AFR
Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO 139 of 2015

Wednesday, this the 03rd day of February 2016

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

No 14855220F Sep/MT Sunil Kumar Singh, aged about 25 years, S/O Shri Bhola Nath Singh Village-Nayapura Hansipur, Post Office-Hansipur, Police Station-Kachawan, District-Mirjapur (UP) PIN-231306.

…Applicant

Ld. Counsel for the: Advocate — **Col (Retd) Y.R. Sharma Advocate**

Versus

1. The Union of India through Secretary, Ministry of Defence, South Block, New Delhi-110011.

2. Chief of Army Staff, Army Headquarter, South Block, New Delhi-110011.

3. General Officer Commanding, HQ 71 Sub Area, PIN-908671, C/o 56 APO.

4. Commanding Officer, 5021 ASC Battalion (MT), PIN-905021, C/O 56 APO.

…….Respondents

Ld. Counsel for the : Respondents. — **Shri Yogesh Kesarwani, Central Govt Counsel assisted by Lt Col Subodh Verma, OIC Legal Cell.**

ORDER (ORAL)

1. This is an application under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred being aggrieved with the impugned order of dismissal dated 15.12.2013 from service in pursuance of power conferred by Section 20 of the Army Act, 1954 (for short the Act) read with Army Rule 17 of the Army Rules 1954 (for short the Rules).

2. We have heard Ld. Counsel for the parties and perused the record.

3. The factual matrix on record seems to be admitted by both the sides. However, the same is discussed herein below.

4. The applicant was enrolled in the Army Service Corps as Driver (MT) on 15.12.2010. After serving for about three years notice dated 10.11.2012 was served on the applicant under Section 20 of the Act read with Rule 17 of the Rules on the basis of intelligence report that the applicant has submitted fake documents at the time of enrolment. Reply was submitted by the applicant on 27.12.2012. It is alleged that without holding any regular inquiry or preliminary inquiry, by the impugned order dated 15.12.2013 the applicant was dismissed from service. The statutory complaint dated 09.07.2014 submitted by the applicant seems to have not been decided by the

respondents, and the matter was kept pending, hence the applicant preferred the present O.A.

5. In the counter affidavit also attention has not been invited towards any material to indicate that the applicant's statutory complaint has been decided by the competent authority.

6. The facts on record shows that the applicant had approached the Recruitment Centre for being enrolled as soldier. While filling the required form he has given address of Delhi where he was residing at that time along with his uncle Shri Sarwan Kumar Singh. It appears that the applicant served the army with unblemished records for three years and nothing adverse has been brought on record by the respondents except the allegations that the applicant had given incorrect address at the time of enrolment. However, it is not disputed that the applicant's permanent address is village Nayapur Hansipur District-Mirjapur (UP). Ld. Counsel for the applicant submitted that since the applicant was residing at Delhi with his uncle at the time of enrolment he gave his address of Delhi.

7. It is not disputed that after receipt of the statutory complaint the respondents proceeded and on the basis of intelligence report and follow up inquiry the applicant was found to be resident of Mirjapur. Keeping in view the disparity in the address recorded at the time of entering into the army notice dated 10.11.2012 was served on the applicant.

8. A plain reading of the notice shows that the applicant was dismissed from Army in pursuance of provisions contained in Section 20 of the Army Act read with Rule 17 of the Army Rules. The notice indicates that the applicant got himself enrolled in the Army by producing fake domicile certificate, hence he was found to be undesirable for the organization resulting in his dismissal from the service.

9. Section 20 of the Army Act empowers the Chief of the Army Staff to dismiss or remove from service any person subject to the provisions contained in the Act. Attention has been invited by Ld. counsel for the applicant to Rule 17 of Army Rules which may be reproduced as under :-

> *"17.* ***Dismissal or removal by Chief of the Army Staff and by other officers****.- Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a court or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section (3) of section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from service:*
>
> *Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that*

effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government".

(Emphasis supplied)

10. A bare reading of the Rule 17 (supra) shows that where a person is dismissed from service on conduct which has led to his conviction by criminal court or court martial no person shall be dismissed or removed under sub section 1 or sub section 3 of Section 20 unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reason he may have to urge against the dismissal or removal from the service. The proviso to Rule 17 (supra) further provides if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government. The facts of the present case show that after receipt of the reply, services of the applicant were dismissed by the impugned order dated

24.12.2013. For convenience sake order dated 24.12.2013 is reproduced as under :-

"5021 ASC Bn (MT)
Pin-905021
c/o 56 APO

3384/HQ/SKS/PC/ST-12 *24 December 2013*

No 14855220F Sep/MT
Sunil Kumar Singh
PIN:905021
c/o 56 APO

FRAUDULENT ENROLMENT IN RESPECT OF NUMBER 14855220F SEPOY/MECHANICAL TRANSPORT SUNIL KUMAR SINGH :DISMISSAL ORDER

1. Ink signed copy of Dismissal Order issued by the Officiating General Officer Commanding 71 Sub Area dated 15 December 2013 is hereby handed over.

