AFR
RESERVED
Court No.1
(List 'A')

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION NO 103 of 2012

Thursday, this the 9th day of March 2017

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

Sita Ram S/O Hira Lal, Recruit No 18007508F R/O Village: Audaha, Police Station: Audaha, District : Chitrakoot (U.P.).

….Petitioner

Ld. Counsel for the: **Shri R. Chandra,** Advocate
Petitioner

Verses

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

2. Commanding Officer No. 2, Training Battalion Bengal Engineering Group and Centre Roorkee, State of Uttaranchal.

3. The Chief of Army Staff, Army Headquarters, DHQ Post Office, New Delhi.

4. The Director General of Military Training, General Staff Branch, Army Headquarters, DHQ, Post Office, New Delhi.

5. Officer-in-Charge Records, Bengal Engineer Group, Roorkee-247667.

…Respondents

Ld. Counsel for the : **Dr. Shailendra Sharma Atal,** Central
Respondents. Govt Counsel assisted by
Maj Soma John, OIC, Legal Cell**.**

ORDER

"Per Hon'ble Mr. Justice Devi Prasad Singh, Member 'J'"

1. Being discharged during course of training, the petitioner preferred Writ Petition bearing No 1261 of 2012 (SS) in Uttarakhand High Court at Nainital which has been transferred to this Tribunal in pursuance to powers conferred under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 103 of 2012.

2. We have heard Shri R. Chandra, Ld. Counsel for the petitioner and Shri Shyam Singh, Ld. Counsel for the respondents assisted by OIC Legal Cell and perused the records.

3. The petitioner was recruited in the Indian Army on 05.04. 2011 in BEG Group and Centre, Roorkee and sent for recruitment training. On 19.08.2011 during course of training he was admitted in hospital at Roorkee suffering from PLEURAL EFFUSION (LT). He was placed in medical category S1H1A1P2(T-24)E1 till 25.04.2012. Later he was upgraded to S1H1A1P1E1 on 09.05.2012 and was discharged on 09.05.2012 having absented from training for 265 days. According to Ld. Counsel for the petitioner, the petitioner was absent from training for about 265 days on medical ground. Order of discharge was passed in pursuance to para 6 of Army Headquarters

letter dated 28.02.1986. Order of discharge was passed on 07.06.2012 in spite of the fact that the petitioner was under SHAPE-I category.

4. Submission of Ld. Counsel for the petitioner is that since the petitioner was in medical category SHAPE-I at the time of discharge from service during course of training, the respondents could not have discharged him. On the other hand Ld. Counsel for the respondents submits that order of discharge was not passed on medical ground but on account of absence for 265 days during training period. It is submitted that if a recruit is discharged for being absent from training for more than 180 days purely on medical grounds, the period of absence may be extended to 210 days provided the recruit forgoes his annual leave of 30 days which he is entitled during recruit training. This period of annual leave will be utilized for carrying out important aspects of training missed during his absence on medical grounds. Since the petitioner's case is within the policy, he has rightly been discharged.

5. Apart from challenging the impugned order of discharge, the petitioner has also challenged the policy dated 28.02.1986 issued by the respondents which provides that an incumbent recruit can be discharged during course of training in case he/she is absent for 180

days and may be extended by 30 days covering total period of 210 days.

6. Policy dated 28.02.1986 filed as ***Annexure A-5*** in its totality is reproduced as follows :-

"Tele : 3018625 Directorate General Military Training
General Staff Branch
Army Headquarters
DHQ, PO : New Delhi-110011

A/20314/MT-3 28 Feb 86

The Commandant
(All Training Centres)

<u>POLICY : RELEGATION OF RECRUITS</u>

1. Reference the following :-

2. (a) Army HQ letter No 46509/Gen/MT 3 dated 21 Jan 71.

(b) Army HQ letter No 46509/Gen/MT 3 dated 07 Dec 71.

(c) Army HQ letter No 46509/Gen/MT 3 dated 07 Sep 72.

(d) Army HQ letter No 07324/OMS-5(II) dated 24 Sep 73.

(e) Army HQ letter No. 46509/Gen/MT 3 dated 03 Apr 82.

3. Policy letters on relegation of recruits were issued by this Headquarters from time to time. Some doubts have arisen on the existing instructions since these were issued separately over a considerable period of time. Therefore,

consolidated instructions on the relegation of recruits for various reasons are outlined in the succeeding paras.

