Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 34 of 2010

Tuesday this the 22nd day of December, 2015

Hon'ble Mr. Justice V.K. DIXIT, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No.15468843M Ex Sowar Arun Kumar Lavania
S/O Jagdish Prasad Lavania
Vikas Public School, Sainik, Sainik Vihar
Devri Road, Agra

…….. Applicant

By Legal Practitioner Col. (Retd.) Ashok Kumar and Shri Rohit Kumar, Advocate

Versus

1. Chief of the Army Staff Army HQ
   South Block New Delhi-110011

2. Commandant-cum-Chief Records Officer
   AC Records & Centre Ahmadnagar

3. Commandant Central India Horse
   C/O 56 APO

4. Commanding Officer 2 (I) Armd Squadron
   C/O 56 APO.

5. Union of India Through Secretary
   Ministry of Defence New Delhi-110011

…… Respondents

By Legal Practitioner Shri Rajesh Kumar, Learned Counsel for the Central Government

ORDER

"Hon'ble Lt Gen Gyan Bhushan, Member (A)"

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, and he has claimed the reliefs as under:-

> *"(a) To summon and quash the discharge order contained in character certificate bearing no.248 date 29 Feb 2004 on file no 614/0016/2003 (Annexure A-1 on page 21 of the Original Application refers), which shows that the applicant had been in colour service from 15 Jul 1995 to 29 Feb 2004,*
>
> *AND*
>
> *(b) To summon and quash the discharge order dated 13 Apr 2008 (Annexure A-2 on page 27 of the Original Application refers), wherein premature discharge order has been shown/said to be with effect from 12 Apr 2008, but communicated to the applicant on 13 Apr 2008, thereby the applicant being discharged retrospectively, [which was in gross violation of Army Rule 18 (2)], making it liable to be set aside, with all the consequential benefits to the applicant."*

PLEADINGS

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army on 15.07.1995 and was discharged from service on 12.04.2008. While the applicant was in service, he was awarded 04 red ink entries and 02 black ink entries out of which one black ink entry was expunged by the competent authority. The applicant was locally discharged from service with effect from 12.04.2008 (afternoon). Details of the offences and the punishments awarded to the Applicant are enumerated below:

Sl. No.	Army Act Section and Nature of offence	Date of award	Punishment awarded	Name of unit where punishment awarded
(a)	AA Sec 48 Intoxication	09 Aug 99	14 days Pay Fine (black ink entry)	HQ Sqn 14 (1) Armed Bde

(b)	AA Section 39 (b) overstaying leave (47 days)	12 Oct 99	14 days Rigorous Imprisonment (Red ink-entry)	HQ Sqn 14 (1) Armed Bde
(c)	AA Section 39 (a) Absenting himself without leave (09 days)	19 Nov 99	07 days Rigorous Imprisonment (Red ink-entry)	HQ Sqn 14 (1) Armed Bde
(d)	AA Section 48 Intoxication	25 Jun 02	07 days Pay Fine (Black ink – entry)	Central India Horse
(e)	AA Section 39 (b) overstaying leave (2 years and 58 days)	10 Dec 05	28 days Rigorous Imprisonment and 14 days Pay fine (Red ink-Entry)	2(1) Armed Sqn
(f)	(i) AA Section 63 An act prejudicial to good orders & military discipline. (ii) AA Sec 41 (2) Disobeying a lawful command given by his superior officer	08 Dec 07	07 days Rigorous Imprisonment (Red ink-entry)	(1) Armed Sqn

3. We have heard Col. (Retd.) Ashok Kumar, Learned Counsel for the applicant, assisted by Shri Rohit Kumar and Shri Rajesh Kumar, Learned Counsel for the respondents and perused all available relevant documents on record.

