AFR
RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 239 of 2012

Friday this the 06th day of July, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)bn

Ram Roop Singh (No. 6377424A Hav/Clk (S))
S/o Shri Faujadar Singh
Resident of Village Vishunpur
Post Office – Jalalpur
District – Faizabad (U.P.)

……Applicant

Ld. Counsel for the Applicant : **Shri I.P. Singh, Advocate**

Versus

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

2. The Chief of the Army Staff,
Integrated Services Headquarters of
Ministry of Defence (Army), New Delhi.

3. General Officer Commanding-in-Chief,
Western Command,
Headquarters Chandimandir.

4. Brigadier/Commander,
Headquarters Jalandhar Sub Area,
Jalandhar Cantonment.

……Respondents

Ld. Counsel for the Respondents : **Shri Asheesh Agnihotri**
Ld. Counsel for Central Govt.

ORDER

"Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)"

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs :-

> *"(a) Issuing/passing of an order or direction to the Respondents setting aside order dated 21.10.1994 passed by the Brigadier/Commander, Headquarters Jalandhar Sub Area, Jalandhar Cantt whereby dismissing the applicant from service and also the order dated 19.12.2011 passed by the General Officer Commanding-in-Chief, Western Command Headquarters Chandimandir insofar as it holds the applicant guilty by rejecting his representation/appeal dated 10.11.1994 on the ground that the same lacks merit and substance and discharging him from service from the date of his dismissal, after summoning the original records.*
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> *(b) Issuing/passing of an order or direction to the Respondents to grant all consequential service benefits to the applicant including reinstatement and continuity of service in the rank of Havildar/Clerk and payment of arrears of salary from the date of his dismissal from service.*
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> *(c) Issuing/passing of any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.*
>
> *(d) Allowing this Original Application with cost."*

2. In brief, the facts as averred by the Applicant in the O.A. may be summarised as under:

The Applicant was enrolled in Army on 16.08.1982 as Sepoy/Clerk (Store) in 277, Petroleum Platoon, Army Service Corps of the Indian Army. On 15.10.1993, while the applicant was posted in Jalandhar Sub Area, Jalandhar Cantonment an unfortunate incident occurred in which Sep/SHGD R.C. Pal Singh of the same Unit consumed Baygon liquid to commit suicide and became seriously ill and was immediately admitted in the Military Hospital. The incident was reported to the Police Station, Jalandhar Cantonment by Major/D.M.O. of Military Hospital, Jalandhar Cantonment by his letter dated 16.10.1993. A Court of Inquiry was instituted by the Authorities to investigate the circumstances in which said Sep/SHGD R.C. Pal Singh had consumed Baygon liquid. In the Court of Inquiry, statement

of Sep/SHGD R.C. Pal Singh was also recorded on 06.12.1993 wherein he has stated that the cause of his attempting to commit suicide was his mental, physical and sexual harassment by the applicant. The applicant was pressurised by the then Officer Commanding of the Unit to admit the allegation levelled by Sep/SHGD R.C. Pal Singh against him, but the applicant declined to confess the guilt. Being annoyed by such denial by the applicant, the Officer Commanding of the Unit punished the applicant by red ink entry on different counts. After completion of Court of Inquiry, the Brigadier/Commander, Headquarters, Jalandhar Sub Area, Jalandhar Cantonment passed an order on 13.01.1994, in which he, agreeing with the findings and opinion of the Court of Inquiry, directed that the applicant as well as Sep/SHGD R.C. Pal Singh to be posted out to different units and also directed to take disciplinary action against both of them. In compliance of the aforesaid order of the Brigadier/Commander, the applicant was posted to 50 Company, Supply Depot, Bangalore and Sep/SHGD R.C. Pal Singh was shifted to Supply Depot, Gwalior by the Army Service Corps, Record. A show cause notice dated 27.09.1994 was issued to the applicant by the Commander, Headquarters, Jalandhar Sub Area, Jalandhar Cantonment and the applicant was asked to explain as to why he should not be dismissed from service under the provisions contained in Section 20 of the Army Act, 1950 read with Rule 17 of the Army Rules, 1954 for the following lapses on his part :

(a) Having an unnatural and abnormal sexual relationship with No.6387475F Sep/SHGD R.C. Pal Singh of his unit resulting in his attempt to commit suicide on 15.10.1993;

(b) Having two red ink entries in the past.

