A.F.R

Reserved

Court No - 3

BEFORE THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW.

ORIGINAL APPLICTION No. 231 of 2014.

Thursday, the 15th day of October, 2015

"Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)"

Gunner (Washerman) Service No. 15151610W Basant Kumar Singh, son of Sri Jai Govind Singh, resident of village and post Gahmar,Tehsil Jamnia, district Ghazipur (U.P.) - 232327

…….Applicant

Ld. Counsel for Applicant : **Shri A.K. Singh, Advocate**

Versus

1. The Union of India through the Secretary, Ministry of Defence, New Delhi.

2. Chief of Army Staff Integrated Head Quarter Ministry of Defence (Army), New Delhi.

3. The Commandant & Officer I/C Artillery Corps Records, Nasik.

4. C.O., 67 Field Regiment, C/O 56 APO.

……Respondents

Ld. Counsel for the Respondents : **Mr. Dileep Singh, Central Govt. Counsel assisted by Lt Col Subodh Verma, Departmental Representative for the Respondents**

Per Devi Prasad Singh, J.

1. Present Original Application under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred by the applicant being aggrieved with the impugned order of discharge passed in pursuance of power conferred by Army Rule 13 (3) (iii) (v), as contained in Annexure No. A-1 to the O.A. on account of four red ink entries.

FACTS

2. The applicant was enrolled in the Indian Army in Artillery Corps as Gunner (Washerman) on 20.09.2001. During course of service in the trade of Gunner (Washerman), notice dated 03.12.2012 was served indicating therein four red ink entries as a ground of being undesirable for the army, keeping in view the contents of Army Headquarter letter dated 28.12.1998. After receipt of reply, the applicant has been discharged from service.

3. From the material and pleadings on record, it appears that one black ink entry was awarded on account of 12 days overstay of leave with pay fine of 14 days by the Commanding Officer on 30.09.2006.

4. Later on by order dated 24.01.2008 the applicant was punished with red ink entry for 14 days rigorous imprisonment on account of intoxication at 08.35 pm.

5. Thereafter, on 09.09.2011, the applicant was deprived of appointment of Lance Naik by Commanding Officer for finding him intoxicated at 08.20 pm on 01.09.2011 with an entry of red ink.

6. Again by order dated 05.01.2012 he was granted red ink entry with rigorous imprisonment of 21 days being found intoxicated at 08.30 pm on 03.01.2012.

7. Another intoxication was detected on 28.11.2012 at 07.30 pm by the Commanding Officer, hence 28 days rigorous imprisonment was awarded in red ink entry on 28.11.2012.

8. Show cause notice dated 03.12.2012, a copy of which has been filed as Annexure A-1 to the O.A. is reproduced as under:

"CONFIDENTIAL

Headquarters
2 Mountain Artillery Brigade
Pin-926902
c/o 99 APO.
03 December 2012.

402301/BKS/ /A

Number 15151610W
Gunner(Washerman)
Basant Kumar Singh
67 Field Regiment
PIN-925767
c/o99 APO

SHOW CAUSE NOTICE

It has come to my notice that <u>you have Four red ink and one black ink entries</u>, thus, rendering you undesirable for further retention in the Army. The details of these entries are as under:-

(a) <u>Army Act Section 39(a) dated 30 September 2006</u>

Awarded "14 days Pay Fine" by Colonel SC Verma, Commanding Officer, 660 Army Aviation Squadron for having over stayed leave from 03 September 2006 to 14 September 2006 (Total period of absence 12 days)

(b) ***<u>Army Act Section 48 dated 24 June 2008.</u>***

Awarded "14 days Rigorous imprisonment" by Colonel Anupam Jain, Commanding Officer, 67 Field Regiment, for having found intoxicated at 2035 hours on 02 June 2008 when returned back to unit line from out pass.

(c) ***<u>Army Act Section 48 dated 09 September 2011</u>.*** *Awarded "Deprived of the appointment of Lance Naik by Colonel Atul Tripathi, Commanding Officer, 67 Field Regiment for having found intoxicated at 2020 hours on 01 September 2011, at Unit Regimental Police gate.*

(d) ***<u>Army Act Section 48 dated 05 January 2012</u>***

Awarded "21 days Rigorous imprisonment by Colonel Atul Tripathi, Commanding Officer, 67 Field Regiment for having found intoxicated at 2030 hours on 03 January 2012, in Other Ranks married accommodation area.

(e) ***Army Act Section 48 dated 28th November 2012*** *Awarded 28 days "Rigorous imprisonment" by Colonel Atul Tripathi, Commanding Officer, 67 Field Regiment for having found intoxicated at 1930 hours on 29 October 2012 at unit line.*

In view of the above, your further retention in the Army is not considered desirable in terms of Army Headquarters letter No A/13210/159/AG/PS2 dated 28 December 1998. Please explain reasons as to why you should not be discharged from service under Army Rule 13 item iii (v).

Your reply should reach the undersigned by 15 December 2012 failing which it will be assumed that you have nothing to state in your favour and necessary administrative action will be initiated against you.

Sd/-…….
(SC Verma)
Brigadier
Commander"

9. It appears that after serving notice, the applicant was discharged.

10. Attention has not been invited by learned counsel for the respondents towards reasoned and speaking order passed and communicated in pursuance of impugned show cause notice. Service of the decision to the applicant seems to have been dispensed with by making entry in the service record. According to service record, the applicant was discharged on 29.03.2013 for the following reasons:

(i) S3H.A.P.E. (T-24) ALCHOHOL DEPENDENCY SYNDROME.

(ii) UNFIT FOR DSC.

