RESERVED

A.F.R.

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 966 of 2010

Tuesday, this the 7th day of April, 2015

"Hon'ble Mr. Justice V.K. DIXIT, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)"

Naresh Chandra Singh,
Sepoy No 2979165A, 15 Rajput
C/o 56 APO, S/o Nathoo Singh
Resident of Village Esepur,
Post Office Ugarpur, Sultanpatti
District - Farrukhabad

…….Petitioner

Versus

1. The Union of India, through
Ministry of Defence.

2. The Commanding Officer,
15 Rajput, C/o 56 A.P.O.

3. Chief of the Army Staff, through Ministry of Defence,
Union of India

….Respondents

Ld. Counsel appeared for the Petitioner - Shri Rakesh Johri, Advocate

Ld. Counsel appeared for the Respondent - Shri D.S. Tiwari,
Central Govt. Counsel.

ORDER

"Per Justice Virendra Kumar DIXIT, Judicial Member"

1. This Writ Petition No. 4986 of 1995 has been received by this Tribunal by transfer from High Court of judicature at Allahabad on 24.06.2010 and registered as Transferred Application No. 966 of 2010.

2. The Petitioner through this Transferred Application has sought following reliefs :-

(a) To issue a writ, order or direction in the nature of certiorari quashing the impugned order of discharge from service dated 21.9.1990 Annexure 7, passed by the Commanding Officer, respondent no. 2, the order dated 18.08.1993, Annexure 13 and the order dated 25.11.1994, Annexure 14 passed by the respondent no. 3.

(a) 1. To issue/pass an order or direction to the Respondents to quash/set aside the arbitrary and illegal sentence of punishments awarded under summary trial as elaborated in paragraphs 2A,3A,4A,5A and 6A supra of the writ petition/transferred application all these punishments being illegal, capricious and in violation of the statutory provisions invogue.

(b) To issue a wit order or direction in the nature of mandamus directing the respondents to treat the Petitioner in continuous service and to pay him arrears of salary since 21.9.1990 and to continue to pay him current salary month to month as and when the same falls due to him along with other benefits as admissible under law.

(c) To issue any other suitable writ, order or direction which this Hon,ble Court deems just and proper in the interest of justice.

(d). To award costs to the Petitioner.

3. In brief, the fact of the case is that the Petitioner was enrolled in the Army in Rajput Regiment on 30 Aug 1980. After successful completion of training he was posted to 15 Rajput. During his service, the petitioner was punished five times, details of which are :-

Ser No	Date of Award	Punishment Awarded	Under AA Sec
(a)	30 Dec 83	14 days detention	AA Sec 52 (a)
(b)	05 May 90	06 days pay fine	AA Sec 39 (b)
(c)	15 May 90	Severe Reprimand	AA Sec 52 (a)
(d)	18 May 90	Severe Reprimand	AA Sec 42 (e)
(e)	23 Jun 90	Reduced to rank of Sepoy	AA Sec 63

4. A Court of Inquiry was ordered to assess the suitability of his further retention in service under the provisions of Army HQ letter No A 13210/159/AG2 (c) dated 28 Dec 1988. The Court of Inquiry opined that his further retention in service is detrimental to good discipline. Based on recommendations, the Petitioner was served a Show Cause Notice by the Brigade Commander and he was thereafter discharged from service as undesirable on 21 Sep 1990 in accordance with Army Rule, 13 (3) III (v) and Army Headquarters letter No.A/13210/159/AG/PS2(c) dated 28 Dec 1988. The Petitioner sent representation to the Chief of the Army Staff praying for his reinstatement in service, but his representation was not accepted by the Chief of the Army Staff. Being aggrieved the Petitioner filed Civil Misc. Writ Petition No 4986 of 1995 in the Allahabad High Court which was transferred to this Tribunal and renumbered as Transferred Application No 966 of 2010.