4. Learned counsel for the Applicant submitted that there had been many procedural errors and legal infirmities in award of punishments to the applicant as well as in the process leading to discharge of the applicant as undesirable soldier. Stress has been laid on following three issues:-

(i) Preliminary Inquiry was not conducted in the instant case and without conducting any preliminary inquiry recommendation of an individual for dismissal/ discharge is against the provision of Army Headquarter Policy letter dated 28.12.1988;

(ii) Show-Cause Notice was given to the applicant on 22.01.2008 requiring him to submit his reply on or before 31.01.2008 (within 08 days). Since the time for submission of reply was too short and for the same applicant needed certain information, therefore, submission of reply to the Show Cause-Notice by the applicant within the time asked for was beyond his control. Thus, the applicant was prevented from defending himself by submitting the reply to Show Cause Notice;

(iii) The Show-Cause Notice was based on six offences alleged to have been committed by the applicant, out of which 04 were red ink entries and 02 were black ink entries. One black ink entry had been set aside by the competent authority, therefore, it ought not to have been included in the Show Cause Notice. Its inclusion vitiates the Show Cause Notice.

5. To elaborate on the aforesaid points, Learned counsel for the applicant thus, submitted that discharge of undesirable soldier without any preliminary inquiry militates against the provisions of Army Headquarters Policy letter dated 28.12.1988, in Para 5 whereof, it is clearly mentioned that under rules 13 and 17 of the Army Rules, a preliminary inquiry is a must before recommending for discharge or dismissal of the individual. Learned counsel for the respondents has not contested the submission pertaining to the non-conduct of preliminary inquiry.

6. Dwelling on the issue, learned counsel for the applicant submitted that punishment of 14 days pay fine under Section 48 of the Army Act, 1950 inflicted on 09.08.1999 (refer to Para 2 (a) above) was expunged by the Commander 14 (1) Armed Brigade vide order dated 09.02.2000, on account of it being tainted with irregularities committed, thereby conclusively establishing that Show Cause Notice dated 22.01.2008 was illegally drafted and reflects biased approach as well as perversity on the part of the respondents. The expunction of this

punishment has again not been contested by the learned counsel for the respondents.

7. Learned counsel for the applicant has now dwelt upon procedural irregularities and legal infirmities in award of other five punishments also. As regards second punishment at Para 2 (b), learned counsel for the applicant has submitted that there is nothing on record to indicate whether the charge sheet issued was described as 'Tentative Charge Sheet' attended with further submission that no witness was produced as required in colum-4 of Appendix 'A' to 'AO' 24/94. Rather, therein, the word "documentary" finds mention and neither details of documents produced nor who has produced the documents find mention. As regards third charge at Para 2 (c), again there is nothing on record to indicate that the charge sheet issued had been described as 'Tentative Charge Sheet'. A perusal of colum-4 of Appendix 'A' to 'AO' 24/94 shows that Prosecution witnesses were Ris Maj Raj Singh and Dfr Omkar Singh. In column 8 thereof, again the same witnesses have been mentioned as Independent witnesses. Thus, the summary punishment bristling with various irregularities and infirmities, was vitiated and is liable to be set aside being illegal and perverse.

8. As regards, fourth punishment shown at Para 2 (d) of the aforesaid chart, learned counsel for the applicant has submitted that 'Tentative Charge Sheet' has been shown to be signed on 25.06.2002 by Col J.S. Sahi, CO (CIH) stating that the applicant was found intoxicated at 2200 hrs on 18.06.2002, without regard being had to the fact that on this date, Rum was issued. The charge also does not show as to who had found him intoxicated, as a person as witness has to be brought in such situation. Further perusal of Appendix 'A' to 'A.O. 24/94 shows that hearing of charge commenced at 1010 hrs on 25.06.2002, wherein column -4 the Prosecution Witnesses shown are Capt VRS Sirohi and Capt V Singhal. Perusal of column -8 of AO 24/94 dated 25.06.2002 again shows presence of Capt V Singhal as Independent Witness who

was the second witness in column-4, as such appearance of this witness in column vitiates the summary trial and its verdict.

9. Further submission of the learned counsel for the applicant is that in regard to punishment at Para 2 (f) Lt. Col. Pradeep Lamba, Sqn Commander had himself ordered the applicant to run BPET, with personal weapon as a measure of punishment and later on the same very officer conducted investigation under rule 22 (1) of the Army Rules and also signed the order on 08.12.2007 punishing the applicant, thus, the punishment is a nullity in the eyes of law.