11. It may be noticed that neither in the notice nor in the punishment awarded, on the basis of red ink entries, there is any allegation that during the alleged intoxicated state of mind, the applicant had violated any local order or quarreled with colleagues or some or was having violent behavior. This fact has been specifically pleaded in para 4.6 of the O.A., which for convenience sake, is reproduced as under:

> *"That all the four red ink entry awards were for the charges under Army Act section 48, intoxication (drinking alcohol). All drinking offences are alleged to have been committed in the unit premises in the evening hours, when the applicant was not on duty (2035 hrs, 2020 hrs, 2030 hrs, 1930 hrs). It may be noted that in all the three red ink entry charges, the applicant has not been charged for any offence other than "intoxication", like violent behavior, quarrel etc. The offence of drinking during non-duty hours could at best be termed as violation of local orders, which is a very mild offence, for which he has already been severely punished (Rigorous Imprisonment). Looking at the offences list in chapter – VI of Army Act 1950 (Section 34 to 70) it can be seen that intoxication (section 48) is one of the lightest offences, more serious one's being, striking or threatening superior officer, disobedience to superior officer, insubordination and obstruction, unbecoming conduct, extortion and corruption etc."*

12. In response to averments contained para-4.6 of the O.A., reply has been given in para-14 of the counter affidavits wherein contents of para-4.6 have not been categorically denied. Hence inference may be drawn that the applicant had not indulged in any violent act or disobeyed order of local authorities or quarreled with someone. Merely on account of consumption of liquor he seems to have been granted red ink entries, punished and later on discharged. The last three red ink entries have been given by the same Commanding Officer with allegation of intoxication in his Unit and that too, within a period of one year followed by the notice. The reasons mentioned in para-14 of the counter affidavit seem to be an afterthought as it does not seem to be supported by original order of punishment.

13. Proceedings under Army Rule 22 read with Army Rule 180, the reason assigned for punishment is borne out from the record annexed with the counter affidavit, which is reproduced as under:

"*Field* -	*AA SEC 48*
02. Jan 08 -	*<u>INTOXICATION</u>*
	In that he,
	As Field at 2035 h on 02 Jan 2008 was found intoxicated when the indl returned from out pass"
Patiala	*AA SEC 39 (b)*

03 Sep 2006	*<u>WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM</u>* *in that he,* *at Peace, on 03 Sep 2006 having been granted leave of absence from 30 Aug 2006 to 02 Sep 2006 to proceed to his home, failed without sufficient cause, to rejoin duty at Patiala, on 02 Sep 2006 (AN) on the expiry of said leave, till he voluntarily rejoined duty at about 2300 hrs on 14 Sep 2006.*
<u>ARMY ACT SECTION 48</u>	*<u>INTOXICATION</u>* *in that he,* *At Field on 29 Oct 2012 at about 1930 hrs was found in an intoxicated state,in unit lines, having consumed alcohol from unauthorized source on a non issue day*
Field *09 Oct 2012*	*AA Sec 48* *<u>INTOXICATION</u>* *in that he,* *At Field on 29 Oct 2012 at about 1930 hrs was found in an intoxicated state in unit lines, having consumed alcohol from unauthorized source on a non issue day."*

NOTICE

14. From a perusal of enquiry report and finding recorded thereon, the punishment awarded on account of intoxication co-relate with consumption of liquor in Unit on account of purchase from outside. There is no allegation, nor even a whisper, that the applicant has not purchased liquor from the Army Canteen. It is also not borne out how purchase of liquor from outside is misconduct.

15. Admittedly, a quota has been fixed for army personnel to purchase liquor. Regulation dated 07.10.2008 contains authorized quota for armed force personnel. Contents of Regulation dated 07.10.2018 is reproduced as under:

"*Tele 23092347* *Integrated HQ of MOD (Army)*

Army HQs/QMG's Branch
Dy. Dte Gen Canteen Services
L-1 Block,Room No.15
New Delhi – 1000 01

No. 96219/Q/DDGCS *07 Oct 2008*

Headquarters

Southern Command (Q)
Western Command (Q)
Eastern Command (Q)
Central Command (Q)
Northern Command (Q)
South Western Command (Q)
HQ ARTRAC (Q)
HQ Andaman & Nicobar Command (Q)
Naval HQ (PDPS)
Air HQ (Dte of Accounts)
Coast Guard HQs

CSD HQ, Mumbai

<u>SCALES OF EMFL EX-CSD</u>

1. *Reference this HQ letter No. 96219/Q/DDGCS dated 31 May 2005*
2. *Due to various representations received from the environment, existing liquor quota of all entitled categories has been reviewed by the competent authority.*
3. *Revised scales of liquor per month will be as under:*

S.No.	*Category of personnel*	*Authorization*
1.	*Field Marshals & equivalent, retd/serving Chiefs of all three Services*	*No limit*
2	*All other Lt. Generals (serving/retd)*	*14*
3.	*All other General Officers & Brig & equivalent (serving/retd)*	*12*
4.	*All officers upto Col & equivalent (serving/retd)*	*10*
5.	*JCOs and equivalent (serving)*	*07*
6.	*JCOs and equivalent (retd)*	*06*
7.	*OR (serving)*	*06*
8.	*OR (retd)*	*05*
9.	*NOK of the deceased soldier*	*03*

16. It may be noted that the notice served on the applicant speaks for only red ink entries and not intoxication. It also does not allege the purchase of liquor from outside source, which has prejudiced the applicant to submit proper reply in response to show cause notice on 03.12.2012 (supra). In consequence thereto notice loses its legal sanctity and suffers from substantial illegality.

HISTORY

17. The consumption of liquor by armed forces personnel seems to be generation old practice according to a research paper published by Edgar Jones & Nicola T. Fear of institute of psychiatry, Kings College London published in December 2010.

18. Traditionally alcohol has been used in the military to cope with the intense stress of battle but also as a way of mediating the transaction from the heightened experience of combat to routine safety. The use of alcohol has divided medical opinion. Some doctors viewed it as wholly harmful to both social and occupational function and to health, while others argued that alcohol had a specific role in lifting morale, aiding unit cohesion and protecting soldiers from adjustment disorders. Although alcohol has always been identified as incompatible with military service, the effects of habitual heavy drinking among military personnel are less well understood.

