment under AA Sec 39 (b) on 12.08.2010.
- (iv) 14 days Rigorous Imprisonment under AA Sec 39 (a) on 23.08.2010.

(b) Black Ink Entries

- (i) 14 days pay fine under AA Sec 39 (a & b) on 29.06.2007.
- (ii) 14 days pay fine under AA Sec 39 (b) on 12.10.2007.
- (iii) 14 days pay fine under AA Sec 39 (a) on 06.07.2009.

16. Policy issued by Army Headquarters letter No A/13210/159/AG/PS 2(c) dated 28 Dec 88, dealing with the procedure regarding removal of undesirable and inefficient JCOs, WOs and OR, Para 387 of the Defence Service Regulations for the Army, 1987 regarding Conduct Sheet Entries are as under :-

(a) "PROCEDURE FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs AND OR

1. The procedure outlined in the succeeding paragraphs will be followed for the disposal of undesirable and inefficient JCOs, WOs and OR.

JCOs, WOs and OR who have proved undesirable

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, recommendation will be for discharge.

(b) Should it be considered that a JCO's discharge/dismissal is not warranted and that transfer

will meet the case, he will be transferred in his substantive rank and not recommended for further promotion and or increment of pay until he proves his fitness for promotion and or increment of pay in his new Unit.

(c) Should it be considered that a WO or an NCO's discharge/dismissal is not warranted and that transfer will meet the requirements of the case, he will be transferred. If the merits of the case so warrant, he may be reduced to a lower grade or rank or the ranks under AA Sec 20 (4) by an officer having powers not less than a Bde or equivalent comdr. Before he is transferred, a WO reduced to the rank shall not be required to serve in the ranks. AA Sec 20 (5) refers.

(d) Should it be considered that an acting NCO's discharge/dismissal is not warranted and that transfer will meet the requirement of the case, he may be reverted by his CO to his substantive rank and if he is not a substantive NCO rank, he may be reverted to the ranks under AA Sec 20 (6) before he is transferred.

(d) In cases where it is considered that all or part of JCOs/WOs/Ors pension should be withheld, this fact will be noted on the recommendation for discharge.

JCOs, WOs and OR who have proved inefficient

3. (a) Before recommending or sanctioning discharge, the following points must be considered :-

(i) If lack of training is the cause of his inefficiency, arrangements will be made for his further training.

(ii) If an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b)	X X X X X X	X X X X X X	X X X X X X
(c)	X X X X X X	X X X X X X	X X X X X X

4. Procedure for dismissal/discharge of undesirable JCOs/WOs/OR. AR 13 and 17 provide that a JCO/WO/OR whose dismissal or discharge is contemplated will be given a Show Cause Notice, as an exception to this, services of the

such person may be terminated without giving him a Show Cause Notice provided the competent authority is satisfied that it is not expedient or reasonable practicable to serve such a notice. Such case should be rare, e.g. where the interests of the security of the State so require. Where the serving of a Show Cause Notice is dispensed with, the reason for doing so are required to be recorded. See provision to AR 17.

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 Inquiry. Before recommending discharge or dismissal of individual the authority concerned will ensure :-

(i) That an impartial inquiry (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 of the merits of the case.

(b) Forwarding for 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, alongwith a copy of the proceedings of the inquiry referred to in (a) above.

(c) Action by Intermediate Authorities. Intermediate authorities through whom the recommendations are made, will consider the case in the light of what is stated above and make their own recommendations for 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 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 cases 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 inquiry held in the case will also be supplied to the individual and will be afforded reasonable time to state in writing any reason 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 inquiry 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 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 individuals service is not warranted but any of the actions referred to in (b) to (d) of para 2 above should meet the requirement 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 entirely satisfactory, he will pass orders accordingly and not to 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.

Note. 1.   X X X X X X X                   X X X X X X X X

2. Discharge from service consequent to four red ink entries is not a mandatory or legal requirement in such case Commanding Officer must consider the nature of offences for which each red ink entry has been awarded.

(g)   X X X X X X X X                   X X X X X X X X

Procedure for Discharge of Inefficient JCOs/WOs/OR

6.   X X X X X X X X                   X X X X X X X X

7.   X X X X X X X X                   X X X X X X X X

(b) Para 387 of Defence Service Regulations for the Army, 1987

(a)   X X X X X X X X                   X X X X X X                   X X X X

(b) The following entries will be made in the conduct sheets of JCOs, WOs and OR as red ink entries :-

- (i) Forfeiture of seniority of rank (JCOs and WOs only)
- (ii) Conviction by court-martial
- (iii) Conviction by a civil court, except when a fine was the only punishment and the CO does not consider that a red ink entry should be made.