***Relegation for Failure in Recruit's Test**.*

3. Recruits in all groups of the Army who are unable to pass the recruits test within the specified training period but are fit in all other respects for retention in the Army, will be relegated at the discretion of the Commandant of the Trg Centre, as under :-

(a) For a maximum period of six weeks during basic military training.

(b) For maximum period of three months during technical training.

Relegation for Absence without leave

4. A recruit who has been absent without leave for a period of 30 consecutive days during basic military training period, will be allowed to rejoin his training again. Such rects will be discharged after necessary disciplinary action. The absence for less than 30 consecutive days may be considered for relegation, if otherwise found suitable for retention. However, once the technical training of a recruit has commenced, the discretion to discharge a recruit for such absence will be left to the Commandant of the Centre, who may retain or discharge him considering the case in its merits.

Relegation on Medical Grounds

5. The maximum period for which a recruit can be relegated on medical grounds will be six months. A recruit falling ill due to sickness or injury during training whether attributable to or aggravated by service, on discharge from hospital maybe placed in a temporary medical category for not more than three months provided there is a reasonable purpose in the opinion of medical specialist that the individual is likely to be fit for training and the total absence from training including hospitalization period is not likely to be more than six months. If on the other hand he is unlikely to be fit for training within six months of first absence from duty due to illness, the individual will not be

discharged from hospital in temporary medical category but will be invalidated out of service.

6. However, if a recruit is being discharged for being absent from training for more than 180 days purely on medical grounds, the period of absence may be extended to 210 days provided the recruit forgoes his annual leave of 30 days which he is entitled during recruit training. This period of annual leave will be utilized for carrying out important aspects of training missed during his absence on medical grounds.

7. These instructions will be incorporated in the GS publication on Basic Military Training for Recruits which is under revision at this Headquarters"

7. A close reading of para 4 of the policy shows that a recruit who has been absent for 30 consecutive days, shall be allowed to rejoin training again but may be discharged subject to disciplinary action. In cases where the absence is for less than 30 consecutive days it may be considered for relegation if otherwise found suitable for retention. In the case of absence during course of training, the decision for discharge has been left to the Commandant of the Centre after considering the merits of the case. The maximum period for which a recruit can be relegated on medical ground shall be six months (180 days) where illness is due to disease or injury during training attributable to or aggravated by military service. On discharge from hospital the recruit shall be placed in temporary medical category for not more than three months but it is subject to total absence during training including hospitalization period, not

likely to more than six months, and in case a person is unlikely to be fit within six months due to illness, he will be discharged from hospital in temporary medical category, but will be invalidated out of service. However if a recruit is discharged being absent from training for more than 180 days or 210 days the period of annual leave will be utilized for carrying out all important aspects of training during absence.

8. A plain reading of the aforesaid provision shows that a recruit may be discharged in case he is absent for 180 days except for illness but in case the illness is attributable to or aggravated by military service, such person may be placed in temporary medical category for not more than three months subject to condition that the total period of hospitalization is not likely to be more than six months (180 days), otherwise he shall be invalidated out.

9. From the material on record it appears that the petitioner did not recover from illness within six months and continued with the illness beyond 210 days. Accordingly, even if the petitioner was in SHAPE-I category after 210 days or after 265 days, as happened in the present case, in accordance with the policy (supra), the petitioner shall not be entitled to continue with the training in terms of policy (supra). The policy regulates not only the petitioner but other recruits also who could not complete the training within specified

period. There appears to be no doubt that it is for the Directorate of Training to formulate the policy to regulate the training of the recruits. They are experts of the field to deal with such training and ordinarily it may not be subject to judicial review. The respondents has relied upon Hon'ble Supreme Court judgment in Civil Appeal No 5015 of 2008; ***Union of India & Ors vs. Manoj Deshwal & Ors*** decided on 28 Oct 2015 observing that a recruit unless attested shall not deem to be a member of Indian Army where his service condition may be dealt with in accordance to Army Act and Army Rules framed thereunder. Supreme Court also declined to interfere with the findings. For convenience sake para 15 and 16 of the case of ***Manoj Deshwal*** *(supra) is reproduced as under:-*