19. Although alcohol has been associated with UK armed forces for many centuries, its role has been controversial. In 1875, for example, Edmund Parkes, profession of military hygiene, questioned the spirit ration given to British soldiers engaged in the Ashanti campaign of 1874, concluding that 'the reviving power of the first issue is not always so considerable as might be supposed and indeed I have been surprised to find how little good effect it has sometimes produced'. Accordingly, Parkes recommended alcohol only in 'emergencies' as when

after great fatigue a sudden but short exertion is required, or, when a march being ended, there is a short depression and failure of the heart's action.

20. The UK armed forces, and indeed many other nations, have traditionally used alcohol as a means of mediating stress, both in theatre and in the after-math of battle. Soldiers about to go over the top during World War One were issued a drink of rum. Indeed, the very term 'Dutch courage' derives from gin taken by English troops in the Low Countries to stiffen their resolve during the Thirty Years War. Indeed, during the Battle of Waterloo many British regiments gave out spirits both before and during the conflict. Seamen in the Royal Navy received a daily ration of alcohol (brandy until 1655 when replaced by rum) until July 1970 in recognition of the hazards not only of combat but routine life on a sailing vessel. The consumption of whiskey by Texan troops during the 1835 war for independence was such that it seriously impaired their operational efficiency. Although US troops deployed to Vietnam were popularly believed to have resorted to illegal drugs to provide release from stress and recreation, recent research has shown that alcohol abuse was far more common.

21. A study of 1,424 Australian veterans of the 1991 Gulf War showed that alcohol abuse was the most common psychological disorder ten years after the event. A recent investigation of UK troops deployed to Afghanistan and/or Iraq

found that UK military personnel were more likely to report alcohol misuse after deployment than their non-deployed colleagues.

22. Because of the privations of trench warfare, most combatant nations issued alcohol in some form to front-line troops. Although the Fresh government banned the manufacture and sale of absinthe and similar liquors in February 1915 because of their intoxicating qualities, soldiers were granted a daily allowance of half a litre of *vin ordinaire.* Similarly, units of the German Army in combat zones received brandy or light beer. By contrast, on the outbreak of war the Russian state prohibited the distillation and sale of vodka to prevent both troops and factory workers from consuming excessive quantities of alcohol. However, the intense privations of World War Two saw Soviet troops on active duty with a daily ration of 100 g of vodka.

23. During World War Two, the US Army made no routine issue of alcohol to its troops, though men could purchase beer when off-duty and officers had a small monthly allowance of spirits for the mess. The supply of liquor and beer varied according to theatre, little being available in the Pacific.

24. Within the military, alcohol is often claimed to have a positive effect; assisting in group bonding during training, providing confidence during battle and helping over-wrought soldiers sleep in the immediate aftermath of combat. Having

studied aircrew in Bomber Command, a group subjected to high attrition rates, Lord Moran observed that alcohol raised their morale, bringing 'them closer together, welding them into one family'. However, these propositions were based on the assumption that service personnel drank responsibly within safe limits. Experience over the last 200 years has shown that the problem of heavy drinking is not new. Senior medical officers were increasingly concerned during the first half of the nineteenth century and in the 1830 the spirit issue to British soldiers were withdrawn. In 1825 the Royal Navy halved the rum ration (then half a pint of 50-50 rum-and-water), halving it again in 1850. A decade later, the banding together of teetotalers on H.M.S. *Reindeer* led to the formation of the Royal Naval Temperance Society.

25. In recent years, the short-term effects of alcohol on function have been ad dressed by tight restrictions in theatre. However, the longer term consequences of social and corporate drinking are more difficult to access and regulate. The difficulty of striking an appropriate balance between responsible and harmful drinking goes to the root of military culture. Heavy drinking is more prevalent in the British Army and Royal Navy than in the Royal Air Force implying an association with high levels of teamwork and an organizational tradition of drinking as a means of relaxing and debriefing.

26. Of necessity, the armed forces recruit risk-taking individuals. It would be impossible to conduct a military campaign without service personnel who are willing to risk death or injury. It may be that some of the characteristics that make a successful combat soldier also put them at risk of alcohol misuse. Sub-groups within the armed forces are particularly predisposed to heavy drinking. In particular those who are young, single and who have been involved in traumatic incidents. Because drinking has been used by UK armed forces as an agent to assist cohesion and informal operational debriefing, it requires a powerful cultural shift to modify ingrained habits and traditions. Public health campaigns are notoriously difficult to conduct, presenting the military with a serious dilemma. How do they address an association established over hundreds of years across many national groups. Possibly models borrowed from charities established to tackle substance abuse could be relevant. Talks and groups held by service personnel and veterans who have recovered from alcoholism may have greater impact than presentations by health care professionals. Alcohol has played such a significant part in service culture for so long.

27. In view of above the consumption of liquor by armed forces personnel is a reality in view of Rules, practice and traditions. While considering a case of misconduct for excessive use of liquor, necessary precautions must be taken

to find out whether armed forces personnel had done some overt act or he consumed liquor during duty hours. Consumption of liquor during duty hours seems not to be permissible; hence it would be serious misconduct. But consumption of liquor off the duty, unless some overt act is done, seems to be permissible and ordinarily should not be interfered.

CONSUMPTION OFF THE DUTY

28. Now a question cropped up, whether consumption of liquor in the Unit, Mess or Barrack may be termed as misconduct?

29. Order of punishment, reproduced hereinabove, reveals that the applicant has consumed liquor in the Unit. There is no element of allegation that he quarreled or became violent or disobeyed orders of local authorities or consumed the liquor while on duty.

