“AFR”
COURT No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No. 1402 of 2010

Friday, this the 01st day of December, 2017

“Hon’ble Mr. Justice D.P. Singh, Member (J)
Hon’ble Air Marshal BBP, Sinha, Member (A)”

Anurag Singh S/o Shri Ram Vijay Singh, R/o Village Raipura Jat, Post Raipura Jat, Tehsil & District Mathura (Army No. 14842941 –M)

…… **Petitioner**

Ld. Counsel for the Petitioner : **Shri K.K. Mishra Advocate** (Counsel for the petitioner)

Versus

1. Union of India, Ministry of Defence, through its Secretary, New Delhi.
2. The Chief of Army Staff, Army Headquarter, New Delhi.
3. Officer In-charge, ASC Records (MT), Bangalore.
4. The General Officer Commanding 3 Corps c/o 99 APO.
5. The Sub Area Commander, Meerut Sub Area, Meerut.
6. The 5003 ASC Battalion Dimapur c/o 99 APO.
7. The Military Hospital, Agra, through the Medical Officer.

------ Respondents

Ld. Counsel for the Respondents. : **Shri Namit Sharma, Advocate,** Central Govt Standing Counsel.

Assisted by : **Maj Salen Xaxa**, OIC Legal Cell.

ORDER (ORAL

1. We have heard learned counsel for the Petitioner and learned counsel for the Respondents and have also gone through the material facts on record.

2. Being aggrieved by the impugned order of termination, the petitioner had initially preferred a Writ Petition bearing No 282 of 2008 in the High Court of Judicature at Allahabad which in course of time stood transferred to this Tribunal under section 34 of the Armed Forces Tribunal Act, 2007. On being received in this Tribunal, the aforesaid writ petition was re-numbered as T.A No.1402 of 2010.

3. The factual matrix seems to be not in dispute. The petitioner was enrolled in the Indian Army as soldier and after completing the required training he joined on 03.09.2003. It would appear from the record that he served the Indian Army with utmost dedication and devotion without earning any adverse entries either black or red ink entries. To sum up, he has got outstanding service record. According to petitioner's counsel, the court of inquiry was constituted on 22.01.2004. The court of inquiry was held to probe the mal-practices held in medical examination during recruitment. The convening order was passed for conducting court of inquiry naming certain persons including Lt Colonels. In court of inquiry, the applicant was

arrayed as a witness. He appeared in the court of inquiry on 01.05.2006 as a witness. Keeping in view the finding recorded in court of inquiry, a show cause notice dated 31.12.2006 was served, in response to it, the applicant submitted his reply on 20.01.2007. After considering the applicant's reply, the services of the applicant were terminated by the impugned order dated 28.02.2007 on the ground of alleged fraudulent enrollment. Against the order of termination, the Applicant preferred an appeal before the Chief of the Army Staff on 28.03.2007 which was rejected vide order dated 07.08.2007.

4. Learned counsel for the petitioner while assailing the impugned order, has raised three fold arguments, firstly that while passing the impugned order of termination, the respondents have not assigned any reasons and considering the grounds given in the reply submitted in response to the show cause notice as well as the grounds contained in statutory appeal, secondly under Section 43 of the Army Act, it is postulated that the action would be taken and order of punishment shall be passed only in pursuance of court martial proceeding and not otherwise and thirdly that no trial or punishment could be awarded after three years as provided in sub section (4) of section 122 of the Army Act.

5. In response to the arguments advanced by learned counsel for the Applicant, learned counsel for the respondents vehemently defended the impugned order and submitted that the provisions contained in sub section (4) of section 122 do not apply in the present case since the petitioner was dismissed in pursuance of the provisions contained in Section 20 read with Rule 17 of the Army Rules. Further submission of the learned counsel for the respondents is that the petitioner has been found to have maneuvered for his enrollment in the Indian Army through fraudulent means and thus the fraud vitiates even the solemn act. Hence order of dismissal should not be interfered with. According to the learned counsel for the respondents, the provisions contained in Army Act 43 also would not come in the way to pas the impugned order of termination.