2. In compliance with orders of Officiating General Officer Commanding 71 Sub Area, your service is hereby terminated with effect from 24 December 2013 by way of dismissal in accordance with Army Act Section 20 read with Army Rule 17.

3. Please acknowledge receipt.

sd/- x x x x x
(Jagmohan Singh)
Lt Col
Officiating Commanding Officer

RECEIPT

Received Dismissal Order of the Officiating General Officer Commanding 71 Sub Area dt 15 December 2013.

sd-/x/x/x/x/x
(Number:14855220F
Rank:Sepoy/Mechanical Transport
Name: Sunil Kumar Singh
Unit:5021 Army Service Corps
(Mechanical Transport)
Dated: 24 December 2013"

11. Along with the order dated 24.12.2013, order passed by the competent authority was enclosed, a copy of which has been filed as **Annexure A-2**. The order contained brief sketch of entire controversy and shows that on inquiry the applicant has been found to be belonging to District Mirjapur (UP) and not Delhi and the domicile certificate submitted by him is not correct. The order further shows that the applicant confessional statement that he was harassed by the intelligence officer to toe his lying and under compulsion and duress he has made confessional statement. He had also brought out that all certificates submitted by him were genuine and had not obtained domicile certificates based on any fake documents. The order further notices that the applicant had submitted ration card issued in the name of his father Shri Bhola Nath Singh along with his mother Smt Shail Kumari and younger brother Sudhir Kumar Singh who were staying in house No A-9/40, Laxmi Nagar, Delhi at the relevant time and in pursuance of advertisement he appeared in the recruitment centre giving his address of Delhi. Though it was appropriate for him to give address of Mirjapur (UP) also while filling the form i.e. as his permanent address but he has not done so.

12. Coming to Rule 17 of the Rules which provides that before order of dismissal or removal is passed the individual shall be informed about the particulars of the cause of actions

against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service.

13. In Chambers 21st Century Dictionary (pp. 1005-1006) the word 'particular' has been defined which may be extracted as under :-

> "***particular 1*** *Adj specific; single; individually known or referred to* ***2*** *especial; exceptional* ***3*** *difficult to satisfy; fastidious; exacting* ***4*** *exact; detailed. Noun* ***1*** *a detail* ***2*** *personal details, eg name, date of birth, etc. particularly; especially; specifically; in detail".*

14. In advanced Law Lexicon (Vol 3, 4th Ed. p.3515) the meaning of word 'particular' has been borrowed from Webster Dictionary to mean:

> "***Particular.*** *As an adjective, sole, single, individual, specific; of or pertaining to a single person, class or thing belonging to one only; not general, not common; hence personal, peculiar, singular.*
>
> *As a noun, a detail. In the plural as a noun, details; the details of a claim, or the separate items of an account; sometimes called a bill of particulars".*

In ***J.C. Yadav vs. State of Haryana*** (AIR 1990, SC 857: (1990) 2SCC 189) Hon'ble Supreme Court has defined the word 'particular' and held that one of the meanings of the expression 'particular' means 'peculiar or pertaining to a specified person, thing, time or place and not in common or

general. The meaning of the word particular in relation to law means separate or special, limited or specific.

In view of the use of word ‘particular’ in section 17 of the Army Act, specific reason may be precisely disclosed while making a case for dismissal/discharge/removal which means for compliance of principles of natural justice required by Article 14 of the Constitution of India.

15. The material facts which form the basis for dismissal of the applicant from service have not been disclosed in the Show Cause Notice. The legislature in their wisdom have used the words ‘particulars of the cause of action’ which means all the relevant facts precisely and specifically (supra) must have been brought on record in the form of notice which was served on the applicant (supra) but notice lacks material fact which is expected from the authority while serving notice under Rule 17 of the Rules. Hence the notice seems to be an incident of vice of arbitrariness and lacks necessary ingredient required under Rule 17 of the Rules. In consequence thereof all subsequent proceedings stand vitiated. It is admitted fact that relevant materials were not brought to the notice of the applicant while serving notice.

16. Needless to say that passing order of dismissal, which deprives a person from his source of livelihood, attracts Article 21 of the Constitution of India. Unless Rules provides for,

even the army authorities have no right to proceed in a arbitrary manner without disclosing material to an individual to whom notice for dismissal/removal/discharge is issued keeping in view the letter and spirit of Rule 17 of the Army Rules (supra).