30. In the present case liquor has been consumed by the applicant in the unit. Nowhere has it been mentioned that he was on duty when liquor was consumed. There is no whisper that some official work was assigned to him when he was found in intoxicated state of mind. In such situation, it does not appear that he committed misconduct. Once the army itself permits its members to consume liquor off the duty, then unless there is some overt act breaking the tranquilly of the unit, there

appears to be no misconduct which may call for punishment or awarding red ink entries. It is well settled principles of rule and law that action of the authorities while awarding punishment during course of employment must be based on some source of law. Unless the law, i.e. the statute, Rules and Regulations empower the armed forces authorities to award punishment on account of mere consumption of liquor in the unit, such instance shall not constitute misconduct. It shall be against rule of law to punish armed forces personnel in the absence of any statutory mandate or authority.

31. Apart from above right to consume liquor and food in routine life, in the absence of any statutory bar, is a constitutional protected fundamental right co-related to dignity and quality of life protected by article 21 of the Constitution, would be curtailed. Hence no interference should be done to the personal life of armed forces personnel unless the conduct is treated as misconduct under the Rules, Regulations or statutory provisions or army.

32. The word "intoxicated" or "intoxicated state" has been defined in Oxford Advance Learned Dictionary (Seventh Edition, p. 816)) as under:

(a) *"intoxicated. **1.** Under the influence of alcohol or drugs"*
(b) *"intoxicating. **1.** (of drink) containing alcohol **2** making you feel excited so that you cannot think clearly."*

In the New Illustrated Medical Dictionary by Dr. Shrinandan Bansal (*Third Edition* ; *2009 p. 787)*, the word "intoxication has been defined as under:

> "*Intoxication – 1. The State of being intoxicated or poisoned. 2. The condition produced by excessive use of alcohol."*

BLACK'S LAW DISCTIONARY

33. In Black's Law Dictionary (9th Edition p. 898) 'intoxication' has been defined as under :-

> "***intoxication,*** *A diminished ability to act with full mental and physical capabilities because of alcohol or drug consumption; drunkenness".*

34. Thus, in view of dictionary meaning the state of intoxication is a question of fact which means and includes (1) anything, state of things, or relation of things capable of being perceived by the senses; (2) any mental condition of which any person is conscious.

35. In view of meaning of intoxication, in case after consumption of liquor a person's ability to act with full mental and physical capabilities because of alcohol consumption to be drunkenness diminishes, only then a person may be charged for intoxication. Intoxicated state of mind is a question of fact which must be established by material evidence showing how a charged officer or employee because of his or her conduct, may be held to be suffering from intoxication. Unless there is some overt act, violent behaviour or apparent misbehaviour or

misconduct a person may not be held to be in intoxicated state of mind, more so, when consumption of liquor is permissible in army.

36. In the case reported in AIR 1962 Mys. 53 ***Rayjappa vs. Nilakanta*** Rao, it was held that Section 11 of the Evidence Act makes existence of facts admissible and not statements as to such existence.

37. Orrisa High Court in the case reported in AIR 1996 Orrisa 38, ***Raghunath Behera vs. Balaram Behera & anr*** held that a question in fact exists or does not exist is a question of fact and finding recorded thereon is a finding of fact.

38. Hon'ble Supreme Court in a case reported in AIR 1983 SC 446, ***Earabhadrappa alias Krishnappa vs. State of Karnataka*** held that the word 'fact' means some concrete and material fact to which information directly relates.

39. Thus, intoxication is a question of fact and burden lies on the person who alleges it. Nothing has been brought on record as to whether consumption of liquor by the applicant is not purchased from Army Canteen. How and under what manner it may be held that it was purchased from outsource? And how the purchase of liquor from outsource is a misconduct? Merely saying that applicant purchased liquor from outsource would not construe misconduct. Liquor consumed by him, that too in Unit off the duty, seems to does not constitute a misconduct

and in consequence thereof, order of discharge relying upon such finding, even assuming true, seems to suffer from non-application of mind.

SECTION 39(b) of the Army Act, 1950

40. Section 39 (b) of the Army Act, 1950 contains a provision to deal with situation where army personnel over stayed the leave. It provides, to quote, *without sufficient cause overstays leave granted to him".*

41. The provision as contained in sub-Section (b) of Section 39 of the Army Act, 1950 means in case army personnel overstays leave without sufficient cause, he may be punished in terms of provision of Section 39 of the Army Act, 1950. Sufficient cause necessarily implies an element of sincerity, bona fide and reasonableness without any negligent inaction or mala fide..

42. Hon'ble Supreme Court in ***Collector, Land Acquisition, Anantanag vs. Mst. Katiji,*** AIR 1987 SC 1353 held, 'sufficient cause' is not a catchword. It is adequately elastic to enable to Court to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose of the existence of the institution of Courts In ***Sankaran Villai vs. V. P. Veguduswami***, AIR 1999 SC 3010, Hon'ble Supreme Court held that the expression 'sufficient cause' necessarily implies element of sincerity, bona fides and reasonableness along with

sincerity. The words 'sufficient cause' provides under sub-section (b) of Section 39 of the Army Act, 1950 the parimetaria to the word used in Section 5 of the Indian Limitation Act. Hon'ble Supreme Court in the case of ***State of Bihar vs. Kameshwar Prasad Singh***, (2000) 9 SCC 94 held that a liberal approach be given for sufficiency of cause. In the case of ***Ram Nath Sao vs. Gobardhan Sao***, AIR 2002 SC 1201, their Lordships of Hon'ble Supreme Court held that while dealing with sufficient cause under the Indian Limitation Act, Courts should see that there is no negligence or inaction on the part of parties. In the case of ***Sher Bahadur vs. Union of India***, (2002) 7 SCC 142, while interpreting the word 'sufficiency of evidence' Hon'ble Supreme Court held that it postulates existence of some evidence which links officer under charge with the alleged misconduct. In the case of ***Singh Enterprises vs.CCE***,(2008) 3 SCC 70 Hon'ble Supreme Court held that the word 'sufficient cause' as found in different statutes essentially means as adequate or enough cause. In ***Sheoduttrai Pannalal vc. CIT.***, (1941) 9 ITR 118, in tax matter, it has been held that sufficient cause refers to question of fact.