6. Undoubtedly, the petitioner has been dismissed in pursuance of the provisions contained in Section 20 of the Army Act read with Rule 17 of the Army Rules on the ground of alleged fraudulent enrolment done in the Indian Army. It is not in dispute that the petitioner was called as a witness during court of inquiry and the said court of inquiry was convened against two officers of the Indian Army and after conclusion of court of inquiry, finding was recorded with regard to petitioner's involvement in fraudulent

enrollment. It is also not in dispute that the petitioner appeared only as a witness in the court of inquiry and no court of inquiry was held against the petitioner or he was permitted to cross examine the witnesses under Army Rule 180.

7. It is vehemently argued by learned counsel for the respondents that in court of inquiry everybody was called as a witness and everybody had a right to cross examine the witnesses. The argument is misconceived for the reason that when the personal reputation of any person is involved then he should be permitted to remain in proceeding and should be permitted to cross examine the witnesses. For the sake of convenience, Army Rule 180 being relevant is excerpted below.

> ***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 and fully understands his rights, under this rule.*
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> *NOTE*
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> *Whenever it appears possible that the character or military reputation of a person subject to AA may be affected as the result of the court of inquiry, the authority who assembles the court of inquiry will take all necessary steps to secure that the provisions of this rule are observed. The ultimate responsibility of ensuring that they are observed in every case will, however, rest upon the presiding officer of the court of inquiry, and should it transpire during the sitting of the court that the character or military reputation of any person subject, to AA is affected by the evidence put forward, the presiding officer, will immediately arrange for such person to be afforded the full facilities of the rule, adjourning the court if necessary for the purpose of securing his, attendance.*

8. It is well settled proposition of law that the provisions contained in Rule 180 must be complied with during Court of Inquiry. In **Maj Gen. Inderjit Kumar Vs UOI & Ors (1997) 9 SCC 1**, Hon. Apex Court reiterated that Army Rule 180 gave adequate protection to the person affected even at the stage of Court of Inquiry. **In Surendra Kumar Sahni Vs Chief of Army Staff (Delhi) reported in 2008 (3) SLR**, a Division Bench of Hon'ble High Court maintained that compliance to the requirements of Rule 180 is mandatory.

9. In view of the above, the arguments advanced by the learned counsel for the respondents that there is no violation of principles of natural justice and in pursuance of court of inquiry, the petitioner could be punished seems to be based on misconceived notion.

10. So far as allegation of fraud against the petitioner is concerned, it is well settled law that fraud constitutes factual dispute and whenever allegations of fraud is raised against any person that commission of fraud must be proved with due compliance of principles of natural justice. (vide-**State of Maharashtra Vs Budhikota Suharao AIR 1989 SC 2282)**. With the aforesaid propositions of law in mind, the legislatures enacted section 43 of the Army Act. Section 43 being relevant is quoted below.

> ***43. <u>Fraudulent enrolment</u>.***—*Any person subject to this Act who commits any of the following offences, that is to say, —*
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> *(a) without having obtained a regular discharge from the corps or department to which he belongs, or otherwise fulfilled the conditions enabling him to enroll or enter, enrolls himself in, or enters the same or any other corps or department or any part of the naval or air forces of India or the Territorial Army; or*
>
> *(b) is concerned in the enrolment in any part of the Forces of any person when he knows or has reason to believe such person to be so circumstanced that by enrolling he commits an offence against this Act; shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.*

11. A plain reading of the provisions contained in Section 43 of the Army Act and also considering the materials on record, would indicate that a person involved in fraudulent enrollment should be tried by Court Martial and be made liable to suffer imprisonment for a term which may extend to five years or less. The Legislature in their wisdom has made the provisions under the Act of Parliament that the offence with regard to fraudulent enrollment should be tried by Court Martial. Now it is well settled that an act should be done in a manner provided in a statute and not otherwise.

12. In view of the above, we are of the view that since provisions contained in Section 43 of the Army Act provides that matter with regard to allegation of commission of fraud

should be tried by court martial, then such allegations should be tried by court martial alone and not otherwise. Since admittedly, the court martial was not held against the petitioner, the order of termination in pursuance of show cause notice under Section 20 read with Army Rule 17 would be vitiated.