(iv) Reduction of a NCO to a lower grade or to the ranks for an offence but not for inefficiency

(v) Deprivation of an appointment or of lance or acting rank, for an offence but not for inefficiency.

(vi) Severe Reprimand (JCOs, WOs and NCOs only).

(vii) Imprisonment

(viii) Detention.

- (ix) Field punishment (on active service only);
- (x) Confinement to the lines exceeding fourteen days.
- (xi) Forfeiture of good service or good conduct pay.

(c) Black ink entries will be made in the conduct sheets of JCOs, WOs and OR in respect of all punishments not included in the list of red ink entries convictions by civil courts not meriting in the CO's opinion a red ink entry.

17. In the instant case, the main brunt of submission propounded by the Learned Counsel for the Applicant is that proper procedure was not followed and that no preliminary inquiry was held especially before making recommendation for discharge of the Applicant and Show Cause Notice was issued without the copy of preliminary inquiry. In connection with the submission, we feel called to refer to few of the decisions of the Apex Court on the point.

18. In the case of **D.K. Yadav v. J.M.A. Industries Ltd.**, reported in (1993) 3 SCC 259, in paras 11, 12, 13 and 14 of the Judgment, the observations made by Hon'ble The Apex Court are as under :-

*"11. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between and quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.*

12. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, egalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

13. In *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, this Court held that right to public employment and its concomitant right to livelihood received protective umbrella under the canopy of Articles 14 and 21 etc. All matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavor. They must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees right to life which includes right to livelihood, the deprivation thereof must be in accordance with just and fair procedure prescribed by law comfortable to Articles 14 and 21 so as to be just, fair and reasonable and not fanciful, oppressive or at vagary. The principles of natural justice are an integral part of the guarantee of equality assured by Article 14. Any law made or action taken by an employer must be fair, just and reasonable. The power to terminate the service of an employeeworkman in accordance with just, fair and unreasonable procedure is an essential inbuilt of natural justice. Article 14 strikes at arbitrary action. It is not the form of the action but the substance of the order that is to be looked into. It is open to the Court to lift the veil and gauge the effect of the impugned action to find whether it secure justice, procedural as well as substantive. The

substance of the order is the soul and the effect thereof is the end result.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In *D.T.C v. D.T.C. Mazdoor Congress (1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213*) the Constitution Bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside".

19. In the case of **Ex-Hav. Satbir Singh v. Chief of the Army Staff**, reported in **2013(1) S.C.C. 390**, in paras 8, 9 and 11 of the Judgement, the observations made by Hon'ble The Apex Court are as under :

"8. We have to see whether the High Court having arrived at a conclusion that the discharge/termination of the appellant from service is unsustainable and after setting aside the termination order was justified in depriving the appellant from any salary for the intervening period as well as for the purpose of terminal benefits, the intervening period during which the appellant remained out of job shall not be counted. Since we have issued notice only for the purpose of terminal benefits, there is no need to go into the entitlement of salary during the intervening period.

9. It is not in dispute that in the concluding paragraph, the Division Bench of the High Court in categorical terms set aside the order of termination. The relevant conclusion reads as under :-

"Fact remains that he was discharged/terminated from service on the basis of Show Cause Notice. This action is found to be unsustainable. Therefore, we have no hesitation in setting aside the termination order."

Having found that the discharge/termination is legally unsustainable, we are of the view that the incumbent, namely, the appellant, ought to



have been provided relief at least to the extent of counting the intervening period for the purpose of terminal benefits. It is true that during the intervening period, the appellant, admittedly, did not work, in that event, the Division Bench was justified in disallowing the salary for the said period. However, for the terminal benefits, in view of the categorical conclusion of the High Court that discharge/termination is bad, ought to have issued a direction for counting the intervening period at least for the purpose of terminal benefits. According to the Division Bench, the conduct of the appellant, namely, securing 4 Red Ink Entries in the service record is the reason for not considering the intervening period even for the purpose of terminal benefits. We hold that the said reasoning adopted by the Division Bench of the High Court cannot be sustained in view of its own authoritative conclusion in setting aside the discharge/termination order.

