RESERVED **"AFR"**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 2

T.A. No. 131 of 2009

Friday, this the 22nd day of April, 2016

"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

Rect. Rakesh Kumar (No. 14415375 A) aged about 21 years S/o Ram Anuj Tiwari R/o Vill & PO Alipur Serawan, The. Kadipur Distt. Sultanpur

…. **Petitioner**

Versus

1. UOI through its Secretary Ministry of Defence, DHQ PO New Delhi
2. Chief of the Army Staff Army Headquarters, DHQ PO New Delhi
3. Commandant & OIC Records Artillery Centre PO Nasik Road Camp 422102.
4. Major B.S. Riar Officer Commanding 3/1 Training Regiment PO Nasik Road Camp 422102

….**Respondents**

Ld. Counsel appeared for the Petitioner **- Shri R.D. Singh Advocate**

Ld. Counsel appeared for the Respondents **- Mrs Anju Singh Central Govt. Standing Counsel**

Order

(Per Justice Devi Prasad Singh, Judicial Member)

1. Petitioner in the instant case was enrolled in the Indian Army on 23rd June 1995 but subsequently, his services were terminated vide order dated 05.01.1995 and being aggrieved by the impugned order of termination, he preferred a Writ Petition being Writ Petition No. 1827(SS)/1997, which was subsequently transferred to the present Tribunal in pursuance of the provisions contained in Section 34 of Armed Forces Tribunal Act, 2007 and was renumbered as T.A. No 131 of 2009.

2. We have heard Shri R.D.Singh, learned counsel for the Petitioner and Mrs. Anju Singh, learned counsel for the respondents assisted by Lt Col Subodh Verma, OIC Legal Cell.

3. Admittedly, the Petitioner was recruited to BRO Amethi in accordance with Rules on being found fit in all respects and was duly enrolled on 23rd June 1995. Thereafter, the petitioner reported to 7 RRC Battery where he was subjected to detailed examination with regard to the conditions of recruitment and then, dispatched to 3/1 Training Regiment for Basic Military Training at Nasik, where he completed the training successfully followed by grant of a month's leave.

4. According to the learned counsel, the petitioner was called on 30th Jan 1996 by the Officer Commanding and was handed over the order of termination dated 5th Jan 1995, the substance of which was that his services have been terminated with effect from Ist Jan 1996. The impugned order dated 5th January 1995 has been annexed as

Annexure 1 to the T.A and it being relevant, is reproduced below in totality.

> "3/1 Training Regiment
> Artillery Centre
> PO: Nasik Road Camp-422102
>
> 323801/01/A 3 Bty 05 Jan 95.
> DiSCH FROM SERVICE: RECT
>
> 1. It is to inform you that your service has been terminated with effect from 01 Jan 96 (FN) as being discharged in consequence of "UNLIKELY AN EFFICIENT SOLDER"
> 2. Your discharge certificate and credit balance if any will be forwarded to you by Artillery Records (Topkhana Abhilekh), Nasik Road Camp at your home address. Further correspondence may be made with the officer of the Artillery Records.
> 3. Railway warrant No 77PA-089149 dated 05 Jan 96 for single side from Nasik Road to Sultanpur issued.
>
> (BS Riar)
> Major
> Battery Commander"

5. Since the order aforesaid enumerates allegedly incorrect date, it may be because of the clerical error but since it has been given retrospective effect, it could not have been done as it would be one militating against the provisions contained in Rule 18 (3) of Army Rule 1954. Rule 18 (3) of the Army Rules, 1954 postulates that dismissal or removal of an officer shall take effect from the date specified in that behalf in the notification of such order in the official gazette. However, in the present case, the petitioner being a soldier and not an officer of the Rule 18 (3) of the Army Rules, 1954 would not come into play. The petitioner has been discharged by the Commanding officer and hence, provisions contained in Rule 17 of the Army Rules seems to be attracted for application subject to the condition that the petitioner is a registered soldier. Hence the petitioner does not seem to be entitled to benefits flowing from Rule 17 or 18 of the Army Rules, 1954 as aforesaid. In Para 4 of the counter affidavit, it has been averred that