10. Per contra, the learned counsel for the respondents in the written submissions contained in counter affidavit has submitted that the applicant had earned 04 red ink entries and two black ink entries and these are recorded in the service documents. Based on these punishments, the applicant was locally discharged from service on 12.04.2008 afternoon being undesirable soldier. In the submission contained in the counter affidavit, endeavour has been made to justify all the punishments as well as validity of discharge of the applicant as undesirable soldier. However, during the arguments, learned counsel for the respondents has conceded that the Preliminary Inquiry as mandated by Army Headquarter Policy letter dated 28.12.1988 was not conducted, as such it was not enclosed with the copy of Show-Cause Notice. He has also conceded to the fact that the punishment of 14 days' Pay fine, which is black ink entry as mentioned in Para 2 (a) has been expunged by the competent authority, as such it should not have been included in the Show-Cause Notice. He has submitted that the Show-Cause Notice was issued on 22.01.2008 and the reply was ordered to be given by 31.01.2008, as such reasonable time was given to the applicant to give reply to the Show-Cause Notice. Thus there was no injustice to the applicant.

11. As stated supra, on being confronted, learned counsel for the respondents did not repudiate the submissions of the learned counsel for

the applicant that punishments shown at Para 2 (b), (c), (d) and (f) bristle with procedural infirmities also. However, a strenuous effort has been made by the learned counsel for the respondents to bring home the point that discipline is hallmark of an organization like Armed Forces and that the discipline and commitment towards duty cannot be compromised at any cost. He has also highlighted the fact that on several occasions the omissions and commissions indulged in by the Applicant were winked at by the disciplinary authority taking a compassionate view of the matter that he would reform himself in due course of time. However, his intemperate and inclement behaviour persisted which tended to have a domino effect to the detrimental of other soldiers in the Unit and in the Army. Explaining the sequence of issue of character certificate, learned counsel for the respondents conceded that it was inadvertently issued, which was later on cancelled (Para 20 of the counter affidavit).

12. Learned Counsel for the respondents further submitted that the Original Application of the applicant deserves to be dismissed as he has been rightly discharged as undesirable soldier

13. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules and Regulations on the point. Policy issued by Army Headquarters letter No A/13210/159/AG/PS 2(c) dated 28.12.1988, dealing with the procedure regarding removal of undesirable and inefficient JCOs, WOs and OR, Para 387 of the Defence Service Regulations for the Army, 1987 regarding Conduct Sheet Entries and Para 52 of the Army Act, 1950 with Notes are as under :-

(a) "PROCEDURE FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs AND OR

1. The procedure outlined in the succeeding paragraphs will be followed for the disposal of undesirable and inefficient JCOs, WOs and OR.

JCOs, WOs and OR who have proved undesirable

2. (a) An individual who has proved himself undesirable and whose retention in the service is considered inadvisable will be recommended for

discharge/dismissal. Dismissal should only be recommended where a Court Martial, if held, would have awarded a sentence not less than dismissal, but trial by Court Martial is considered impracticable or inexpedient. In other cases, recommendation will be for discharge.

(b) Should it be considered that a JCO's discharge/dismissal is not warranted and that transfer will meet the case, he will be transferred in his substantive rank and not recommended for further promotion and or increment of pay until he proves his fitness for promotion and or increment of pay in his new unit.

(c) Should it be considered that a WO or an NCO's discharge/dismissal is not warranted and that transfer will meet the requirements of the case, he will be transferred. If the merits of the case so warrant, he may be reduced to a lower grade or rank or the ranks under AA Sec 20 (4) by an officer having powers not less than a Bde or equivalent comdr. Before he is transferred, a WO reduced to the rank shall not be required to serve in the ranks. AA Sec 20 (5) refers.

(d) Should it be considered that an acting NCO's discharge/dismissal is not warranted and that transfer will meet the requirement of the case, he may be reverted by his CO to his substantive rank and if he is not a substantive NCO rank, he may be reverted to the ranks under AA Sec 20 (6) before he is transferred.