11. In the light of the above discussion, while upholding the order of the Division Bench setting aside the termination order, we hold that for the purpose of terminal benefits, the "intervening period" for which the appellant remained out of job shall be counted. In view of the same, respondents Nos. 1 and 2 are directed to pass appropriate orders fixing terminal benefits within a period of two months from the date of receipt of copy of this judgement and intimate the same to the appellant."

20. In the case of **Surinder Singh Sihag v. Union of India**, reported in **2003(1)S.C.T. 697** in paras 13 and 15 of the Judgment, the observations made by Hon'ble Delhi High Court are as under :

"13. It is not in dispute that an order of discharge casts a stigma. Having regard to 14 years of service rendered by the Applicant, he was otherwise entitled to pension. An order of discharge of service without following the procedure prescribed, therefore, in our opinion, cannot be sustained. It is now trite he who carries the procedural sword must perish with it (See **Vitarelli v. Seaton (1959 359 US 535:3 L.Ed. 2<sup>nd</sup> 1012)**).

15. In **SPRY on Equitable Remedies, Fifth Edition** at Page 5, referring to **Moody v. Cox, (1917) 2 Ch. 71** at pp. 87-88 and **Meyers v. Casey, (1913) 17 C.L.R. 90**, it is stated :

".....that the absence of clean hands is of no account "unless the depravity, the dirt in question on the hand, has an

*immediate and necessary relation to the equity sued for". When such exceptions or qualifications are examined it becomes clear that the maxim that predicates a requirement of clean hands does not set out a rule that is either precise or capable of satisfactory operation."*

21. Now coming to the merits of the submission, it is worthy of notice here that in the instant case, out of seven punishments, four punishments are of red ink entries and three punishments are of black ink entries.

22. In this connection, we may refer to Note 2 of Para 5 of Army Headquarters letter dated 28 Dec 88, which clearly postulates that discharge after four red ink entries is not mandatory. We have scrutinized the policy letter in all its pros and cons and in our opinion since no tangible criterion for considering person 'undesirable' is laid down, this Note leads us to infer that a minimum of four red ink entries would not qualify to visit a person with the epithet of 'undesirable'. In the instant case, as stated supra, the Applicant had incurred four red ink entries which led the authorities to brand him as an undesirable soldier.

23. It would thus appear that legal infirmities are writ large followed by non compliance with the principles of natural justice. On a punctilious reading of Army Headquarters policy letter dated 28 Dec 1988 particularly para 5, it is clearly postulated that "Before recommending discharge or dismissal of an individual the authority concerned will ensure that an impartial inquiry (not necessarily a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity for putting his defence or explanation and of adducing evidence in his defence, that the allegation have been substantiated and that the extreme steps after termination of the individual's service is warranted on the merits of the case". In para 5 (b) of the policy letter it is also postulated that "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, alongwith a copy of the proceedings of the inquiry".*

24. It is noticed here that on 06 Sep 2010, Respondent No. 4 had sent recommendation to the Commander 68 Mountain Brigade regarding removal of the Applicant. It is also noticed here that the preliminary inquiry was conducted on 28 Sep 2010 much after making recommendation for discharge of the Applicant which clearly bespeaks that procedure prescribed for discharge was not observed, in compliance. The Show Cause Notice was issued to the Applicant on 30 Sep 2010 and the same was replied to by the Applicant on 04 Oct 2010 and in ultimate analysis, the Applicant was discharged from service on 31 Oct 2010.

25. A strenuous effort has been made by Learned Counsel for the Respondents to bring home the point that discipline is hallmark of an organization like Armed Forces and that discipline and commitment towards duty cannot be compromised at any cost. It is very true and there is no conflict with the submission that indiscipline and dereliction of duty is unacceptable in Government service especially in Armed Forces, but at the same time, it must be borne in mind that the anxiety for discipline must not prompt the competent authority to give the procedure a complete go by.

26. In the case of **D.K. Yadav (supra)**, Hon'ble Apex Court has held that the order of discharge of service without following the prescribed procedure cannot be sustained. The principles of natural justice are essential ingredients of Article 14 and the procedure prescribed by law must be just, fair and reasonable. In view of the law laid down by Hon'ble Apex Court in the above case, we are of the considered opinion that the Applicant has been discharged from service without complying with the rules of *audi alteram partem* and without following the proper procedure for removal of undesirable and inefficient soldiers. An order of discharge from service without following the prescribed procedure

is arbitrary, unjust, illegal and not in accordance with the rules and regulations.