5. Heard Col (Retd) Rakesh Johri, Learned Counsel for the Petitioner and Shri D.S. Tiwari, Learned Counsel for the Respondent at length and perused the relevant documents available on record.

6. Learned Counsel for the Petitioner submitted that the petitioner was enrolled in the Army on 30 Aug 1980. While serving with 15 Rajput, the Petitioner was awarded five punishments, 14 days detention under AA Sec 52(a) on 30 Dec 1983, 6 days Pay fine under AA Sec 39(b) on 5 May 1990, Severe Reprimand under AA Sec 52(a) on 15 May 1990, Severe Reprimand under AA Sec 42(e) on 18 May 1990 and reduced to the rank of Sepoy under AA Sec 63 on 23 June 1990. He submitted that out of five, four punishments have been awarded to the Petitioner within less than two months. The first punishment was awarded on 30 Dec 1983; thereafter he had a clean record of service for about 6 years and 5 months and between 05 May 1990 and 23 June 1990, in less than 2 months, he has been punished four times. On the day of last punishment, the Petitioner was illegally served a Show Cause Notice by the Officiating Commanding Officer which clearly shows the haste in which the Respondent No 2 wanted to terminate the services of the Petitioner.

7. Giving details of punishment, learned Counsel for the Petitioner submitted that the Petitioner was falsely implicated in a case of theft for Rs 780/- on 16 Nov 83 for which he was tried summarily and awarded a punishment of 14 days detention under AA Sec 80 for offence under AA Sec 52(a) on 30 Dec 83. The entire process was '***void ab initio'***. The offences under AA Sec 52 cannot be dealt with summarily. Note 1 to AA Sec 52 debars summary trial under AA Sec 80 for offences under this Act. This punishment is illegal.

8. Learned Counsel further submitted that the Petitioner was granted 10 days Casual Leave from 28 Feb 90 to 09 Mar 90 which he over stayed for 6 days due to genuine domestic problems for which he was awarded 6 days Pay Fine on 05 May 90. No hearing of charge as per Army Rule 22 and Army Order 70 of 1984 was done. The offence report shows the date of joining of the Petitioner as 15 March 1990, whereas, the punishment has been awarded on 05 May 1990, after lapse of 2 months which indicates it lacked transparency. Para 387 of Regulation for the Army Rule, 1987 does not include 6 days Pay Fine in the list of red ink entries. The punishment has been wrongly entered in the conduct sheet as a red ink entry.

9. Learned Counsel for the Petitioner submitted that the Petitioner was again blamed for theft of Trouser and Shirt Combat (one pair) of a soldier of the same Regiment for which he was tried summarily and given Severe Reprimand under AA Sec 80 for offence under AA Sec 52(a) on 15 May 90. The offences under AA Sec 52 (a) cannot be dealt with summarily under AA Sec 80 as per Note 1 to Army Act, 1950. Note 1 to AA Sec 52 debars Summary Trial under AA Sec 80 for offence under this Act. This punishment is illegal.

10. Learned Counsel for the Petitioner submitted that the Petitioner was once again given Severe Reprimand under AA Sec 42(e) on 18 May 1990 for leaving his post alone without arms against the local orders which directs all persons to leave the post in pair with arms. In this case also no hearing of charge under Army Rule 22 has been done. The charge is vague and it does not contain particulars of the local orders which have been violated. Note 8 to AA Sec 42 pertains to clause (e) of Sec 42, which gives out that the order contravened or a certified copy thereof must be

produced. The sole witness against the Petitioner is once again the same JCO who was witness in other cases. This punishment awarded is also illegal.

11. Learned Counsel for the Petitioner further submitted that the Petitioner was again punished under AA Sec 63 and was reduced to rank from Naik to Sepoy on 23 Jun 90 for visiting civil houses placed out of bound between 0230 hours to 0345 hours on 21 Jun 90 without proper out pass. This was a false allegation levelled against the Petitioner as he was on patrol duty at that time. He had protested against this illegal punishment but was threatened to be tried by a Court Martial. No hearing of charge under Army Rule 22 was done and plea of the Petitioner was not recorded. This punishment was also awarded illegally.