17. It may be noted that even if assuming that the respondents were having right to dismiss or remove a person from army without holding inquiry but in that event it was obligatory for the competent authority to report such incidents to the Central Government. In the present case the respondents have not set up a case that inquiry was not feasible or possible. In case respondents took decision to dismiss the applicant then such decision should have been communicated to the Central Government assigning reasons, which admittedly seems to not have been done. If the present case would be kept in the category of 'exception case', even then such exception is to be followed in letter and spirit assigning reason for adopting exceptional clause.

18. Attention has been invited to Army Order dated 28.12.1988 which deals with the procedure of discharging an army personal. Para 4 of the Army Order dated 28.12.1988 is reproduced as under :-

> *"4. 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 such a person may be terminated without giving him a*

show cause notice provided the competent authority is satisfied that it is not expedient or reasonably practicable to serve such a notice. Such cases should be rate, eg, where the interests of the security of the state so require. Where the serving of a show cause notice is dispensed with, the reasons for doing so are required to be recorded. See provision to AR 17."

At the face of record in case a person is dismissed from service, a preliminary inquiry is to be held to find out whether he should be retained in service or not keeping in view the Army Act and Regulations. In the present case admittedly no preliminary inquiry was held in terms of order dated 28.12.1988 (supra) which has been re-iterated by Army Headquarters by subsequent Army Headquarter letter dated 31.10.2011 which provides that while dismissing Army personnel from service opinion of DJAG Corps/Command should be taken, as has been held in O.A. No. 222 of 2011 ***Rajesh Kumar vs. Union of India & Ors*** decided on 01.12.2015. In the present case nothing has been brought on record to show that opinion of DJAG branch has been obtained prior to passing order of dismissal. While deciding O.A. No. 168 of 2013 ***Abhilash Singh Kushwah*** vs. ***Union of India*** we have already held Army Order dated 28.12.1988 has statutory force and procedure contained therein must be complied with. Army Order 1988 (supra) further makes it condition precedent to hold preliminary inquiry where power is exercised under Rule 17 of

the Army Rule. Accordingly while exercising powers under Rule 17 of the Army Rule, it shall be obligatory for the competent authority to hold preliminary inquiry. The aforesaid proposition of law has been upheld by Hon'ble Supreme Court in Civil Appeal D. No. 32135 of 2015 ***Veerendra Kumar Dubey Vs. Chief of Army Staff and others*** decided on 16.10.2015. There may be one exception where a person may get recruited in the Army by committing fraud and in case commission of fraud is admitted, it may not require for compliance of principles of natural justice and Army authorities may dismiss such person after receipt of reply to show cause notice by passing speaking order, but where factual matrix is disputed it shall be obligatory on the part of Army authorities to comply with the principles of natural justice in accordance with rules strictly.

19. Attention has been invited by Ld. Counsel for the applicant to Section 122 of the Army Act which deals with the period of limitation of trial which commence from the date of offence. Sub Section 4 of Section 122 of the Army Act provides no trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, <u>served continuously in an exemplary manner for not less than three years with any portion</u>

of the regular Army. For convenience sake Section 122 of the Act is reproduced as under :-

"*122. **Period of Limitation for Trial**.—(1) Except as provided by sub section (2), no trial by court – martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence,-*

(a) on the date of offence; or

(b) where the commission of the offence was known to the period aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.

(2) The provision of sub section (1) shall not apply to a trial for an offence of desertion of fraudulent enrolment or for any of the offences mentioned in section 37.

(3) In the computation of the period of time mentioned in sub –section (1), any time spent by such person as a prisoner of war, or in enemy territory or in evading arrest after the commission of the offence, shall be excluded.

(4) no trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer has subsequently to the commission of the

offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army".

(Emphasis supplied)

20. It is vehemently argued by Ld. Counsel for the respondents that provisions contained in Section 122 of the Army Act relates to counting the period of limitation for trial. No doubt had note of section 122 of the Army Act speaks of period of limitation for trial, but sub-section (4) of Section 122 (supra) provides that after three years of service a non commissioned officer like soldier in the present case shall not be tried for any fraudulent act in case he or she has served the Army with unblemished record in exemplary manner for not less than three years. It is further argued by Ld. Counsel for the respondents that sub-section relates to trial and not discharge from Army and no show cause notice is required. The arguments advanced by Ld. Counsel for the respondents seem to be misconceived. We have to see the intent of the legislature. The intent of legislature should be inferred from the language and the entire statute must be read as a whole then section by section, phrase by phrase and word by word.

21. 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."*

22. 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.

23. *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.

24. *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.*

25. *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.

26. 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.

27. 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.

28. 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.

29. 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.

30. In 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).

31. In case we see the intent of the legislature, the purpose of sub-section (4) of Section 122 of the Army Act is that Army personnel who are not officers should not be tried after three years in case they have served Army in an exemplary manner even if they have committed some fraud and the purpose of trial is to punish guilty persons.