The applicant submitted his detailed reply to the said show cause notice on 10.10.1994 denying the charges levelled against him and pleaded that he has not done anything disgraceful, as alleged. He also pleaded that the provisions contained in Section 20 of the Army Act, 1950 are not attracted in the matter. Copies of the notice and reply

thereof submitted by the applicant have been annexed with the O.A. The applicant had 12 years of unblemished service to his credit, but without taking the same into consideration, he was dismissed from service on 21.10.1994.

Feeling aggrieved by the order of dismissal dated 21.10.1994, the applicant preferred an appeal before the GOC, Western Command Headquarters Chandimandir on 10.11.1994, which was not disposed off despite repeated reminders. The applicant thereafter filed Writ Petition No.5868 (S/S) of 1996 before the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, Lucknow. After exchange of pleadings in the aforesaid writ petition, the same was transferred to this Tribunal and numbered as T.A. No. 70 of 2010. Subsequently vide judgment and order dated 13.09.2010, this Tribunal was pleased to dispose of the said Transferred Application with the direction to the General Officer, Commanding-in-Chief, Western Command, Headquarters, Chandimandir to decide the applicant's representation dated 10.11.1994, if already not decided within a period of three months from the date a certified copy of this order is filed. This Tribunal also directed the respondents to communicate the decision taken by him to the applicant. Despite the order of the Tribunal, the statutory petition of the applicant was not decided, therefore, the applicant moved a Contempt Petition which was registered as Dy. No.433 of 2011, in which this Tribunal had directed the respondents to seek instructions. Ultimately, the respondents informed the Tribunal that in compliance of the judgment and order dated 13.09.2010 passed by the Tribunal, the representation of the applicant dated 10.11.1994 has been decided. In view of the said fact, the contempt application was dismissed vide order dated 24.1.2012. By the said order, the Commanding Officer, Western Command converted the dismissal from service into discharge from service from the date of his dismissal. It is also submitted that Sep/SHGD R.C. Pal Singh, who has made an attempt to commit suicide, has committed an offence under Section 309 IPC, but inspite of the information to the police, he has not been not prosecuted. During

the Court of Inquiry on the basis of the evidence of Sep/SHGD R.C. Pal Singh, the applicant was held responsible for the same. Feeling aggrieved by the dismissal of the statutory petition, the present O.A. has been filed.

3. It is pertinent to mention here that Sep/SHGD R.C. Pal Singh has also faced trial by the SCM. He was punished with discharge from service. Feeling aggrieved by the finding and punishment inflicted by the SCM, T.A.No.970 of 2010 was preferred by Sep/SHGD R.C. Pal Singh, which has been decided finally by this Bench on 11.04.2018. It was held by this Tribunal that the petitioner in that T.A., was only a victim of the act of the present applicant, therefore, the Tribunal granted relief to him. The operative portion of that order reads as under :

> *"Accordingly, the T.A. is **partly allowed** and the order dated 21st October 1994, discharging the petitioner from service, is hereby set aside. Keeping in view that the matter is more than 20 years old, we do not propose to substitute any other punishment. The petitioner shall be notionally treated to be in service till the date of his acquiring pensionable service. However, he shall not be entitled to the back wages for the said period on the principle of 'no work no pay', but shall be entitled for service pension of the rank held by him, taking into account his notional service. The respondents shall calculate the pension of the petitioner from the date of his notional discharge after acquiring pensionable service.*
>
> *The respondents are directed to complete this exercise within a period of six months from today, failing which the petitioner shall be entitled to interest @ 9% per annum on the amount accrued from due date till the date of actual payment.*
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> *Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order."*

It is hereby made clear that we have mentioned the aforesaid fact only to state as to what was the result of action against Sep/SHGD R.C. Pal Singh. We have not based our conclusion in the instant O.A. on the outcome of the aforementioned T.A.