12. Learned Counsel for the Petitioner submitted that on award of fifth punishment on 23 Jun 90, first Show Cause Notice was also served on 23 Jun 1990 by Officiating Commanding Officer, 15 Rajput, under Army Rule 13 (3) III (v). As per Army Rule 13 (3) III (v), Commanding Officer is not competent to exercise this power but this was replied by the Petitioner suitably. Before issuing Show Cause Notice, no preliminary inquiry was conducted which should have been done as per paragraph 5 of the Army Headquarters letter dated 28 Dec 1988. The entire process was illegal. After issue of this Show Cause Notice, neither any action was taken nor this Show Cause Notice was cancelled or withdrawn and second Show Cause Notice dated 03 Aug 1990 under Army Rule 13 (3) III (v) signed by Officiating Commanding Officer was again served to the Petitioner whereas the competent authority to issue Show Cause Notice was Brigade/Sub Area Commander. This was also replied by the Petitioner but no action was

taken against the Petitioner and this Show Cause Notice was also not cancelled or withdrawn.

13. Ld. Counsel for the Petitioner submitted that a Court of Inquiry was convened thereafter by orders of Commanding Officer, 15 Rajput to carry out investigation under which the Petitioner has incurred more than three red ink entries and to assess the suitability of his further retention in the service. The Court of Inquiry assembled on 27 July 1990 when first Show Cause Notice had already been issued on 23 Jun 1990. The Court of Inquiry constituted has some inherent and incurable defects as the Court was not competent to judge the actions of their Commanding Officer as they were serving under him and also Army Rule 180 was not invoked.

14. Ld. Counsel for the Petitioner also submitted that the Petitioner was again served the third Show Cause Notice dated 11 Aug 1990 signed by Commander 93 Infantry Brigade. A plain reading of the letter shows that decision to discharge the Petitioner had already been taken. As the heading shows 'SHOW CAUSE NOTICE TO UNDERSIRABLE/INEFFICIENT PERSONAL. The first sentence is – "**It has been established that you have a consistently poor record of service**". There is no mention of any Inquiry in the Show Cause Notice. Show Cause Notice was signed on 11 Aug 90 and reply was asked by 12 Aug 90, just one day was given to the Petitioner to reply.

15. The learned Counsel for the Petitioner submitted that out of five punishments considered for his undesirability, one is not a red ink entry but has been wrongly entered and two punishments are for offences under AA Sec 52 which should not have been tried summarily as such these are also illegal. Therefore, the balance punishments are only two and as such he

cannot be treated as undesirable as per Army Headquarters letter dated 28 Dec 1988. Even the other two punishments are illegal. He submitted that even issuance of three Show Cause Notice is illegal and shows prejudice. In view of the aforementioned, Learned Counsel for the Petitioner submitted that the discharge of the petitioner from service is illegal and deserves to be set aside with all consequential benefits.

16. In support of his arguments, Learned Counsel for the Petitioner has relied upon the law laid down in the cases of :-

(a) D.K. Yadav v. J.M.A. Industries Ltd., reported in (1993) 3 SCC 259.

(b) Ex-Hav. Satbir Singh v. Chief of the Army Staff, New Delhi reported in (SC) 2013 (1) SLR 753.

(c) Surinder Singh Sihag v. Union of India (Delhi) (DB), reported in 2003(1) S.C.T.697.

(d) Union of India and Others v. K.V. Jankiraman and others repoted in (1991) 4 SCC 109.

(e) Ex Rifleman Tilak Raj vs Union of India, reported in 2009 (2) JKJ 720: 2009 (4) S.C.T 645.