32. Rule 17 of the Army Rules speaks for court martial which seems to not have been done in the present case. The proviso of Rule 17 mandates that all cases of dismissal or removal where the prescribed procedure has not been complied with shall be reported to the Central Government. Once a person cannot be convicted after due trial, then how he can be convicted by adopting administrative procedure has not been satisfactorily explained by the respondents. The statutory bar of trial under sub-section (4) of Section 122 of the Army Act means that a soldier may not be punished after three years of exemplary service in the Army for defect in recruitment. Latitude given by the Parliament seems to be for the soldiers keeping in view that they belong to the lower rung of the Army and in view of the latitude given by the Parliament, it is not open for the Tribunal to record a finding otherwise. It is for the respondents to approach the Legislature for amending the provision of sub-section (4) of Section 122 of the Army Act.

33. It is well settled that the Legislature is quite competent to create a legal fiction, in order words, to enable a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of non-existent facts as existing does not offend the Constitution. Although the word ‘deemed’ is usually used, a legal fiction may be enacted without using that word. (See ***CIT vs. Urmila Ramesh***, AIR

1998 SC 2640). While interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so constructing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. The principles stated above are well settled. A legal fiction may also be interpreted narrowly to make the statute workable. A legal fiction in terms enacted for purposes of this Act will cover the entire Act. (See ***State of West Bengal vs. Sadam K. Bormal,*** AIR 2004 SC 3666).

34. Under Section 43 of the Army Act, a person committing fraud is required to be tried by court-martial. For convenience sake Section 43 of the Army Act is reproduced as under:

> ***"43. Fraudulent enrolment.—****Any person subject to this Act who commits any of the following offences, that is to say,--*
>
> *(a) Without having obtained a regular discharge from the corps or department to which he belongs, or otherwise fulfilled the conditions enabling him to enroll or enter, enrolls himself in, or enters the same or any corps or department or any part of the naval*

or air forces of India, or the Territory Army; or

(b) is concerned in the enrolment in any part of the Forces or any person when he knows or has reason to believe such person to be so circumstanced that by enrolling he commits an offence against this Act,

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

(Emphasis supplied)

35. In the present case, the provisions contained sub-section (4) of Section 122 of the Army Act are contrary to the provisions of Section 43 of the Army Act which provides initiation of court-martial proceedings for the for the offences enumerated therein. It means that exception has been given by the Legislature itself with regard to fraudulent enrolment and consequently action taken thereon. We feel that the provisions of sub-section (4) of Section 122 of the Army Act is exception to Section43 of the Army Act which goes to the root of the matter in the event of commission of fraud and in case Army personnel has served for more than three years in an exemplary manner, he may not be punished with order of dismissal in the garb of statutory power. In this view of the matter, the Army authorities are not empowered to proceed with trial in view of Section 43 of the Army Act.

36. Needless to say that policy letters are subordinate legislation and policy letters being subordinate legislation, or executive instructions cannot go against the statutory mandate of the Army Act. The provisions contained in the statute, i.e. the Army Act in question, is binding on the respondents and no guideline or policy letter may be issued against statutory provision unless the Act itself permits to do so.

37. Attention of the Tribunal has not been invited to any statutory provision in the Army Act, 1950 or the Rules framed there under which may indicate that the respondents have right to issue letter in contravention of the statutory mandate contained in the Army Act. Otherwise also, as we have observed above, dismissal without holding a regular inquiry is permissible, but that should be done with due communication to the Central Government and the notice may contain brief material facts to apprise the incumbent of the charges arraigned so that he may give reply to the show cause notice which seems to not have been done.

38. During course of arguments, Ld. Counsel for the applicant has invited attention to Sections 16 and 17 of the Army Act and Para 114of the Army Regulations to submit that the applicant was attested in accordance with Rules and it is not open for the respondents to dismiss the applicant from Army. However, we

are not going into this controversy since we have concluded that the decision offends statutory provisions.

39. In view of our observations made above, we are of the view that the impugned order dismissing the applicant from service is bad in the eyes of law.

40. The O.A. deserves to be allowed; hence allowed. Impugned order of dismissal dated 15.12.2013 is set aside with all consequential benefits. However, we confine payment of back wages to 25 % admissible under the Rules. Let consequential benefits be provided to the applicant expeditiously, say, within four months from the date of production of a certified copy of this order. OIC Legal Cell shall communicate this order to the appropriate authority forthwith apart from communication of the order by the applicant.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

anb

Ld. Counsel for the respondents made an oral prayer for leave to appeal. We do not find any question of public importance involved in the present case which may require to grant leave to appeal for Hon'ble Supreme Court.

Prayer for leave to appeal is rejected.

(Air Marshal Anil Chopra)
Member (A)

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