the Petitioner was discharged, since he was short of height to the minimum requirement. The Petitioner's height was 162.08 cm while the requirement is 167 cm. Hence it is alleged that he was not qualified to be enrolled in the Army. It is averred that the Petitioner admitted in no Delphic terms that his height was 162.08 cm and not 167 cm as recorded. The letter dated 11th July 1995 filed by the Petitioner is annexed to the counter affidavit as Annexure A-1. In pursuance of the directions issued by the Army Headquarters dated 30th August 1995 to Headquarter Recruitment Zone Lucknow, an investigation was done and Court of Inquiry was ordered by the Headquarter Recruitment Zone Lucknow vide letter dated 4th August 1995. In Para 7 of the counter affidavit, it is admitted that the Petitioner was allowed to undergo Basic Military Training before actual absorption in the strength of the Army. By letter dated 22.11.1995, Army Headquarter informed the Petitioner that he was no longer required by the Headquarter Recruitment Zone Lucknow and can be discharged. The required papers were prepared on 26.12.1995 citing irregular enrollment in terms of Rule 13 of the Army Rules and consequential discharge order was passed on 26th Dec 1995, a copy of which has been annexed as Annexure A-2 to the counter affidavit.

6. Formal interview of the Petitioner took place on 30th Dec 1995 and the petitioner was informed that discharge would take effect from Ist Jan 1996 and a copy of the order dated 26th Dec 1995 was also provided to the Petitioner. It has been averred in the counter affidavit that the impugned order of discharge suffered from the error committed by the subordinate staff and on discovery of the typographical error , corrigendum dated 22.04.1996 was issued by the Officiating Battalion Commander at Nasik Road. A copy of the letter

dated 22.04.1996 has been annexed as Annexure A 3 to the counter affidavit.

7. It has been contended by the learned counsel for the respondents that since admittedly, the petitioner was short in height by 3.2 cm, there was no plausible reason to retain him in Army service. It is also submitted by the learned counsel that in any way, the irregularity committed during the course of recruitment with regard to height cannot be regulated at a later stage.

8. On the other hand, learned counsel for the Petitioner submits that no Court of Inquiry was held and the impugned order has been passed without following due process of law and hence, the order of termination/discharge is vitiated. With regard to Court of Inquiry, an affidavit dated 19.07.2011 has been filed averring therein that records of Court of Inquiry have been weeded out. Para 3 of the affidavit containing averments with regard to weeding out of records of Court of Inquiry is reproduced below for ready reference.

> *"3. That the Court of Inquiry in respect of the applicant has already been destroyed by a Board of Officers assembled in accordance with Instructions given in the Regulations for the Army, Revised Edition 1987, Volume II, Para 592. The copy of Extract of Destruction Board Proceedings showing above fact is being annexed herewith as Annexure No 1 to the short counter reply."*

9. Be that as it may, however, the fact remains that when the records were alleged to be weeded out on 6th March 2007, the matter was sub-judice in the writ petition No 1827/SS/1996 which was then pending in the High Court. By then counter affidavit was also filed by the respondents dated 23rd May 1996. When the matter was already pending in the High Court, then how and under what circumstances,

the respondents could have weeded out the records of Court of Inquiry, is not comprehensible. In identical situation in T.A. No 39 of 2012 decided on 2nd March 2016, we have taken into reckoning the relevant Rules, Regulations and Instructions of the Army whereby, it has been provided that during pendency of judicial proceedings, the records could not be weeded out, regard being had to Regulations 592 of the Army Regulations. It has been further held that an adverse inference may be drawn in case records are weeded out. While considering the drawing of adverse inference in the case of **Selina John Vs Union of India**, delivered by this Bench we have observed as under vide paragraphs 34,35,36,37,38,39,40 and 41.

> "34. Section 114 of the Evidence Act deals with the presumption of incident of certain facts and Illustration (g) seems to be applicable in the present case. For convenience sake Section 114 of the Evidence Act with Illustration (g) is reproduced as under :-
>
> " *114.* ***Court may presume existence of certain facts.—****The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.*
>
> *(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who holds it.*
>
> 35. Hon'ble Supreme Court in the case reported in ***State, Inspector of Police vs. Surya Sankaram Karri*****,** 2006 AIR SCW 4576 held that a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the Court of Law, fails and/or neglect to produce the same, an adverse inference may be drawn against him. The law gives exclusive discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-à-vis the facts of the particular case. The discretion conferred by Section 114 of the Evidence Act is an inference of a certain fact drawn from other proved facts. The Court applies the

process of intelligent reasoning which the mind of a prudent man would do under similar circumstances unless rebutted.