17. On the other hand learned Counsel for the respondents submitted that the Petitioner was enrolled in the Rajput Regiment on 30 Aug 1980. Giving details of the punishment, he submitted that while serving with 15 Rajput, the petitioner was attached to 31 Sub Area CSD Canteen where he committed theft of property worth Rs 780/- of the CSD (I) Canteen belonging to the Government of India on 16 Nov 83. The Petitioner was caught red handed by JC-108499 Subedar Biswanath Singh, therefore, he was awarded “14 days detention” under AA Sec 52(a) by Commanding Officer. The Petitioner was granted 10 days casual leave from 28 Feb 90 to 09 March 90. On expiry of leave, he failed to report to the unit without

sufficient cause and after 06 days overstaying, he reported voluntarily, therefore, he was awarded “06 days pay fine” under AA Sec 39 (b). Again on 29 Apr 90, the Petitioner stole one pair uniform (trouser and shirt combat) belonging to a person of same regiment, therefore, he was awarded “Severe Reprimand” under AA Sec 52(a) by Commanding Officer. On 14 May 90, while the Petitioner was on piquet duty on the Line of Actual Control, he left his post without arms and thereby acted in violation of local orders, therefore, was awarded “Severe Reprimand” under AA Sec 42(e) by Commanding Officer. The Petitioner while on duty on 21 Jun 90, on the Line of Actual Control visited civil house, placed out of bound without proper out pass/written permission of his senior, therefore, was punished under AA Sec 63 and was awarded “Reduced to rank of Sepoy”.

18. Ld. Counsel for the Petitioner further submitted that the Petitioner was given a number of opportunities to improve; but he failed to do so. A Court of Inquiry was ordered to carry out an impartial inquiry to investigate the circumstances under which the Petitioner has incurred more than three red ink entries and to assess the suitability of his further retention in service. The Court of Inquiry opined that the petitioner be discharged from service under the provisions of Army HQ letter No A 13210/159/AG2 (c) dated 28 Dec 1988 as his further retention in service detrimental to good discipline. Based on recommendation of the Commanding Officer, the Petitioner was served a Show Cause Notice signed by the Brigade Commander and he was discharged from service as undesirable on 21 Sep 1990 in accordance with Army Rule, 13 (3) III (v) and Army Headquarters letter No.A/13210/159/AG/PS2(c) dated 28 Dec 1988. The Petitioner sent

representation to the Chief of the Army Staff for reinstatement in service, but his representation was rejected by the Chief of the Army Staff

19. Ld Counsel for the Respondents further submitted that the Petitioner was discharged from service because of his behavior and conduct witnessed during his service. In ten years of service, he was punished five times, twice under AA Sec 52(a), once under AA Sec 39(b), once under AA Sec 42(a) and once under AA Sec 63. As such it is evident that the Petitioner had no temperament for working under stress and he was not loyal to the organization. He further submitted that discipline is hallmark of an organization like Armed Forces and that discipline and commitment towards duty cannot be compromised at any cost. The Petitioner was given number of opportunities to improve but he never paid heed to any of the advise/counseling, therefore, he was found unsuitable for continuing in the Army. Ld. Counsel for the respondents submitted that the Transfer Application of the Petitioner deserves to be dismissed as the same is totally wrong and baseless.

20. We have bestowed our best of the consideration on rival submissions made by both sides and perused all relevant documents available on record.

21. In the instant case the Petitioner was enrolled in the Army in Rajput Regiment on 30 Aug 1980 and was discharged from service on 21 Sep1990 being undesirable soldier in accordance with Army Rule 13 (3) III (v) and Army Headquarters letter No A/13210/159/AG/PS2(c) dated

28 Dec 1988. During his service, he was punished five times :-

Ser No	Date of Award	Punishment Awarded	Under AA Sec
(f)	30 Dec 83	14 days detention	AA Sec 52 (a)
(g)	05 May 90	06 days pay fine	AA Sec 39 (b)
(h)	15 May 90	Severe Reprimand	AA Sec 52 (a)
(i)	18 May 90	Severe Reprimand	AA Sec 42 (e)
(j)	23 Jun 90	Reduced to rank of Sepoy	AA Sec 63

22. The Petitioner sent representation to the Chief of the Army Staff for his reinstatement in service but his representation was not accepted by the Chief of the Army Staff.