4. The submission of the learned counsel for applicant is that in this case, no charge sheet was given to the applicant; no opportunity of hearing was afforded to the applicant'; by means of administrative order under Section 20 of the Army Act, 1950, the applicant has been dismissed only on the basis of the Court of Inquiry. The order was

passed in contravention of the provisions of Section 20 of the Army Act, 1950 read with Rule 17 of the Army Rules, 1954 and no FIR was lodged in this case. There is violation of Rule 182 of the Army Rules, 1954. It has also been argued that the punishment inflicted was too harsh.

5. The respondents, in their counter affidavit, have stated the facts in paragraph nos.3, 4 and 5 as under :

> *"3. The applicant was enrolled in the Army on 16 Aug 1982 in ASC. Coming to the fact in issue and narrating them briefly while serving with 277 pet cont unit, the applicant developed friendship with one Sep RC Pal Singh of his unit only and started harassing him mentally, physically and sexually. The modes operandi of the applicant was that used to arouse Sep RC Pal Singh sexually by hugging him and massaging his sexual organs. It had become a regular habit of the applicant to involve himself in such an immoral act. Sep RC Pal Singh; the victim, whenever attempted to resist the advances of the applicant, the applicant would manhandle him. The applicant had reached such a stage that he could not control himself from such sexual escapades and had fallen for the Sep RC Pal Singh. The applicant, suffice to say had become a sex maniac and when not allowed to indulge himself in his advances would become violent to the victim.*
>
> *4. The matter, when came to the notice of the authorities administrative action under Army Act section 20 read with Army Rule 17 was initiated by the commander Jalandhar Sub Area. The applicant was dealt with by due process of law by serving with a Show Cause Notice on 27 Sep 1994 as per the procedure and his reply obtained by granting him sufficient time to do so, his reply duly considered impartially and applicant was accordingly dismissed thereafter from service wef 30 Oct 1994. It would kindly be appreciated that the disposal of the case of the applicant by a court martial is not a sine qua non. Dismissal & removal from service of any person subject to the Army Act other than an officer under Army Act 20 read with Army Rule 17 is in order. However, we would also hasten to add that the Adm disposal of the applicant is also based on legal, reliable and unimpeachable evidence. The due process of law keeping the principals of natural justice was fully and surely followed; SCN served, replied from the applicant taken, having afforded sufficient time and opportunity which belies the contention of the applicant. Thus the dismissal of the applicant is in order hence no arrear of salary under the rules is entitled to him having been dismissed from service. The applicant failed to substantiate his allegation which are false and baseless. It is apparent that the OA filed by the applicant is with a specific design coupled with a personal motive to get monetary benefits from the government by concocting facts and misleading the court thereby not coming with clean hands.*
>
> *5. The gravity of various offences committed by the applicant on the victim Sep RC Pal Singh over a period of time explains the evil designs of the applicant which led the victim to attempted suicide and leaving him to be a mental wreck. An introspection of the culpability of the applicant perpetrated unabated over a hapless person is most unfortunate, yet he has been dealt with a hand of mercy, deserves no more mercy now lest it sets a wrong precedence."*

6. It is submitted on behalf of the respondents that the procedure was duly followed. The applicant was dismissed from service on

administrative grounds and subsequently his dismissal was converted into discharge. It is submitted that there was no procedural infirmity, irregularity or illegality in the administrative discharge of the applicant, therefore, the applicant is not entitled to any relief.