43. In view of aforesaid propositions of law, 'sufficient cause' implies presence of legal and adequate reasons inasmuch as to justify overstay of leave by army personnel. It means to be viewed with reasonable standard and practicable caution.

Since it is question of fact while recording finding and punishment, a finding should be recorded precisely to establish that without sufficient cause, the armed force personnel overstayed the leave. In the absence of such a finding, the punishment awarded may vitiate keeping the facts and circumstances of each case. Vice versa over staying leave may be defended showing sufficient cause as ever overstay of leave should be of reasonable period under compelling circumstance showing justification in not applying for extension of leave.

44. In the present case applicant has also been punished under Section 39 (a) of the Army Act which provides that where army personnel absents himself without leave then on conviction by court-martial he or she may be liable to suffer imprisonment for a term up to 3 years. The material on record does not show that any court-martial proceedings were held against the applicant. Order passed with regard to punishment (supra) dated 03.12.2012 shows that applicant overstayed leave for about 12 days. It was not a case of absence without leave but a case of overstaying leave for 12 days. The provisions contained in Section 19 (a) of the Army Act seems to be not applicable hence, it appears to be a question of non-application of mind. In the event of overstaying leave for short period, it shall be obligatory for the authorities concerned of the army to find out justification for overstaying leave in view of the provisions contained in Section 39 (b) of the Army Act. In case

armed forces personnel shows sufficient cause for overstaying leave then punishment may be diluted or he or she may be pardoned. In the present case there is absolutely non application of mind while awarding punishment. No evidence has been brought on record whether the applicant overstayed leave without sufficient cause. Rather while serving notice shelter of Section 39 (a) has been taken which is based on unfounded facts; a serious negligence on the part of authorities and against all canon of justice.

STATUTORY PROVISION

45. The applicant has also been punished in pursuance of provisions of Section 48 of the Army Act, 1950 (in short, Act, 1950). Section 48 of the Act, 1950 is reproduced as under:

> "***Intoxication.*** *(1) Any person subject to this Act who is found in a state of intoxication, whether on duty or not, shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is not an officer, be liable, subject to the provisions of sub-section (2), to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.*
>
> *(2) Where an offence of being intoxicated is committed by a person other than an officer when not on active service or not on duty, the period of imprisonment awarded shall not exceed six months.*

46. From a perusal of definition of 'intoxication' as given in the dictionary (supra), it is necessary that the person who

consumed liquor must be having intoxicated state of mind, i.e, loses his senses to think in proper way or become violent or is not in a position to discharge his duty. There must be some overt act indicating intoxicated state of mind.

47. Consumption of liquor without any loss of senses, violent act or alike state of mind that too off the duty in unit, barrack or home shall not create ground for punishment under Section 48 of the Act, 1950.

48. Sections 45 and 46 of the Act define 'unbecoming conduct' and 'certain forms of disgraceful conduct'. Sections 45 and 46 are reproduced as under:

> ***"45. <u>Unbecoming Conduct</u>.*** *Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned.*
>
> ***"46. <u>Certain forms of disgraceful conduct</u>.*** *Any person subject to this act who commits any of the following offences, that is to say,-*
>
> *(a) Is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or*
>
> *(b) Malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates or infirmity; or*

(c) With intent to render himself or any other person unfit for service, voluntary causes hurt to himself or that person,

Shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

49. A plain reading of aforesaid provisions (supra) shows that unbecoming conduct is based on certain abnormal behaviour or disgraceful conduct which may render a person unfit for service who voluntarily causes hurt to himself or to others or becomes violent etc. Thus, it includes not only violent state of mind, but also temptation to quarrel, disobey orders of seniors, or misbehave with colleagues.

50. The provisions contained in Section 48 of the Act must be looked into and be read along with provisions of Sections 45 and 56 of the Act to decide whether a person has misconducted himself during course off the duty or otherwise. Unless a person committed misconduct, keeping in view the provision of Sections 45 and 46 of the Act, or loses sense of mind, quarrel with others or becomes violent, after consumption of liquor, at home or while on leave, such armed forces personnel shall not commit misconduct and may not be punished under Section 48 of the Act. The provision of Section 48 of the Act should not be read in isolation but it should be read with other sections (provisions).

INTERPRETATION

51. According to Maxwell, any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected. Relevant portion from Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:-

> *"A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, through extraordinary and perhaps an oversight, could not be eliminated."*

52. In AIR 2005 SC 1090**, *Manik Lal Majumdar and others Vs. Gouranga Chandra Dey and others*,** Hon'ble Supreme Court reiterated that legislative intent must be found by reading the statute as a whole.

53. *In* 2006 (2) SCC 670***, Vemareddy Kumaraswami and another Vs. State of Andhra Pradesh,*** their Lordship of Hon'ble Supreme Court affirmed the principle of construction and when the language of the statute is clear and unambiguous court can not make any addition or subtraction of words.

54. *In* AIR 2007 SC 2742***, M.C.D. Vs. Keemat Rai Gupta*** and AIR 2007 SC 2625***, Mohan Vs. State of Maharashtra****, their Lordship of Hon'ble Supreme Court ruled that court should not add or delete the words in statute. Casus Omisus should*

not be supplied when the language of the statute is clear and unambiguous.

55*. In* AIR 2008 SC 1797***, Karnataka State Financial Corporation vs. N. Narasimahaiah and others****,* Hon'ble Supreme Court held that while constructing s statute it can not be extended to a situation not contemplated thereby. Entire statute must be first read as a whole then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to take action against a person in a particular manner that should be done in the same manner. Interpretation of statute should not depend upon contingency but it should be interpreted from its own word and language used.