36. Hon'ble Supreme Court in the case reported in ***Ram Das vs. State of Maharashtra*** AIR 1977 SC 164 reiterated the well settled proposition of law that in the event of non-production of document, adverse inference may be drawn against the failing party. Similar view has been expressed by Orissa and Patna High Courts in the cases reported in ***Ridhi Karan Ramadhin vs. French Motor Car Co. Ltd.***, AIR 1955 Orissa 60 and ***Devij Shivji vs. Mohanlal Thacker***, AIR 1960 Patna 223 as well as Calcutta High Court in the case reported in ***Burn and Co. vs. State,*** AIR 1976 Cal 389. The Orissa, Patna and Calcutta High Courts constantly held that non production of best illus or withholding of material documents may make out a case to draw adverse inference.

37. What prompted the respondents, or the authorities concerned, to weed out the record may be inferred from the material on record, i.e. to save their neck, since the order of release from Army seems to be per se bad and not sustainable and power has been exercised without jurisdiction. Burden was on the respondents to establish genuineness of weeding out the record during pendency of the Writ Petition which they have failed to do (Vide AIR 2006 SCW 6155 ***B. Venkatamuni vs. C.J., Ayodhya Ram Singh)***

38. Presumption of bona fide by the respondents seems to be frustrated because of weeding out of record during pendency of the Writ Petition in the High Court; that too after filing counter affidavit. Allahabad High Court in the case reported in 1991 All. LJ 930, ***Harish Chand vs. State of U.P.***, has held that non-production of documentary evidence in case it could be and was bound to be available, would give rise to adverse presumption that if it was produced, it would have been derogatory for the case of the prosecution.

39. From the material brought on record and Service Conditions (supra) the tenure of appointment of the petitioner seems to be 55 years; it means petitioner was to superannuate at the age of 55 years, unless removed, dismissed or terminated earlier in accordance with rules.

40. In the present case, Service Conditions, statutory provision manner and method of release from MNS Services of the petitioner point out towards one and only one thing - that hasty and arbitrary decision was taken ignoring the statutory mandate and procedural

> safeguard, hence presumption may be drawn that procedure prescribed by law was not followed and action of the respondents suffers from high handedness and arbitrary exercise of power.
>
> 41. In view of above, the presumption may be derived and inference may be drawn that alleged weeding out of the record by the respondents or the authorities of the Army was for extraneous reasons; hence an adverse presumption may be drawn against them to the effect that petitioner was released arbitrarily without following the procedure prescribed by law.

10. In the light of the position of law as enunciated above, the arguments advanced by the learned counsel for the Petitioner seem to be correct that no Court of Inquiry was held. The petitioner seems to have been discharged after completion of training. It may be worthy of mention here that once a procedure with regard to Court of Inquiry was required to be followed or a defence has been set up that Court of Inquiry was held, burden shall lie on respondents to establish that Court of Inquiry was held in accordance with law. We have searched the impugned order and also the modified order for any reference to holding of Court of Inquiry but there is nothing to indicate either in the impugned order or in the subsequent modified order that Court of inquiry was held. In case no Court of Inquiry has been held, then there appears to be no cogent reason for the respondents to set up a case that action was taken against the petitioner after holding of Court of Inquiry. In Para 6 of the counter affidavit, it has been averred that Court of Inquiry was ordered by the Headquarter Recruitment Zone Lucknow vide letter dated 04.08.1995, but inspite of repeated orders passed by the Tribunal, neither records were produced nor the finding of Court of Inquiry was annexed with the counter affidavit.

11. In view of the above, an adverse inference may be drawn that no Court of Inquiry was held. In such situation, it may be presumed that the respondents have not come up before the Tribunal with clean

hands. They have not placed entire correct facts before the Tribunal. It is highly unfortunate on their part.

12. Army Rule 177 deals with Court of Inquiry and is meant to collect evidence and report the matter to the superior Authorities. Army Rule 179 contains detailed procedure with regard to Court of Inquiry. Army Rule 180 postulates that in case the evidence of facts affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry. Sections 177, 179 and 180 being germane to the controversy involved in this case are reproduced below for ready reference.

> *"177. Courts of Inquiry.- (1) A court of inquiry is an assembly of officers or of junior commissioned offices or of officers and junior commissioned officers, warrant officers or non commissioned officers, directed to collect evidence and if so required to report with regard to any matter which may be referred to them.*
>
> *X x x x x x x x x x*
>
> *179. Procedure. – (1) The court shall be guided by the written instructions of the authority who assembled the court. The instructions shall be full and specific and shall state the general character of the information required. They shall also state whether a report is required or not.*
>
> *(2) The officer who assembled the court shall, when the court is held on a returned prisoner of war or on a prisoner of war who is still absent, direct the court to record its opinion whether the person concerned was taken prisoner through his own willful neglect of duty, or whether he served with or under, or aided the enemy; he shall also direct the court to record its opinion in the case of a returned prisoner of war, whether he returned as soon as possible to the service and in the case of a prisoner of war still absent whether he failed to return to the service*

when it was possible for him to do so. The officer who assembled the court shall also record his own opinion on these points.