> "*15. It is an admitted fact that respondent No.1 had not been attested. Certain formalities are required to be done for being attested as per the provisions of Section 17 of the Act and admittedly the said formalities had not been done. The status of respondent No. 1 was just like a probationer, whose service could be terminated without holding any enquiry. In spite of the fact that service of respondent No. 1 could have been terminated without holding any enquiry, an enquiry had been held on 29th July, 2005 and it was found that respondent No. 1 had remained absent for 108 days without any sanctioned leave. The said act is an act of gross indiscipline. Absence of Respondent No. 1, being a finding of fact, we would not like to interfere with the same especially when after holding the said enquiry respondent No. 1 had also been declared deserter.*

> *16. A person who remained absent unauthorisdly and who was declared deserter can never turn out to be a good soldier and as per the provisions of Rule 13 (3) of the Rules, it is very clear that the Commanding Officer can discharge non attested person enrolled under the Act. The Commanding Officer, as per the provisions of Rule 13 (3) of the Rules, had satisfied himself about the fact that respondent No. 1 had remained absent without sanctioned leave and had been declared deserter and therefore, he was unlikely to become an efficient soldier. In the circumstances, we do not find any fault with his decision about discharging respondent No. 1 from service."*

10. In identical case decided on 03 Aug 2016 by this Bench in T.A. No 32 of 2011 ***Muneesh Kumar vs Union of India & Ors*** where a recruit was discharged in pursuance of Army Headquarters policy (supra) holding that a person who is so week and cannot face the hazards of training and became ill for more than 210 days, it was held that he is not fit to be retained in Army service and he has been rightly discharged by the competent authority.

11. In the present case absence for 265 days has not been disputed. The fact has been admitted that discharge of the petitioner in pursuance to policy (supra) from the Indian Army does not seem to suffer from any vice of arbitrariness. So far as submission of Ld. Counsel for the petitioner that while discharging the petitioner, no reference has been made to any medical ailment which seems to be misconceived for the reason that in the present case discharge is not

on medical ground but because of the fact that the petitioner has exceeded absence of the maximum limit of 210 days during course of training and once the fact has been admitted, there is no reason to hold that discharge suffers from vice of arbitrariness.

12. Coming to second limb of argument that the petitioner's fundamental rights have been violated being hit by Article 14 seems to be attracted for the reason that it is not a case where factual position has been disputed. Once the fact has been admitted under Section 158 of the Evidence Act, it does not require any further evidence or material or proof. For convenience sake Section 158 of the Evidence Act is reproduced as under:-

> "***158. What matters may be proved in connection with proved statement relevant under section 32 or 33.-*** *Whenever any statement, relevant under section 32 or 33 is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination of the truth the matter suggested".*

13. In view of the above no further evidence is required for the petitioner's discharge that too under the teeth of the fact that he absented during course of recruit training, and he was not attested, as such he cannot be said to be a person subject to the Army Act

and the Rules framed thereunder. No fundamental right seem to have been violated keeping in view the fact that petitioner's absence of 265 days has not been disputed. It shall be a futile exercise of power to hold an inquiry. A court of inquiry could have been held only in case the petitioner would have been a person duly attested in accordance with Rules (supra).

14. Ld. Counsel for the petitioner has relied upon a case reported in JT 2000 (9) SC 502, ***Mansoor Ali Khan etc. vs Aligarh University Non-teaching Employees***. The case of Mansoor Ali Khan (supra) relates to permanent employee where it has been held by the Hon'ble Supreme Court that the principle of natural justice should have been complied with before recording finding with regard to deemed vacation of office. However, in the same case their Lordships have held that absence of motive in first case makes no difference as no prejudice was caused. Relevant portion from the judgment relied upon by Ld. Counsel for the petitioner whereby useless formality has been dealt with by their Lordship Sabyasanchi Mukherji, J, in the case reported in 1984 (1) SCC 43 ***K.L. Tripathi vs. State Bank of India*** is reproduced as under:-

> *"It is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as their scope and extent….There must have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of*

> *natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth."*

15. The Courts have consistently applied the principle of prejudice in several cases. The above ruling and various other rulings laying down the same view have been exhaustively referred to in ***State Bank of India vs. S.K. Sharma***, JT 1996 (3) SC 722. The principle of prejudice has been further elaborated. The same principle has been reiterated again in ***Rajendra Singh vs. State of M.P.***, JT 1996 (7) SC 216.