56. House of Lord in the case of ***Johnson Vs. Marshall, sons and Co. Ltd.*** reported in (1906) AC 409 (HL) where the issue was whether the workmen was guilty of serious and willful misconduct their Lordships held that burden of proving guilt was on employer. Misconduct is reduced to the breach of rule, from which breach injuries actionable or otherwise could reasonably be anticipated is depend upon each case.

57. In the case of ***Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal*** Corporation reported in (1985) 2 SCC 35, *(Para 5*) Hon'ble Supreme Court has held that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to

the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct.

58. In the case of ***Union of India Versus J. Ahmed,*** (1979) 2 SCC 286***,*** Hon'ble Supreme Court has held that, deficiency in personal character or personal ability do not constitute misconduct for taking disciplinary proceedings*.*

59. In the case of ***A.L. Kalara Vs. Project & Equipment Corporation*** (1984) 3 SCC 316***;*** Hon'ble Supreme Court has held that acts of misconduct must be precisely and specifically stated in rules or standing orders and cannot be left to be interpreted ex-post facto by the management.

60. The case of ***Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal Corporation,*** (1985) 2 SCC 35, the apex Court has held that it is well settled that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct. (Para 5).

61. In view of interpretative jurisprudence, the provisions contained in Section 48 of the Army Act is vague. Section 48 deals with word intoxication and should be read in conjunction with Sections 45 and 46 of the Army Act which deals with

unbecoming conduct as well as disgraceful conduct which seems to be possible while looking to the conduct of a person having intoxicated state of mind. Thus, provisions of sections 45, 46, 47 and 48 of the Army Act should be read conjointly while punishing army personnel under Section 48 of the Act.

MISCONDUCT

62. Another question cropped up, i.e. misconduct. Section 48 of the Army Act only speaks of intoxication and not the overt act, hence assistance may be taken from the provisions of Sections 45 and 46 of the Army Act. As held hereinabove, intoxication is a question of fact and to construe misconduct, it must be proved from the conduct and behaviour of army personnel.

63. In the case of ***State of Punjab Vs. Ex-Constable Ram Singh*** (1992) 4 SCC 54, Hon'ble Supreme Court held that the word misconduct though not capable of precise definition as reflection receives its connotation from the context, the delinquency in its effect on the discipline and the nature of duty. It may involve moral turpitude, it must be improper or wrong behavior, unlawful behavior, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgement, carelessness or negligence in performance of the duty; the act complained or bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and context

where in the terms occurs; regard being had to the scope of the statute and public purpose it seeks to serve.

64. In the case of *G.M.* ***Appellate Authority, Bank of India Vs. Mohd. Nizamuddin*** (2006) 7 SCC 410; Hon'ble Supreme Court has held that, it is well settled law that gravity of misconduct has to be measured in terms of the nature of misconduct. (Para 9)

65. In Black's Law Dictionary Seventh Edition, the word, "misconduct" has been defined as under *:-*

> *"**Misconduct**1. A dereliction of duty; unlawful or improper behavior.*
>
> ***Affirmative Misconduct 1.** An affirmative act of misrepresentation or concealment of a material fact; intentional wrongful behavior".*
>
> ***Official misconduct**. A public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance- Also termed misconduct in office; misbehavior in office; malconduct in office; misdemeanor in office; corruption in office; official corruption".*
>
> *"**Wanton misconduct.** An act, or a failure to act when there is a duty to do so, in reckless disregard of another's rights, coupled with the knowledge that injury will probably result- Also termed wanton and reckless mis-conduct.*
>
> ***Willful misconduct.** Misconduct committed voluntarily and intentionally.*

> *"This term of art (willful misconduct) has defined definition, but it is clear that it means something more than negligence. Two classic examples of misconduct which will defeat the seaman's claim are intoxication and veneral disease". Frank L. Maraist, Admiratly in a Nutshell 185-86 (3 Ed. 1996)".*

66. In Law Lexicon by P Ramanatha Aiyar, mis-conduct has been defined as under *:*

> *"**Misconduct.** A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior, its synonyms are mis-demeanor, misdeed, misbehavior. Delinquency, impropriety, mismanagement, offences, but not negligence or carelessness. Term "misconduct" when applied to act of attorney, implies dishonest act or attempt to persuade court or jury by use of defective or reprehensible methods. People v. Sigal, 249 CA 2D 299, 57 Cal Rptr. 541, 549. Misconduct, which renders discharged employee ineligible for unemployment compensation occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.*

Walson V. Brown, La. App., 147 So. 2D 27, 29 (Black).

67. Various meanings have been given of word, “mis-conduct” in the celebrated book, “Words and Phrases” published by West Publishing Company. The definition of mis-conduct in reference to present context is reproduced as under :

“The term “misconduct” implies a wrongful intention, and not a mere error of judgement. Smithy V. Cutler, N.Y. 10 Wend. 590, 25 Am. Dec. 580 U.S. v. Warner, 28 Fed. Cas. 404”.

“Word Misconduct has several different meanings; it is bad behavior, improper conduct, mismanagement; wrong behavior, wrong conduct; any improper or wrong conduct; in usual parlance, a transgression of some established and definite rule of action, where no discretion is left; except what necessity may demand; it does not necessarily imply corruption or criminal intention, but implies wrongful intention, and not mere error of judgment. Boynton Cab Co. V. Neubeck, 296 N.W. 636, 639, 237 Wis. 249”.

68. Thus from the dictionary meaning, the word, “misconduct” implies wrongful intention and not mere error of judgment or bona fide error of judgment on the part of government servant.