7. The first argument advanced by the learned counsel for the applicant is that the evidence collected during the Court of Inquiry is not admissible in evidence, therefore, it could not have been used for dismissal of the applicant. Rule 177 of Army Rules, 1954 defines Court of Inquiry and Rule 182 of Army Rules, 1954 says that the evidence so collected during the Court of Inquiry is not admissible in evidence. Rules 177 and 182 of the Army Rules, 1954 reads as under :

> ***"177. Courts of Inquiry***.— *(1) A Court of Inquiry is an assembly of officers or of officers and junior commissioned officers or 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.*
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> *(2) The court may consist of any number of officers of any rank, or of one or more officers together with one or more junior commissioned officers or warrant officers or non-commissioned officers. The members of court may belong to any branch or department of the service, according to the nature of the investigation.*
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> *(3) A Court of Inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.*
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> ***182. Proceeding of Court of Inquiry not admissible in evidence***.— *The proceedings of a Court of Inquiry, or any confession, statement, or. answer to a question, made or given at a Court of Inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court;*
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> *Provided that nothing in this rule shall prevent the proceeding from being used by the prosecution or the defence for the purpose of cross -examining any witness."*

8. Court of Inquiry is not a trial. It is only a fact finding enquiry which has a limited purpose. Hon'ble Apex Court in the case of **Union of India & others vs Major A. Hussain** (AIR 1998 SC 577) has discussed the nature of Court of Inquiry**,** Hon'ble Apex Court has opined as under :

> *"Provisions of Rules 180 and 184 had been complied. Rule 184 does to postulate that an accused is entitled to a copy of the report of Court of Inquiry. Proceedings before a Court of Inquiry are not adversarial proceedings and is also not a part of pre-trial investigation. In Major General Inder Jit Kumar vs. Union of India & Ors. [(1997) 9 SCC 1] this Court has held that the Court of*

Inquiry is in the nature of a fact-finding enquiry committee. The appellant in that case had contended that a copy of the report of the Court of Inquiry was not given to him and this had vitiated the entire court martial. He had relied upon Rule 184 in this connection. With reference to Rule 184, the Court said that there was no provision for supplying the accused with a copy of the report of the Court of Inquiry. This Court considered the judgment in Major G.S. Sodhi's case and observed that supply of a copy of the report of enquiry to the accused was not necessary because proceedings of the court of enquiry were in the nature of preliminary enquiry and further that rules of natural justice were not applicable during the proceedings of the court of enquiry though adequate protection was given by Rule 180. This Court also said that under Rule 177, a Court of Inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which may be referred to it. Rule 177, therefore, does not mandate that a Court of Inquiry must invariably be set up in each and every case prior to recording of summary of evidence or convening of a court-martial. "

9. Hon'ble Apex Court in the case of ***Major Suresh Chand Mehra vs. Defence Secretary, Union of India & others*** (1991) 2 SCC 198) has considered the nature and object of Court of Inquiry and has held in Para 13 as under :

"13. .....We find that there is no substance in this contention. The said inquiry was by a Court of Inquiry provided for in Rule 177 of the Army rules, the provisions of sub-rule (1) of the said rule show that the said inquiry must be by an assembly of officers of the ranks described in sub-rule (1) and the purpose of this inquiry is merely to collect evidence and if so required, to report with regard to any matter which may be referred to the said officers. This is merely in the nature of a preliminary investigation and cannot be equated with a trial.

10. Thus, the purpose of Court of Inquiry is very limited. It is only a fact finding enquiry. As per the averments of the respondents, the said Court of Inquiry was conducted in connection with the attempt to commit suicide by Sep/SHGD R.C. Pal Singh, wherein he has given evidence regarding the circumstances which compelled him to take such a step and made allegations of his physical, mental and sexual harassment by the present applicant before us. When these facts came into light, then the decision was taken to initiate action under Section 20 of the Army Act and for the aforesaid purposes, a show cause notice was issued to the applicant. The said show cause notice has been annexed by the applicant alongwith the O.A., which reads as under :

"SHOW CAUSE NOTICE

1. I have observed the following lapses on your part on perusal of proceedings of the Court of Inquiry/ S of E and other focus :-

a) You were having an unnatural and abnormal sexual relationship with No. 6387475 F Sap/SHGD RC Pal Singh of your unit resulting in his attempt to commit suicide on 15 Oct 93.

b) Your records shows that you have got two red ink entries in past. (extract of Fd. conduct sheet att.)