12. Now we come to second limb of argument. The second limb of argument is that the order of punishment has been passed by a cryptic and unreasoned order. A perusal of the show cause notice indicates that the petitioner got enrollment in the Indian Army on the basis of erroneous medical certificate. That part the show cause notice also indicates that General Officer Commanding has been directed to terminate the petitioner's services in pursuance of Army Rule 13 (3) (iii) (v) . For the sake of convenience, the relevant portion of show cause notice is reproduced below:-

On perusal of the proceedings of the Staff Court of Inquiry held to investigate the alleged malpractice in conduct of Medical Examination of candidates found medically (temporary) unfit during September to December 2002 and April to June 2003 and the directions of Sub Area Commander, Meerut Sub Area, it is observed that you have been found to be medically unfit during review medical examination. This amounts to irregular enrolment.

The General Officer Commanding 3 Corps has directed that your services be terminated under the provisions of Army Rule 12(3) (iii) (v).

13. The contents of show cause notice on the face of record indicate that General Officer Commanding had directed the Commanding Officer to terminate the petitioner's services. The competent Authority who is the Commanding Officer was having no option except to terminate the services which it would appear was done with pre-decided mind in pursuance of the order passed by the Higher Authority or otherwise suffers from vice of arbitrariness and hit by Article 14 of the Constitution of India.

14. In the present case on the face of record, the show cause notice appears to be mere formality. There was no option for the Commanding Officer but to terminate the services. Hence it suffers from the vice of arbitrariness and hit by Article 14 of the Constitution of India. Since the show cause notice goes to the root of the matter and is the foundation of order of punishment or subsequent action, it crumples down and vitiates the order of punishment.

15. Apart from the above, while filing reply to the show cause notice and later-on while filing statutory appeal the petitioner had given a detailed reply with medical opinion of the Doctors at Military Hospital at Agra dated 09.05.2003 according to which the petitioner was found fit with a

finding that mouth opening adequately fit. Apart from this, in the memo of appeal as contained in Annexure CA-8, the petitioner has assigned number of reasons while defending his continuance in service inspite of the fact that petitioner had come forward with specific case that he has been declared fit by Army Hospital at Agra apart from certain other pleas. The appellate authority without considering the factual reply given by the petitioner rejected the appeal without considering the defence set up by the petitioner. Such action on the part of the appellate authority without considering the reasons assigned by the petitioner, and merely recording the finding that the petitioner was guilty of mal practices, that too in the teeth of administration decision without holding any court martial seems to suffer from vice of arbitrariness being cryptic and unreasoned order. Paras 2,3 and 4 of the impugned appellate order passed by the appellate authority being relevant is quoted below:-

> *"2. It is intimated that you were enrolled in Army on 03 Sep. 2003 by Director Recruiting Agra. Prior to the enrollment, you were found to be suffering from SUB MUCUS FIBROSIS (Oral) and permanently unfit by RMO at Mathura. As such, your case was referred to MH Agra for review and you were however declared fit by Classified Specialist ENT.*
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> *3. However, there was alleged malpractice in conduct of the re-medical examination of*

candidates found medically unfit during the recruitment. Hence, a C of I was order to investigate into the allegations and it was found that you were declared fit in the re-medical through malpractice, being a bogus enrollment. Accordingly, a show cause notice was issued by HQ 3 Corps for which reply has been given by you. Accordingly the discharge has been sanctioned by GOC 3 Corps.

4. From, the above, it is clear that though you were medically UNFIT for enrollment you managed to get yourself declared medically FIT by unfair means.

Hence your enrolment in Army was bogus and irregular. As such petition is devoid of merit and substance. There are no provisions of re-instatement of such indls in the Army."

16. A plain reading of the appellate order indicates that the petitioner was found suffering from sub mucos fiboosis and permanently unfit by RMO Mathura at the time of initial recruitment. However, the opinion of Medical Officer at Agra is otherwise. It was the duty of the respondents to find out and record a finding keeping in view the conflicting medical opinions on record whether response given in petitioner's reply was lawful. Without recording any reasons vis a vis the defence set up by the petitioner in reply to show cause notice followed by memo of appeal, the decision taken by the appellate authority seems to be cryptic and unreasoned and hit by Article 14 of the Constitution of India.