69. In a case, reported in ***State of Punjab vs. Ex-Constable Ram Singh*** (1992) 4 SCC 54, their Lordships of Hon’ble Supreme Court have interpreted the word, “misconduct”. To

reproduce relevant portion from the judgment of Ram Singh (Supra), to quote;

> *"Thus it could be seen that the word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behavior; unlawful behavior, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere effort of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order".*

70. In another judgment, reported in AIR 2002 SC 1124 ***Baldev Singh Gandhi Versus State of Punjab***, their Lordships of Hon'ble Supreme Court had occasion to define the word, "misconduct" which is reproduced as under :

> *"Misconduct has not been defined in the Act. The word "misconduct" is antithesis of the word "conduct". Ordinarily the expression "misconduct" means wrong or improper conduct, unlawful behavior, misfeasance, wrong conduct, misdemeanor etc. Since, there are different meanings of that expression, the same has to be construed with reference to the subject and the context*

wherein it occurs. Regard has to be paid to the aims and objects of the statute".

71. In view of the above, the provisions contained in Section 48 of the Act should not be read in isolation, but be read along with Section 45 and 46 of the Act, or other provisions of the Armed Forces Act and Rules. Intoxication of an armed forces personnel must be proved by overt act and merely saying shall not suffice. In case the competent authority wants to discharge a person, then intoxication must be ascertained and looked into keeping in mind the provisions contained in Sections 45 and 46 of the Act.

RED INK ENTRIES

72. While filing counter affidavit, it has been asserted by the respondents that the procedure provided by Army Order dated 28.12.1988 has been followed in letter and spirit, though facts seem to be otherwise. Respondents have not communicated any order in response to decision taken. No enquiry was held in terms of Army Order dated 28.12.1988.

73. This Tribunal, in the case of ***Nk Abhilash Singh Kushwah vs. Union of India and ors.***, (Original Application No. 168 of 2013) vide order dated 23.09.2015 held that the provision contained in Army Order dated 28.12.1988 are mandatory since it has been issued in pursuance of power conferred by Rule 2A read with Rule (iii) of Rule 13 of the Army

Rule. Army Headquarter Letter dated 28.12.1988 provides to hold a preliminary enquiry or fact finding enquiry before passing an order of discharge, that too after serving copy of the enquiry report. In the present case, the procedure has not been followed.

74. While considering the mandatory nature of army Order 1988 (supra), in the case of ***Nk Abhilash Singh Kushwah vs. Union of Inida*** (supra) in paragraph-75, this Tribunal has culled out the law on the subject. For convenience sake, para-75 is reproduced as under:

> "*75. In view of above, since the applicant has been discharged from Army without following the additional procedure provided by A.O. 1988 (supra) seems to suffer from vice of arbitrariness.* ***Finding with regard to applicability of Army Order 1988 (supra) is summarized and culled down as under****:*
>
> > *(i) In view of provision contained in sub-rule 2A read with sub-rule 3 of Rule 13 of the Army Order (supra), in case the Chief of the Army Staff or the Government add certain additional conditions to the procedure provided by Rule 13 of the Army Rule 1954 (supra), it shall be statutory in nature, hence shall have binding effect and mandatory for the subordinate authorities of the Army or Chief of the Army Staff himself, and non compliance shall vitiate the punishment awarded thereon.*
> >
> > *(ii) The Chief of the Army Staff as well as the Government in pursuance to Army Act, 1950 are statutory authorities and they have right to issue*

order or circular regulating service conditions in pursuance to provisions contained in Army Act, 1950 and Rule 2A of Rule 13 (supra). In case such statutory power is exercised, circular or order is issued thereon it shall be binding and mandatory in nature subject to limitations contained in the Army Act, 1950 itself and Article 33 of the Constitution of India.

*(iii) The case of **Santra** (supra) does not settle the law with regard to applicability of Army Order of 1988 (supra), hence it lacks binding effect to the extent the Army Order of 1988 is concerned.*

*(iv) The judgment of Jammu & Kashmir High Court and Division Bench judgment of Delhi High Court as well as provisions contained in sub-rule 2A of Rule 13 of the Army Act, 1950 and the proposition of law flowing from the catena of judgments of Hon'ble Supreme Court and High Court (supra) relate to interpretative jurisprudence, hence order in **Ex Sepoy Arun Bali** (supra) is per incuriam to statutory provisions as well as judgments of Hon'ble Supreme Court and lacks binding effect.*

(v) The procedure contained in Army Order of 1988 (supra) to hold preliminary enquiry is a condition precedent to discharge an army personnel on account of red ink entries and non-compliance of it shall vitiate the order. Till the procedure in Army Order of 1988 (supra) continues and remain operative, its compliance is must. None compliance shall vitiate the punishment awarded to army personnel.

(iv) The procedure added by Army Order of 1988 is to effectuate and advances the protection provided by Part III of the Constitution of India, hence also it has binding effect.

(vii) Order of punishment must be passed by the authority empowered by Rules 13, otherwise it shall be an instance of exceeding of jurisdiction, be void and nullity in law.

75. In view of the above, since the procedure provided by Army Headquarter Order dated 28.12.1988 has not been followed, the impugned order seems to be not sustainable and suffers from vice of arbitrariness.

76. Before parting with the case, we further observe that three times the same Commanding Officer at about 08.00 pm alleged to found the applicant to be in intoxicated state, followed by discharge order. The original punishment order while recording red ink entries shows that the applicant was guilty of availing liquor from outsourcing it. But in the show cause notice, it has not been brought on record. Hence, notice itself suffers from substantial illegality since applicant could not get opportunity to explain the availability of liquor, which is being provided as quota entitlement from Army Canteen. It is further unfortunate that the applicant was granted red ink entries without any recorded overt act, that too on account of consumption of liquor in unit off the duty. In case consumption of liquor in unit is an offence, then there is no justification for the Army to provide quota to purchase liquor from Army Canteen

dfor consumption. Nothing has been brought on record to indicate that there is any order or circular to indicate where army personnel should consume liquor that too off the duty. In counter affidavit it has been stated that liquor had been consumed on non-issue days from out sourcing it. However, consumption of liquor from unauthorized source on non-issue days is misconduct, is not understandable, that too in the teeth of Section 48 of the Army Act? Non-issue day has also not been explained. Once a soldier has right to purchase liquor from canteen, then he can drink it on any day including non-issue days at his residence and off the duty. The material reflects that a case has been cooked up with pre-decided motive to punish the applicant. Of-course, liquor might be consumed when the person is not on duty, broadly at residence or in Bar, and in such situation it shall not constitute misconduct calling for action under Section 48 of the Army Act. Of-course, at prohibited place it shall not be open to consume liquor. Applicant seems to have been dealt with highhandedness by the Commanding Officer without application of mind.