23. 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 and Para 52 of the Army Act, 1950 with Notes 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.

<u>JCOs,WOs and OR who have proved inefficient</u>

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

(c) x x x x x x x x x x x x x x x

4. <u>Procedure for dismissal/discharge of undesirable JCOs/WOs/OR</u>. 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 Enquiry. Before recommending discharge or dismissal of individual the authority concerned will ensure :-

(i) That an impartial enquiry (not necessarily a court of inquiry) has been made into the allegations against him and that he has had adequate opportunity of putting up his defence or explanation and of adducing evidence in his defence.

(ii) That the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted 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 enquiry 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

enquiry 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 enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.

(f) Final Orders by the Competent Authority. The authority competent to sanction the dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with 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

Procedure for Discharge of Inefficiebnt JCOs/WOs/OR

6. *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*

(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*

(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 .

(c) **Section 52 of the Army Act, 1950 alongwith Notes**

. *"52.* ***Offences in respect of property.*** *Any person subject to this Act who commits any of the following offences, that is to say :-*

(a) Commits theft of any property belonging to the Government or to any military, naval or air force mess, band or institution or to any person subject to military, naval or air force law; or

(b) Dishonestly misappropriates or converts to his own use any such property; or

(c) Commits criminal breach of trust in respect of any such property; or

(d) Dishonestly receives or retains any such property in respect of which any of the offences under clauses (a), (b) and (c) has been committed, knowing or having reason to believe the commission of such offence; or

(e) Willfully destroys or injures any property of the Government entrusted to him; or

(f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person;

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

NOTES

1. *Offences under this Section should not be dealt with summarily under A.A.s. 80,83 or 84. Before trial is ordered on charges under this Section, reference should be made to the DJAG Command concerned. See Regs Army paras 432 and 458."*

24. 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 Judgement, 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, equalitarian 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 employee/workman 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".

25. 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."

26. 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 Judgement, 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 petitioner, he was otherwise entitled to pension. An order of discharge of service without following the procedure prescribed, therefore, in our opinion, therefore, 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. 2nd 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."

27. In the instant case, out of five red ink entries, the Petitioner had earned two red ink entries for offence under Army Act Sec 52(a), first on 30 Dec 83, for a theft of CSD (I) Canteen items worth approx Rs 780/- on 16 Nov 83 and second on 15 May 90 for theft of one pair of Army uniform of his co-soldier on 29 Apr 90. He was punished summarily on both occasions by the Commanding Officer under AA Sec 80 for offences under AA Sec 52 (a). Notes to Sec 52 of Army Act, 1950 and Para 432 of Defence Service Regulations, 1987 clearly lay down that offences under this Section should not be dealt with summarily. It requires a reference to DJAG Command concerned before trial is ordered. Thus, two red ink

entries awarded to the petitioner under AA Sec 52 (a) on 30 Dec 83 and 15 May 90 without fulfilling the procedure prescribed under Army Act are against the provisions of law.

28. One red ink entry pertains to his punishment of 6 days pay fine under AA Sec 80 for offence under AA Sec 39(b). However, Paragraph 387 of Regulation for the Army, 1987, does not include pay fine in the list of red ink entries whereas in the Conduct Sheet of the Petitioner, it has been shown as red ink entry.