(e) In cases where it is considered that all or part of JCOs/WOs/Ors pension should be withheld, this fact will be noted on the recommendation for discharge.

<u>JCOs, WOs and OR who have proved inefficient</u>

3. (a) Before recommending or sanctioning discharge, the following points must be considered :-

(i) If lack of training is the cause of his inefficiency, arrangements will be made for his further training.

(ii) If an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) x x x x x x x x x x x x

(c) x x x x x x x x x x x x

4. <u>Procedure for dismissal/discharge of undesirable JCOs/WOs/OR</u>. 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 the such person may be terminated without giving him a Show Cause Notice provided the competent authority is satisfied that it is not expedient or reasonable practicable to serve such a notice. Such case should be rare, e.g. where the interests of the security of the State so require. Where the serving of a show cause notice is dispensed with, the reason 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 , is set out below :-

(a) Preliminary Inquiry. Before recommending discharge or dismissal of individual the authority concerned will ensure :-

(i) That an impartial inquiry (not necessarily a court of inquiry) has been made into the allegations against him and that he has had adequate opportunity of 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 of the merits of the case.

(b) Forwarding for Recommendations. The recommendation 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, along with a copy of the proceedings of the inquiry referred to in (a) above.

(c) Action by Intermediate Authorities. Intermediate authorities through whom the recommendations are made, will consider the case in the light of what is stated above and make their own recommendations for 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 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 cases 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 inquiry held in the case will also be supplied to the

individual and will be afforded reasonable time to state in writing any reason 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 inquiry 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 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 individuals service is not warranted but any of the actions referred to in (b) to (d) of para 2 above should meet the requirement 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 entirely satisfactory, he will pass orders accordingly and not to 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.

Note. 1. x x x x x x x x x x

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

(g) x x x x x x x x x x x

Procedure for Discharge of Inefficient JCOs/WOs/OR

6. *x x x x x x x x x x x*

7. *x x x x x x x x x x x*

(b) Para 386, 387 and 388 of Defence Service Regulations for the Army, 1987

386. Conduct Sheet to be Maintained. A conduct sheet shall be prepared and maintained for every person subject to Army Act. The conduct sheets of Officers, JCOs and WOs will be kept as confidential documents; those of NCOs and men will be kept with other service documents.

387. Conduct Sheet Entries.

(a) Entries will be made in the conduct sheets of officers in respect of all convictions by court martial, criminal court or summary punishments awarded under Army Act Sections 83 or 84.

(b) The following entries will be made in the conduct sheets of JCOs, WOs and OR as red ink entries :-

(i) Forfeiture of seniority of rank (JCOs and WOs only)

(ii) Conviction by court-martial

(iii) Conviction by a civil court, except when a fine was the only punishment and the CO does not consider that a red ink entry should be made.

(iv) Reduction of a NCO to a lower grade or to the ranks for an offence but not for inefficiency

(v) Deprivation of an appointment or of lance or acting rank, for an offence but not for inefficiency.

(vi) Severe Reprimand (JCOs,WOs and NCOs only).

(vii) Imprisonment

(viii) Detention.

(ix) Field punishment (on active service only);

(x) Confinement to the lines exceeding fourteen days.

(xi) Forfeiture of good service or good conduct pay.

(c) Black ink entries will be made in the conduct sheets of JCOs, WOs and OR in respect of all punishments not included in the list of red ink entries convictions by civil courts not meriting in the CO's opinion a red ink entry .

388. Manner in which Entries are to be Made.

(a) Entries will be made in the conduct sheets as follows :-

(i) The statement of offence as set out in Army Rules will be entered. Where the statement does not disclose the full nature of offence such as charges under Army Act, Sections 42 (e) and 63, the purport of the particulars will be added, thus :

"Neglecting to obey garrison orders – bathing in the river at a prohibited hour".

"Act prejudicial to good order and military discipline – negligent performance of duties".