FINDINGS:

77. In view of discussion made hereinabove, we record our findings as under:

(i) Mere consumption of liquor off the duty by armed force personnel shall not construe misconduct.

(ii) Intoxication is a state of mind and question of fact and should be proved by overt act, violence, non-compliance of orders or alike acts and disgraceful acts with the aid of Sections 45 and 46 of the Army Act. Mere saying that army personnel is intoxicated shall not be sufficient to punish for misconduct.

(iii) Supply of liquor to army personnel by providing quota means that it is permissible for the members of armed forces to consume liquor while they are off the duty, hence for consumption of liquor they cannot be punished.

(iv) It is permissible under the quota to purchase liquor from CSD Canteen. No Rules, Regulations or Circular letter has been brought to the notice of the Tribunal that purchase of liquor from private shops situated outside army area ignoring army canteen is punishable or construes misconduct, hence punishment awarded through red ink entries with the allegation of purchase of liquor from outside seems to be based on unfounded facts.

(v) Out sourcing liquor may be on payment from outside, hence what is the nature of outsourcing liquor is a material fact which should be established by material evidence while holding armed force personnel guilty.

(vi) Sufficient cause contained in Section 39(b) of the Army Act, 1950 means in case army personnel overstayed

the leave for short period under compelling circumstances, bona fidely, sincerely and established this fact, then ordinarily punishment should be minor, or he or she should be pardoned.

(vii) While punishing under Section 39 (b) of the Army Act, it shall be obligatory for the competent authority to record a factual finding that army personnel over stayed the leave without sufficient cause to fulfill statutory requirement, otherwise order of punishment may vitiate keeping in view the facts and circumstances of each case.

(viii) While taking defence of sufficient cause, it shall be obligatory for the army personnel to also establish that he or she was not in a position to apply for extension of leave on account of compelling reasons. However, overstaying leave for few days bona fidely for compelling reasons may be explained to establish sufficient cause which may be a ground for excuse by the competent authority.

(ix) Sections 45, 46 and 48 of the Army Act, 1950 should be read conjointly while recording a finding with regard to misconduct under Section 48 of the Army Act, 1950. Nature of misconduct committed under Section 48 of the Act should be ascertained from the letter and spirit of Section 48 of the Act and definitions of intoxication (supra)

(x) Notice has been served on the applicant indicating punishment under Section 39 (a) of the Army Act, which is based on unfounded facts.

(xi) No reasoned and speaking order has been passed and communicated to the applicant after service of notice under Rule 13 (3) (iii) (v) which seems to have been dispensed merely by making entry in the service record. Such action on the part of the respondents has deprived the applicant to defend his cause by submitting statutory complaint under Section 26 of the Army Act, 1950 and other provisions pointing out the defence set up by him, hence decision suffers from vice of arbitrariness.

(xii) Notice also does not contain allegations with regard to outsourcing liquor by disclosing other relevant materials and their effect, but it is based only on grant of red ink entries only which seems to suffer from arbitrariness.

(xiii) Grant of three red ink entries in quick succession followed by notice of discharge within a period of two months seems to be hasty action on the part of the authority concerned without opportunity to amend or defend his conduct, which seems to be not justified.

(xiv) No preliminary enquiry was held in view of Army Order dated 28.12.1988 though it has been relied upon while serving notice, resulting in denial of principles of

natural justice. In the case of ***Abhilash Singh Kushwah vs. Union of India & ors*** **(O.A. No. 168 of 2013)** decided by this Tribunal on 23.09.2015, it has been held that it is mandatory to hold an enquiry before serving a notice. Notice should be served along with report of fact finding preliminary enquiry report and only after receipt of reply, army personnel may be punished. Order of punishment stands vitiated on account of non- compliance of statutory mandate.

Chief of the Army Staff may himself look into the matter and ensure that army personnel are not dealt in such a shabby manner in utter violation of his order.

78. In case enquiry would have been held in pursuance to Army Order dated 28.12.1988, applicant would have come forth with his defence, but for the reason best known the Commanding Officer has not held enquiry in pursuance of procedure prescribed by Army Order dated 28.12.1988 mentioned in notice. The O.A. deserves to be allowed.

79. It may not be forgotten that East India Company lost its battle because of lack of trust between soldiers and the officers. The officers of the army must deal with subordinates or soldiers in a just and fair manner to strengthen their trust into them so that during time of war, the officers may be their hero to fight with enemies.

George S. Patton, Jr. rightly said, to quote:

"Soldier is the army. No army is better that its soldiers. A Soldier is also a citizen. In fact, the highest obligation and privilege of citizenship is that of bearing arm for one's country."

80. O.A. is allowed accordingly. Notice dated 03.12.2012 and order of discharge dated 19.03.2013 are set aside and in case the applicant has not completed service of the rank up to the age of superannuation, then he shall be reinstated and all consequential benefits shall be provided to him within a period of three months from today. However back wages is confined to 50% of the payable salary and perks under rule.

81. Let a copy of this judgment be sent by the Registrar to the Chief of the Army Staff for circulation and to issue appropriate order in the light of observations made in the body of the judgment.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

anb