17. Now it is well settled proposition of law that unless otherwise directed by statute, members of Armed Forces have also fundamental rights as envisaged in Part III of the Constitution of India. Being so it was incumbent on the appellate authority to have passed a reasoned order after taking into account the defence set up by the petitioner in the memo of appeal. Whether the petitioner's mouth problem was cured during the period in question or was existing at the time of enrollment, required adjudication by considering appropriate evidence. It is alleged that copy of court of inquiry and other materials were not supplied to the petitioner alongwith show cause notice which is evident from the show cause notice itself.

18. A person cannot be dismissed even in pursuance of Section 20 of the Army Act in case copy of the materials used against the incumbent is not supplied alongwith show cause notice. The only exception to it is sub section (1) of Section 20 or where the matter involves question of national security and its disclosure may expose the security of the Nation to risk. The present case does not fall under such category. Accordingly, it was incumbent on the respondents to supply copy of the documents alongwith show cause notice which seems to be borne out from Army Rule 17 also. For the sake of convenience, Army Rule 17 being relevant is reproduced below.

> ***"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.*

19. Otherwise also, the principle of natural justice is embedded in Article 14 of the Constitution of India except certain exceptions which must be followed by authorities even if there is no provision in the Act or statute.

20. Passing of speaking and reasoned order is no more res integra. As we have observed (supra), when members of Armed Forces are protected by fundamental rights as contained in Part 3 of the Constitution of India subject to certain exceptions, hence it was incumbent on the appellate authority as well as the authority who passed the impugned order of termination, to have assigned reasons. In a recent case, the Apex Court held that the authorities must be aware that the changes in law with reasoned order is the pulse beat of democratic system and every person who has suffered from any order must know the reasons for the punishment awarded to him.

21. In view of the above, since reasons have not been assigned by the appellate authority that too vis a vis the

fact that the competent authority had passed the order being influenced by the order of the higher authority, the order impugned herein does not survive.

22. Coming to last limb of argument, which is with regard to applicability of Section 122 of the Army Act. Section 122 of the Army Act provides that no trial by the court martial shall be held for any offence commencing after expiration of three years and such period shall commence on the date of offence or on the date of knowledge of commission of offence. For the sake of convenience Section 122 of the Army Act being relevant is quoted below:-

> ***"122. Period of limitation for trial.—*** *(1) Except as provided by sub-section (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years [and such period shall commence.-*
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> *(a) on the date of the offence; or*
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> *(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to knowledge of such person or authority, whichever is earlier; or*
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> *(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.]1*
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> *(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in sec-37.*
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> *(3) In the computation of the period of time mentioned in sub-section (1), time spent by such person as a prisoner of war, or in enemy territory, or in adding arrest after the commission of the offence, shall be excluded.*
>
> *(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.*

23. A combined reading of Section 122 indicates that Legislature in their wisdom has provided an exception that is sub section (4) of Section 122 of the Act. It is well settled that limitation provided by any Act or Statute confers statutory right to the affected person but so far as order or trial on the ground of limitation, in case action is taken after statutory period of limitation, such action shall be void being without jurisdiction. Once the statute confers a jurisdiction to be exercised within certain limitation, then concerned authority will have to take action or exercise jurisdiction within the said statutory period and not otherwise. Accordingly the decision or action taken after statutory period shall be liable to be vitiated and may be held to be without jurisdiction which shall vitiate the action.

24. Sub section (4) provides that no trial for offence or desertion other than desertion on active service or fraudulent enrollment shall be commenced if a person in question not being an officer serves the army in an exemplary manner for not less than 3 years. So far as service of the petitioner is concerned, he has served more than three years with a bright service record. Sub section (4) may be divided into two parts viz (1) trial for offence of desertion other than desertion in active service which means an offence or desertion may not be tried after lapse of three years subject to exception of desertion done in

active service. (2) Legislature in their wisdom has used the word ‘or’ which appears to be in disjunction. It means if a fraudulent enrollment has been committed by members of Army who is not an officer and possesses three years of bright service record then he may not be tried after three years.