2. It appears to me from the available evidence that you have lapsed on the above counts. I afford you on opportunity to explain your conduct on the above counts and show cause as to why you should not be dismissed from service under the provisions of AA 20 read with AR 17 for the lapses on your part.

3. You should submit your reply to this show cause notice within ten days of its receipt, failing which it shall be assumed that you have no grounds to urge against the proposed action and the said action shall be proceeded with.

4. Copies of C of I, S of E and addl. S of Es (I, II & III) and relevant extract from Fd conduct sheet are enclosed for your perusal.

(GS Sandhu)"

11. Reply given by the applicant to the said show cause notice has also been filed. It appears from the perusal of the said reply that Sep/SHGD R.C. Pal Singh had given evidence against the applicant and the applicant has challenged his evidence recorded during the Court of Inquiry and summary of evidence on the ground that it was not supported by evidence of any other witness. In his reply, he has tried to impress the Authorities that the statement of Sep/SHGD R.C. Pal Singh was false and he has not committed any offence. It is clear that the evidence recorded during the Court of Inquiry, could not have been used as evidence in any trial, but in the instant case, the said evidence has not been used as evidence against the applicant, but only on the basis of such preliminary enquiry, an administrative action was initiated against the applicant. The applicant was dismissed vide order dated 21.10.1994, which reads as under :

"2. I have examined in detail your case as also your reply to show cause notice placed before me. Your soiled record of service and your unnatural and unhealthy sexual relationship with No 6387475F Sep/SHGD RC Pal Singh shows gross moral depravation and detrimental to discipline in the Army.

3. I, therefore, reject your reply as it lacks substance.

4. Further, I am of the opinion that your further retention in service will not be in the interest of discipline in the Army. I, therefore, by virtue of powers vested in me vide Army Act section 20 read with Army Rule 17, direct that you be dismissed from service with immediate effect."

Sd/- xx x x x
(GS Sandhu)
Brig
Cdr"

12. Thus, the applicant was dismissed on the ground that he was not fit to be retained in Army. The challenge of the learned counsel for the applicant is that the provisions of Section 20 of the Army Act, 1950 were not complied with. In support of his submission, he has placed reliance on the pronouncement of a Co-ordinate Bench of this Tribunal in the case of ***Sep Sunil Kumar Singh vs. Union of India & Ors*** (2016 SCC OnLine AFT 418) and has drawn our attention particularly towards Paragraphs 9, 10, 17, 18, 21 and 32 of the said order. While interpreting the provisions of Section 20 of the Army Act, this Tribunal has observed in Paragraphs 17 and 18 as under:

> *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.*
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> *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 12 OA No 139 of 2015 Sunil Kumar Singh 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."*

13. A perusal of Section 20 of the Army Act, 1950 gives powers to the Competent authority to dismiss or remove from service. The submission of the learned counsel for the applicant is that the power given by Section 20 has to be exercised keeping in view the provisions of Army Rules 17. Army Rule 17 reads 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 criminal court or a court-martial, no person shall be dismissed or removed under sub-section (1) or subsection (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 the 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."*

14. Admittedly, in this case, a Court of Inquiry was conducted thereafter the applicant has been served with a show cause notice in writing and after receiving his reply in writing, the order has been passed. Alongwith show cause notice, the copies of Court of Inquiry and summary of evidence were also provided to the applicant. Therefore, the provisions of this section are not attracted in the instant case, because the requirement of giving an opportunity to give reply to

the show cause notice, was fulfilled by issuing a show cause notice and the applicant has availed this opportunity by filing a detailed reply.

15. Hon'ble Apex Court in the case of ***Romesh Kumar Sharma vs Union of India & others*** (2006) 6 SCC 510) has considered the provisions of Army Rule 17. Para 13 of the said judgment reads as under :

> *"13. Under the proviso to Rule 17 the Chief of the Army Staff and other officers are competent to order dismissal or removal without complying with the procedure set out in the main part of the Rule after certifying that it is not expedient or reasonably practicable to comply with the provisions so set out. There is a further requirement that such cases of dismissal or removal shall be reported to the Central Government."*

16. Thus, a perusal of the aforesaid observations of the Hon'ble Apex Court shows that the proviso shall be applicable when the competent authority had not to follow the procedure in view of certain special circumstances and wants to do away with the procedure, only then proviso to Army Rule 17 shall come into operation. While in the present case, due procedure has been followed.