(3) Previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of the court, to all persons concerned in the inquiry except a prisoner of war who is still absent.

(4) The court may put such questions to a witness as it thinks desirable for testing the truth or accuracy of any evidence he has given and otherwise for eliciting the truth.

(5) The court may be re-assembled as often as the officer who assembled the court may direct, for the purpose of examining additional witnesses, or further examining any witness, or recording further information.

(5A) Any witness may be summoned to attend by order under the hand of the officer assembling the court. The summons shall be in the form provided in Appendix III.)

(6) The whole of the proceedings of a court of inquiry shall be forwarded by the presiding officer to the officer who assembled the court.

180. ***Procedure when character of a person subject to the Act is involved. -*** *Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of any fully understands his rights, under this rule."*

13. In the present case, nothing has been brought on record to establish that firstly the Court of Inquiry was held and secondly, the procedures were followed. Keeping in view the facts that respondents have failed to establish that Court of Inquiry was held, rather contents of affidavits filed seem to be false, all subsequent actions including order of discharge stand vitiated. Para 6 of the counter affidavit being relevant is reproduced below.

> *"6. That the matter was immediately reported to the Addl. Director General of Rtg./Rtg.5 (OR) vide letter dated 27.7.1995. The Army Head Quarters immediately issued directions vide letter dated 30.8.1995 to the Head Quarters Recruiting Zone Lucknow to investigate the matter and intimate the circumstances of the Enrolment Officer. In the matter, a court of Enquiry was ordered by the Head Quarters Recruitment Zone, Lucknow, vide letter dated 4.8.1995."*

14. For reasons discussed hereinabove, it appears that hasty decision was taken by the respondents to discharge the petitioner from service without following due process of law. It is well settled that the things should be done in the manner provided in the Act or statute and not otherwise (See- vide ***Nazir Ahmed vs. King Emperor,*** AIR 1936 PC 253; ***Deep Chand vs. State of Rajasthan,*** AIR 1961 SC 1527**,** ***Patna Improvement Trust vs. Smt. Lakshmi Devi and ors,*** AIR 1963 SC 1077; ***State of U.P. vs. Singhara Singh and others,*** AIR 1964 SC 358; ***Barium Chemicals Ltd vs. Company Law Board,*** AIR 1967 SC 295; ***Chandra Kishore Jha vs. Mahavir Prasad and others,*** 1999 (8) SCC 266; ***Delhi Administration vs.Gurdip Singh Uban and others,*** 2000 (7) SCC 296; ***Dhananjay Reddy vs. State of Karnataka,*** AIR 2001 SC 1512; ***Commissioner of Income Tax,***

Mumbai vs. Anjum M.H. Ghaswala and others, 2002 (1) SCC 633; ***Prabha Shankar Dubey vs. State of M.P.,*** AIR 2004 SC 486 and ***Ramphal Kundu vs. Kamal Sharma,*** AIR 2004 SC 1657).

15. Apart from the above, since the respondents have banked upon the opinion of Court of Inquiry while discharging the petitioner from service, the burden lay on them to prove that Court of Inquiry was held in accordance with Rules. Since neither the finding of Court of Inquiry was filed nor records were produced, hence there is no alternative but to draw an adverse inference that a false affidavit has been filed by the respondents to prop up their failing case/cause. In the circumstances, the action of the respondents seems to be an instance verging on malice in law. In connection with it, we feel called to refer to Para 68 of the decision rendered in the case of **Selina John vs. Union of India** (supra).

> *68. In **Ravi Yashwant Bhoir vs. District Collector, Raigad**, AIR 2012 SC 1339; 2012 AIR SCW 1877: (2012) 4 SCC 407, the Supreme Court held that the State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (see: **A.D.M., Jabalpur v. Shivakant Shukla**, AIR 1976 SC 1207: (1976) 2*

SCC 521: 1976 Cr LJ 945; ***Union of India thr. Govt of Pondicherry vs. V. Ramakrishnan****, (2005) 8 SCC 394: AIR 2005 SC 4295: 2005 AIR SCW 5147; and* ***Kalabharati Advertising vs. Hemant Vimalnath Narichania****, AIR 2010 SC 3745: (2010) 9 SCC 437: (2010) 9 SCALE 60)"*

16. Since Court of Inquiry requires full participation of the petitioner in compliance of principles of natural justice, it may be inferred that no opportunity was afforded to the petitioner and they have not acted fairly. Para 61 of the decision rendered in **Selina John Vs Union of India** (supra) being relevant is reproduced below.