25. The Parliament in their wisdom has given concession to the soldiers of Indian Army excusing the fraud, if any, subject to three years on exemplary service. At the lower rung of army, for the soldiers, the Parliament has shown its magnanimity depriving the Army to proceed with trial in case such allegations are against soldiers apart from the fact that punishment may be awarded in pursuance of section 43 of the Army Act with due court martial. Once the Legislature in their wisdom gives certain exceptions or concession to any section of Army for any reason whatsoever till the statutory provision stands, the Court are bound to follow the provisions giving it literal meaning.

26. Our attention has been invited to a case reported in **Kamta Prasad Agarwal Vs Executive officer Ballabhgarh, 1974 AIR 685**. In the said case, Hon’ble Supreme Court held that ‘or’ may be used in a conjunctive sense as well as in disjunctive sense. Coming to the present case, in case expression ‘or’ has been used in disjunctive sense, it means, the legislature has provided two conditions in sub section (4) of section 122 of the Army Act, 1950. The

first condition relates to desertion during peace and second condition pertains to soldiers with satisfactory service record. In view of the above, we are of the view that these two conditions provided in sub section (4) of section 122 of the Army Act makes the trial impermissible in case it is against soldier of the Indian Army. It is well settled that no word in statute has to be construed as surplusage. Also no word in the statute can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, a full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced to a dead letter or useless lumber. An interpretation which renders a provision an otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in an exercise in futility and the product came as a purposeless piece of legislation and that the provisions has been enacted without any purpose and the entire exercise to enact such a provision was most unwarranted besides being uncharitable. (see-Vide: **Patel Chunibhai Dajibha** v. **Narayanrao Khanderao Jambekar**, AIR 1965 SC 1457: 1966 (1) SCJ 774: (1965) 2 SCR 543: (1966) 1 328; **Martin Burn Ltd V. Corporation of Calcutta**, AIR 1966 SC 529: (1966) 1 SCR 543: (1966) 1 SCR 618; **M.V. Elisabeth v. Harwan Investment &**

Trading Pt. Ltd. Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, AIR 1993 SC 1014: 1993 AIR SCW 177: (1992) 1 SCR 1003; **Sultana Begum v. Prem Chand Jain**, AIR 1997 SC 1006: 1997 (2) Civ LJ 37: (1997) 1 SCC 373: **State of Bihar v. Bihar Distillery Ltd**., AIR 1997 SC 1511 1997 AIR SCW 259: (1997) 2 SCC 453:. **Institute of Chartered Accountants of India v. Price Waterhouse**, AIR 1998 SC 74: 1997 AIR SCW 4023: (1997) 6 SCC 312; **South Central Railway Employee Co-operative Credit Society Employee Union, Secundrabad v. Registrar of Co-operative Societies**, AIR 1998 SC 703: (1998) 2 SCC 580: 1998 SCW 390; and **Hadeep Singh v. State of Punjab**, (2014) 3 SCC 92: AIR 2014 SC 1400: AIR SCW 667.

26. In the above conspectus, we are of the view that the word 'or ' may not be made redundant. The purpose of 'or' is to deal with two class of the members of the Army i.e soldiers who deserted during peace and soldier who joined the Army by commission of some fraud.

27. We may take note of the fact that Medical officer of the Army Hospital Agra through his reasoned opinion which annexed with the affidavit filed by the petitioner expresses his view that the Applicant is fit for Army. In such situation, it seems that removal does not seem to be warranted keeping in view the spirit of sub section (4) of section 122 of the Army Act.

28. In the result, the T.A is allowed. The impugned orders are set aside with all consequential benefits. The petitioner shall be restored in service forthwith with all consequential benefits including continuity in service. In the facts and circumstances of the case, we confine payment of arrears of salary for the period the petitioner has not worked, to 50% to the total salary.

29. There shall be no order as to costs.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: December, 01, 2017
MH/-