17. So far as the arguments of the learned counsel for the applicant that in this case, no FIR was lodged and without trial by court martial, the applicant has been punished, has virtually no substance. There is no provision under the Army Act or any other rule or regulation, which mandates that FIR has to be lodged in every case. Admittedly, in this case the applicant has not been tried by the court martial, but he has only discharged administratively. The dismissal was subsequently converted into discharge. Thus, it is clear from perusal of sub-section (1) of Section 20 of the Army Act that The Competent authority may dismiss or remove from the service any person subject to Army Act, but this power is subject to the other provision, contained in Army Act, Rules and Regulations. The submission of the learned counsel for the applicant is that the provisions of Rule 17 of the Army Rules, 1954 has not been complied with, but the perusal of Rule 17 clearly establishes that there is no violation of Rule 17. In Para 10 of the order of the Sep Sunil Kumar Singh vs. Union of India & Ors (supra),

the Coordinate Bench in Para 10 has interpreted the provision of Rule 17 of the Army, which reads as under :

> *"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.*

18. The said interpretation of Rule 17 was done in the peculiar facts of that case. In the facts of that case, the applicant was enrolled in the Indian Army and subsequently it was found that he submitted fake documents at the time of his enrolment. A notice was given to the applicant, reply was submitted by the applicant, but without holding any Court of Inquiry/preliminary enquiry, the applicant was dismissed from service. In that case, a preliminary enquiry was a must to hold whether the documents filed by the applicant at the time of his enrolment, were virtually fake or not, but in the instant case, the order of punishment clearly indicates that the applicant was dismissed from service which was subsequently converted into discharge, was mainly on the ground that his retention in service was not in the interest of the discipline of the Army. It also transpires from perusal of the record that in the instant case, the police was informed only with regard to the incident of attempt to commit suicide by Sep/SHGD R.C. Pal Singh and the Court of Inquiry was conducted in that case. The opinion expressed by the Court of Inquiry was agreed to by the Officiating Commander. It was observed in the said order that substantial evidence shows that No.6377424A Hav/Clk (S) RR Singh (present applicant) of 277 Pet Cant Unit is to be blamed for causing mental, physical and sexual harassment to No.638775F Sep/SHGD RC Pal Singh probably provoking the later to attempt to commit suicide in utter disgust and by

the same order, it was directed that both the persons be posted out of the unit.

19. In the case law of ***Abhilash Singh Kushwah*** *(supra)*, on which reliance has been placed by the learned counsel for the applicant, the Co-ordinate Bench has also considered Army Headquarters letter dated 28th December 1988, which provides for removal of undesirable and inefficient JCOs, WOs and OR. The relevant part of which reads as under :

> ***"Procedure for Dismissal/Discharge of Undesirable JCOs/WOs/OR***
>
> *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.*
>
> *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, it set out below :-*
>
> *(a) **Preliminary Enquiry**. Before recommending discharge or dismissal of an individual the authority concerned will ensure:-*
>
> *(i) that an impartial enquiry (not necessarily by a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity for 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 on the merits of the case.*
>
> *(b) **Forwarding of Recommendations**. The recommendations 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 pass will consider the case in the light of what is stated in (a) above and make their own recommendations as to the 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 a 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 cause 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 he will be afforded reasonable time*

to state in writing any reasons 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 a 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 the individual's service is not warranted but any of the actions referred to in (b) to (d) of Para 2 above would meet the requirements 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 as entirely satisfactory, he will pass orders accordingly.*

Note 1. As far as possible, JCO, WO and OR awaiting dismissal orders will not be allowed to mix with other personnel.

2. Discharge from service consequent to four red ink entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not 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.