29. According to Note 2 of para 5 of Army Headquarters letter dated 28 Dec 88, discharge after four red ink entries is not mandatory. Though there is 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 qualify a person as an 'undesirable'. In the instant case, the petitioner had five red ink entries, out of which, two red ink entries are for offences under AA Sec 52(a) which are unsustainable as the sentences for the offence under AA Sec 52 (a) were awarded summarily. One black ink entry '6 days pay fine' for offence under AA Sec 39 (b) has been wrongly shown as red ink entry. Thus only two red ink entries are left, which is not sufficient to make a person undesirable. It is also observed that proper procedure for issue of Show Cause Notice has not been followed and adequate time has not been provided to the Petitioner to put forward his case. It suffers from evident legal infirmities and also from the principles of natural justice. Ld. Counsel for the Petitioner has also raised relevant issues of about two other punishments and about non compliance of Army Rule 22 but we are not going into these details since out of five red ink entries, two are illegal and one is wrongly entered as red ink entry but in actuality, it is a black ink entry

and there are legal infirmities in issuance of Show Cause Notice. Therefore, only two red ink entries remain in the record of the Petitioner. It is evident that neither the authority recommending discharge, nor the authority competent to sanction discharge followed the procedure laid down in the Army Headquarters letter No A/13210/159/AG/PS 2(c) dated 28th Dec 1988.

30. A strenuous effort has been made by Learned Counsel for the Respondents to convince that discipline is hallmark of an organization like Armed Forces and that discipline and commitment towards duty cannot be compromised at any cost. While there is no scope for any disagreement with learned counsel for the Respondents that indiscipline and dereliction of duty is unacceptable in Government service and much less acceptable in Armed Forces, yet concern for discipline must not prompt the competent authority to give the procedure a complete go by.

31. In the case of **D.K. Yadav (supra),** Hon'ble The Apex Court has observed that the order of discharge of service without following the prescribed procedure cannot be sustained. The principles of natural justice are part 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 petitioner 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. Further, the Petitioner has put in approx 10 years of service and would have been entitled to pension on completion of 15 years of service, had he not been discharged illegally. An order of discharge from service without following the prescribed procedure

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

32. In the case of **Delhi Transport Corpn. v. D.T.C. Mazdoor Congress (supra),** Hon'ble The Apex Court has 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 inbuilt of natural justice.

33. In view of the above, we are of the considered view that the impugned discharge order dated 21 Sep 1990 (Annexure 7 to T.A.), Army HQ letter dated 18.08.1993 (Annexure 13 to T.A.) and Records The Rajput Regiment letter dated 25 Nov 94 (Annexure 14 to T.A) were not only unjust, illegal but also were not in conformity with rules, regulations and law. The impugned orders deserve to be set aside. The Petitioner has put in approx 10 years of service and would have been entitled to pension on completion of 15 years of service, had he not been discharged illegally. We are also of the considered view that the Petitioner shall be notionally treated in service till he would be entitled for service pension. In view of the facts and circumstances of the case, the Petitioner shall not be entitled for back wages from the date of dismissal to the date he reaches pensionable service. However, the Petitioner shall be entitled to terminal benefits and

pension as per Pension Regulations for the Army, 1960 alongwith 9% interest on arrears.

ORDER

34. Thus in the result, the TA succeeds and is allowed. The impugned discharge order dated 21 Sep 1990 (Annexure 7 to T.A.), Army HQ letter dated 18 Aug 1993 (Annexure 13 to T.A.) and Records The Rajput Regiment letter dated 25 Nov 94 (Annexure 14 to T.A) are hereby quashed. The Petitioner shall be notionally treated in service till he would be entitled for service pension. The Petitioner shall not be entitled for back wages from the date of dismissal to the date he reaches pensionable service. The Petitioner shall be entitled to terminal benefits and pension as per Pension Regulations for the Army, 1961 alongwith 9% interest on arrears. The Respondents are directed to comply the order within three months from the date of production of a certified copy of this order.

35. However, there is no order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member

(Justice V.K. DIXIT)
Judicial Member

Dated : Apr ,2015

dds/-*