27. In the case of **Delhi Transport Corpn. v. D.T.C. Mazdoor Congress (supra)**, Honble The Apex Court observed that matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavor. The power to terminate the service of an employee/workman in accordance with just, fair and unreasonable procedure is an essential ingredient of natural justice.

28. From a perusal of the Counter Affidavit by the Respondents, it is evident that before forwarding the case of the Applicant for discharge to the Commander, 68 Mountain Brigade, no Preliminary inquiry was held. There is mention of preliminary inquiry having been held on 28.09.2010. Even-if it be assumed that Show Cause Notice was issued after preliminary inquiry but there is nothing on record to show whether the Show Cause Notice was issued regard being had to the preliminary inquiry. Even in the discharge order, there is no reference not to speak of pointed reference to the preliminary inquiry. In this view of the matter, the submission of the Learned Counsel for the Applicant is loaded with substance that preliminary inquiry was a mere eye wash to make good the lacunae after realization was borne in the authorities that as per policy, it was mandatory to hold preliminary inquiry. Therefore, admittedly the procedure encapsulated in the policy letter dated 28 Dec 1988 was not adhered to. Since no preliminary inquiry was held, the Applicant was deprived of opportunity to defend himself during the preliminary inquiry.

29. In view of the above, we converge to the view that the impugned discharge order dated 31 Oct 2010 was not only unjust, illegal but was also not in conformity with rules, regulations and law. In our firm view, the impugned order is apt to be set aside.

30. On the point whether the intervening period should be counted for terminal benefits, the Learned Counsel for the Respondents drew our attention to the past conduct of the Applicant submitting that his conduct throughout his career in the Army did not warrant any leniency. In connection with this submission, we may refer to the decision of the Apex Court in **Ex Hav Satbir Singh v Chief of the Army Staff (supra)** in which the Hon'ble Apex Court observed that "having found that the discharge/termination is legally unsustainable, we are of the view that the incumbent, namely, the appellant ought to have been provided relief at least to the extent of counting the intervening period for the purposes of terminal benefits". The Apex Court further observed that "during the intervening period the appellant admittedly did not work, in that event, the Division Bench was justified in disallowing the salary for the said period", but in view of categorical conclusion of the High Court that discharge/termination was bad, ought to have issued a direction for counting the intervening period at least for the purpose of terminal benefits. The Apex Court in that case further observed that according to the Division Bench, the conduct of the appellant in securing four Red Ink Entries in the service record is the reason for not considering the intervening period even for the purpose of terminal benefits. The Apex Court in ultimate analysis held that the reasoning adopted by the Division Bench of the High Court cannot be sustained in view of its own authoritative conclusion in setting aside the discharge/termination order.

31. Since we have already converged to the view that the order of discharge passed against the Applicant is not legally sustainable, the submission of the Counsel referring to the past conduct of the Applicant as aforesaid does not commend to us for

acceptance in the light of the Ex-cathedra decision of the Apex Court and we hold that the intervening period between discharge of the Applicant and his reinstatement in the service pursuant to this order shall be counted for terminal benefits.

32. We are of the considered view that the Applicant shall be notionally treated in service till he is duly reinstated in compliance of this order. In view of the facts and circumstances of the case, it may be clarified that the Applicant shall not be entitled to back wages from the date of dismissal to the date he is reinstated in the service. However, the intervening period i.e, from the date of discharge to the date of his re-instatement in service pursuant to this order shall be counted for other terminal benefits.

**ORDER**

33. In the result, the OA succeeds and is allowed. Impugned Discharge Order dated 31 Oct 2010 is set aside. The Applicant shall stand reinstated in the service but would not be entitled to back wages from the date of dismissal to the date he is reinstated in the service. However, the intervening period i.e, from the date of discharge to the date of his re-instatement in service pursuant to this order shall be counted for other terminal benefits. The order shall be observed in compliance within three months from the date of production of a certified copy of this order.

34. There shall be no order as to costs.

(Lt Gen Gyan Bhushan)  
Administrative Member

(Justice Virendra Kumar DIXIT)  
Judicial Member

Date : August 31, 2015

MH/-