(g) ***Carrying Out Dismissal/Discharge****. On receipt of the orders of the competent authority for dismissal/discharge, all action to effect dismissal/discharge will be taken by the Regt Centre/Record office, or the unit, as the case may be.*

Procedure for Discharge of Inefficient JCOs/WOs/OR

6. Such JCO, WO and OR will remain with their unit and will be dealt with as in Paras 4 and 5 above in so far as it relates to discharge from service.

7. This letter supersedes the provisions of this HQ letter of even number dated 23 August 1965 and 14 March 1985.

Sd/- xxxxxxx
(RP Agarwal)
Maj Gen
Addl DG PS
For Adjutant General"

20. Thus, the aforementioned Army Order shows that the preliminary enquiry not necessarily a court of enquiry, is a condition precedent for such an administrative action under Section 20 of the Army Act. In the case before Hon'ble Co-ordinate Bench, there was absolutely no enquiry. Under the Policy, quoted above, the Court of Inquiry is also

included as impartial inqauiry. We, keeping in view the object and purpose of Court of Inquiry, as discussed in the earlier part of the judgment are of the considered view that the impartial enquiry and the Court of Inquiry has the same purpose. We find no substance in the submission of the learned counsel for the applicant that the Court of Inquiry was conducted regarding the reasons as to why Sep/SHGD R.C. Pal Singh made an attempt to commit suicide and the said Court of Inquiry concluded that it was a physical, mental and sexual harassment by the applicant, which compelled Sep/SHGD R.C. Pal Singh to take such a drastic steps. Thus, the Court of Inquiry was on the same point on the basis of which the show cause notice was issued to the applicant. Apart from it, summary of evidence was also recorded. Copies of the Court of Inquiry and the summary of evidence were also provided to the applicant alongwith the show cause notice. Therefore, in these circumstances, there was no further requirement to hold any preliminary enquiry, as the same has already been conducted. The submission of the learned counsel for the applicant is that the Court of Inquiry cannot be used as evidence in view of provisions of Rule 182 of Army Rules, 1954, but we do not find any substance in this submission. It is true that Rule 182 of Army Rules, 1954 provids that the evidence recorded during Court of Inquiry, cannot be used as evidence, but here in this Rule, the word “evidence” has been used in a very restricted sense, that means that it cannot be used in any trial of the Army personnel by any type of Court Martial, but so far as any administrative action is required, the same, without any hesitation, can be founded on such Court of Inquiry. If the argument of the learned counsel for the applicant is that the Court of Inquiry cannot be used for any purpose as evidence, even for administrative action, then the net result of this argument would be that to hold a Court of Inquiry is a futile exercise as no administrative action can be based thereon. Virtually it is a fact finding enquiry and the purpose of impartial enquiry under the aforesaid Army Order was to satisfy the competent authority regarding the facts on which he proposes to issue a show cause notice. In the

instant case, the Court of Inquiry and evidence collected during summary of evidence was sufficient to base the administrative action.

21. In view of the discussions made above, the applicant is not entitled to get the benefit of the case law of ***Abhilash Singh Kushwah (supra).***

22. Lastly learned counsel for the applicant has argued that punishment of dismissal from service, which was subsequently converted into discharge from service, was much harsher and was not appropriate to the alleged misconduct of the applicant. It is submitted that any other punishment except the punishment of dismissal/discharge from service, would have met the ends of justice. It is also submitted that the discharge from service before completing minimum pensionable service, make the applicant not entitled for getting benefit of pension, due to which his entire family has come to roads for want of means of survival. In support of his argument, learned counsel for the applicant has placed reliance on a pronouncement of coordinate Regional Bench of Mumbai in the case of **Lijo Stephen Chacko vs. Union of India & others** (O.A.No. 117 of 2014) decided on 28.04.2017. It is submitted that in the said case, the allegation against the officer was of involvement in sexual misconduct and in that case the discharge of the applicant from service was set aside and the applicant was given the benefit of pension.