"61. In ***Sayeedur Rehman vs. State of Bihar***, AIR 1973 SC 239: 1973 Lab IC 197: (1973) 3 SCC 333, the Supreme Court while considering the challenge to the decision of the Board of Secondary Education, which had reviewed it earlier order granting salary and allowances to the Appellant, reversed the order passed by the Patna High Court and held :

"This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestant. This right has its root in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties. The omission of express requirement of fair hearing in the rules or other source of power claimed for considering an order is supplied by the rule of justice which is considered as and integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties."

17. Apart from the above, the impugned order does not contain reasons for termination of service. Firstly the order recites the expression **"Unlikely an efficient solider"** and later-on changed the refrain as "irregular recruitment". In the case of **State of Punjab vs Bondep Singh & Ors reported in (2016) I SCC 724**, their Lordships of Hon'ble Supreme Court held that reasons must be

recorded while passing an order. The decision must be composite and self sustaining one containing all reasons which prevailed on the official to arrive at his conclusion. The order of statutory authority cannot be construed in the light of explanation subsequently given by the officer. It must be construed objectively with reference to language used in the order. The Government of India, in the present case the Army, does not have any carte blanche on the army to take any decision it chooses. It cannot take capricious, arbitrary and prejudiced decision. The decision must be informed and impregnated with reasons. In the case of **Dalip Singh vs State of U.P. and others, reported in (2010) 2 SCC 114,** Hon'ble Supreme Court had considered as to whether relief may be given in the event when a person files false affidavit or conceals the fact. It has been held that if a person has not come forward with clean hands, and has not candidly disclosed all the facts that he is aware of or he intends to delay the proceedings, then the Court will non-suit him on the ground of contumacious conduct.

18. In the case **of Basdeo Tiwary Vs Sido Kanhu University** reported in **AIR 1998 SC 3261,** Hon'ble Apex Court held that appointment may be terminated in case, it is done in violation of Rules and Regulations but for that necessary enquiry followed by notice should be conducted. In the absence of enquiry, the order shall be set aside. Paras 12 and 13 of the above decision being relevant are quoted below.

> *"13. Admittedly in this case notice has not been given to the appellant before holding that his appointment is irregular or unauthorized and ordering termination of his service. Hence the impugned order terminating the services of the appellant cannot be sustained.*

14. The appellant has since demised during the pendency of these proceedings, no further direction either as to further inquiry or reinstatement can be given. We declare that the termination of the appellant by the respondent as per the notification referred to by us is invalid. Consequently, it would be deemed that the appellant had died in harness. Needless to say that the appellant would become entitled to the payment of arrears of salary from the date of termination of his services upto the date of his death on the basis of last pay drawn by him. Let Respondent take action within a period of three months from today to work out the arrears due to the appellant from the date of his termination till his death, and pay the same to his legal representatives."

19. Be that as it may, since the respondents have not come forward with clean hands while filing affidavit, the impugned order does not contain reasons or precise grounds of cancelling the Petitioner's recruitment or termination passed on some irregularity, the order seems to have retrospective tenor, the T.A aforesaid deserves to be allowed and the impugned order deserves to be set aside with all consequent benefits.

20. Learned counsel for the Petitioner pressed into service the Sections 13,14, and 15 of the Army Act 1950 which relate to procedure with regard to enrollment, mode of enrollment and validity of enrollment and fervently argued with regard to above sections. However, we do not propose to record any finding at this stage in the instant case with regard to status of the statutory provisions and leave it open to be discussed in any other future case.

21. As a result of foregoing discussion, the T.A is allowed and the impugned order bearing date 5th Jan 1995 (Annexure No 1 to the TA.) is set aside with all consequential benefits. The Petitioner shall be deemed to continue in service for all service benefits but would not be

entitled to back-wages or arrears of salary. In case the rank and service of the petitioner is left over, he would be restored to service forthwith or else he would be paid pensionary and other consequential service benefits in accordance with rules treating him to be service.

22. Let all consequential benefits be provided to the Petitioner expeditiously, say, within four months from the date of receipt of a certified copy of this order.

23. There shall be no order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dt April 22 ,2016

MH/-