16. The useless formality theory, it must be noted, is an exception. Apart from the class of cases of 'admitted or indisputable facts leading only to one conclusion' referred to above,- there has been considerable debate of the application of that the3ory in other cases. The divergent views expressed in regard to this theory have been elaborately considered in ***M.C. Mehta vs. Union of India,*** JT 1999 (5) SC 114. The court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton L. etc, in various cases and also views expressed by leading write4rs like Profs. Garner, Craig, De. Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for

otherwise, the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case, to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

17. In yet another case relied upon by Ld. Counsel for the petitioner in SLP (C) No. 1079 decided on 06.02.1998, ***Uptron India Ltd. Vs Shammi Bhan and Anr***, which related to cases with regard to policy and guidelines governing seniority of tenure, their Lordships have held that service of confirmed regular employee of an establishment cannot be terminated by giving simple notice. The case of ***Upton India Ltd*** (supra) at the face of record does not seem to be applicable under the facts and circumstances of the present case where the controversy relates to a recruit of the Indian Army who has still not been attested in accordance with statutory provisions (Army Act and Army Rules) and may be terminated without serving a show cause notice in view of law settled by Hon'ble the Supreme Court. Ld. Counsel for the petitioner has relied upon a case reported in (1983) 3 SCC 401, ***R Viswan & Ors vs. Union of India & Ors***. The case of ***R Viswan*** (supra) relates to a dispute where the provisions stipulated in Army Rule 19 to 21 were challenged. Their Lordships of the Hon'ble Supreme Court held that

the provision is attracted to Article 33 of the Constitution where right conferred under Section 21 make rules restricting rights under Article 19 (1) (a), (b) and (c) to such extent and in such manner as may be necessary, therefore it is not open to challenge on ground of being broad, uncanalised and unrestricted. The controversy relates to Border Road Task Force. While considering the fact as to what involved 'training' under GREF, Hon'ble the Supreme Court held as under:-

> "*The training includes not only drill, marching and saluting but also combat training including physical training such as standing Exercises, beam exercises. rope work, route marches etc. and combat engineering training including field engineering, handling of service explosives, camouflage, combat equipment, bridging, field fortifications, wire obstacles etc. Moreover, the directly recruited personnel are taken up only after they voluntarily accept the terms and conditions of employment which include inter alia conditions 5 (1v), (v). 5 (vi) and 5 (xi) which have been reproduced in full while narrating the facts. These conditions make it clear the directly recruited personnel may be required to serve anywhere in India and outside India and when directed, they would have to proceed on field service and if required, they would also be liable to serve in any Defence Service or post connected with the defence of India. It is also stipulated in these conditions that on their appointment, the directly recruited personnel would have to wear the prescribed uniform while on duty and that they would be subject to the provisions of the Army Act, 1950 and the Army Rules, 1954 as laid down in SROs 329 and 330 for purposes of discipline. It is abundantly clear from these facts and circumstances that GREF is an integral part of the Armed Forces and*

> *the members of GREF can legitimately be said to be members of the Armed Forces within the meaning of article 33.*

18. Coming to other limb of argument that adherence to Army Order (supra) has violated Article 14 read with Article 21 of the Constitution also seem to be not sustainable for the reason that a trainee in the Army is less than a probationer as held by the Hon'ble Supreme Court in the case of ***Manoj Deshwal*** (supra). Before attestation, even no notice is required. Once it has been settled by the Supreme Court that a recruit may be discharged without giving any notice under provisions contained in the Army Act being unattested person the contention that provision of Army Act (supra) violates Article 21 of the Constitution, seems to be not sustainable. A person who intends to join an elite class of Indian Army who defends the nation requires certain basic training to make him fit not only bodily but with mental sternness to face the eventualities which he may face while defending the nation. It is for the respondents to frame policy to regulate the training of the incumbent who join the Army services. Such policy is not capricious fervors, based on unfounded grounds and is not open to judicial review.

19. It is for the Directorate of Training of the Indian Army and its officers who are experts of the field to choose from amongst the citizens to serve the nation through Army. The Courts/Tribunals

ordinarily should be loath to intervene with such decisions except in cases of utter illegality or violative of Constitutional ethos. Policy framed by Directorate of Training of the Indian Army to choose the best by taking quality decision during course of training and while evaluating fitness of a person, it does not seem to suffer from any illegality or violative of fundamental right of the petitioner trainee.

20. Accordingly we are of the view that policy in question is not in contravention of Article 14 and 21 and it should be viewed in pursuance of necessity to choose and train physically best and talented persons to serve the Indian Army.

21. In view of the above, T.A. lacks merit and is accordingly **dismissed.**

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Rathore