23. On behalf of the respondents, it is submitted that keeping in view the strict discipline of the Army, the punishment of discharge from service was appropriate punishment. However, no case law in reply to the case law, relied upon by the learned counsel for the applicant, could be brought to our notice by the learned counsel for the respondents. In the said judgment, following the case of **Ranjit Thakur vs. Union of India & Ors,** reported in (1987) 4 SCC 611, the Regional Bench of Mumbai has observed in Paras 31 and 32 as under :

"31. The Hon'ble Apex Court in ***Ranjit Thakur v. Unionof India & Ors.,*** *reported in (1987) 4 Supreme Court Cases 611, in paragraphs 25 and 26, has observed as under:*

> *"25. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister for the Civil Service 1984 3 WLR 1174 HL Lord Diplock said:*
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> > *"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;. . ."*
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> *26. In Bhagat Ram v. State of Himachal Pradesh 1983 2 SCC 442 this Court held: [SCC p. 453, SCC (L&S) p. 353, para 15]*
>
> > *"It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution."*
>
> *32. The observation made by the Hon'ble Supreme Court, as noticed above, is applicable to the facts and circumstances of the present case. Though we are not sitting in appeal against the order of conviction and sentence passed by the Court-Martial, under Section 15 of the Armed Forces Tribunal Act, 2007, we are exercising the power of judicial review under Section 14 of the said Act. It is a settled position of law that if the penalty imposed by the authority is disproportionate to the misconduct, it would amount to violate of Article 14 of the Constitution of India."*

24. A perusal of the said judgment shows that in that case, punishment was inflicted by the court martial and the court martial is vested with power to impose any sentence to meet the ends of justice, but in the case in hand, the applicant has been discharged under Section

20 of the Army Act. Under Section 20 of the Army Act only the order of dismissal or discharge can be passed and the Chief of the Army Staff can also impose the punishment of reversion to lower rank. We find substance in the submission of the learned counsel for the applicant that the punishment imposed on the applicant was harsher keeping in view his misconduct. It has also been argued that the benefit of pension has also been given to Sep/SHGD R.C. Pal Singh, therefore, the applicant should be treated at par keeping in view the misconduct of the applicant and the fact that in the case law relied upon by the learned counsel for the applicant, the officer was also involved in sexual misconduct the benefit of pension was granted to him. Accordingly, we are of the view that the punishment of discharge from service was not appropriate to the misconduct and it was very harsh. The punishment of reduction to the lower rank would meet the ends of justice.

25. On the point of adequate punishment, we would like to refer the pronouncement of Hon'ble Apex Court in the case of reported in AIR 1992 SC (417) **Ex Naik Sardar Singh vs. Union of India & Ors** their Lordship of the Supreme Court have held as under :-

> *"This principle was followed in Ranjit Thakur v. Union of India, (1987) 4 SCC 611: (AIR 1987 SC 2386) where this court considered the question of doctrine of proportionality and it was observed thus (at p.2392 of AIR): "The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the conclusive province of the court-martial, if the decision of the count even as to sentence is outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.*
>
> *(Emphasis supplied)*

26. Accordingly, we find it appropriate to modify the sentence. The applicant may be treated to be reduced to the next lower rank from the rank last held by him. He may be treated to be in service notionally for the period till he attains the minimum pensionable service and thereafter he may be entitled to get the pension of the rank to which he

was reduced to. However, the applicant may not be entitled to get any back wages on the principle of 'no work no pay'. We are of the considered view that such modification in the order would meet the ends of justice.

27. Accordingly, this O.A. is **partly allowed** and the order dated 21st October 1994, discharging the applicant from service, is hereby modified. The applicant shall be reduced to the next lower rank last held by him and he shall be notionally treated to be in service till he attains pensionable service, thereafter, he shall be entitled to post retiral benefits in accordance with law. However, he shall not be entitled to the back wages for the said period on the principle of 'no work no pay', but shall be entitled for service pension of the rank to which he is reduced to. The respondents shall calculate the pension of the applicant from the date of his notional discharge after acquiring pensionable service.

The respondents are directed to complete this exercise within a period of six months from today, failing which the applicant shall be entitled to interest @ 9% per annum on the total amount accrued from due date till the date of actual payment.

Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated: July , 2018
PKG