(ii) The original sentence, together will any alteration, revision or variation by a competent authority will be recorded in the column "punishment awarded". In case of sentences by courts martial the remarks of the confirming/reviewing officer and the date of confirmation/counter signature will be entered immediately under "punishment awarded". When the accused is found guilty of a charge different from the one on which arraigned, the charge on which found guilty will also be entered in column – "punishment awarded".

(iii) Every suspension of a sentence under Army Act, Section 182 will be entered in the "remarks" column, showing the date on which and the authority by whom the suspension was ordered. If the sentence was subsequently put into execution or remitted, a further entry will be made in the same column to this effect, stating the date and the authority.

(iv) When the record of a court martial or a summary award is ordered to be removed, the entry will be erased and the authority quoted.

(v) No entry will be made of any charge of which the accused has been found not guilty.

(b) In the case of JCOs, WOs and OR, the number of days spent in hospital on account of disease due to neglect or misconduct and willful, self-inflicted injury will be recorded in the sheet roll under the heading "prominent occurrences affecting conduct and character".

(c) In the case of boys, conduct sheet entries will be made on IAFK-1166. IAFK-1166 will be destroyed and the ordinary conduct sheet be brought into use on a boy attaining the age of sixteen. These entries will also be similarly made in the statement of service page of the sheet roll."

14. In the case of **D.K. Yadav v. J.M.A. Industries Ltd.,** reported in (**1993) 3 SCC 259,** in Paras 11, 12, 13 and 14 of the Judgment, the observations made by Hon'ble The Apex Court are as under :-

"11. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between and quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

12. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

13. In ***Delhi Transport Corpn. v. D.T.C. Mazdoor Congress****, this Court held that right to public employment and its concomitant right to livelihood received protective umbrella under the canopy of Articles 14 and 21 etc. All matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309*

of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavor. They must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees right to life which includes right to livelihood, the deprivation thereof must be in accordance with just and fair procedure prescribed by law comfortable to Articles 14 and 21 so as to be just, fair and reasonable and not fanciful, oppressive or at vagary. The principles of natural justice are an integral part of the guarantee of equality assured by Article 14. Any law made or action taken by an employer must be fair, just and reasonable. The power to terminate the service of an employee/workman in accordance with just, fair and unreasonable procedure is an essential inbuilt of natural justice. Article 14 strikes at arbitrary action. It is not the form of the action but the substance of the order that is to be looked into. It is open to the Court to lift the veil and gauge the effect of the impugned action to find whether it secures justice, procedural as well as substantive. The substance of the order is the soul and the effect thereof is the end result.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In D.T.C v. D.T.C. Mazdoor Congress (1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213) the Constitution Bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside".

15. In the case of **Ex-Hav. Satbir Singh v. Chief of the Army Staff,** reported in **2013(1) S.C.C. 390,** in Paras 8**,** 9 and 11 of the Judgment, the observations made by Hon'ble The Apex Court are as under :

"8. We have to see whether the High Court having arrived at a conclusion that the discharge/termination of the appellant from service is unsustainable and after setting aside the termination order was justified in depriving the appellant from any salary for the intervening period as well as for the purpose

of terminal benefits, the intervening period during which the appellant remained out of job shall not be counted. Since we have issued notice only for the purpose of terminal benefits, there is no need to go into the entitlement of salary during the intervening period.

9. It is not in dispute that in the concluding paragraph, the Division Bench of the High Court in categorical terms set aside the order of termination. The relevant conclusion reads as under :-

"Fact remains that he was discharged/terminated from service on the basis of show cause notice. This action is found to be unsustainable. Therefore, we have no hesitation in setting aside the termination order."

Having found that the discharge/termination is legally unsustainable, we are of the view that the incumbent, namely, the appellant, ought to have been provided relief at least to the extent of counting the intervening period for the purpose of terminal benefits. It is true that during the intervening period, the appellant, admittedly, did not work, in that event, the Division Bench was justified in disallowing the salary for the said period. However, for the terminal benefits, in view of the categorical conclusion of the High Court that discharge/termination is bad, ought to have issued a direction for counting the intervening period at least for the purpose of terminal benefits. According to the Division Bench, the conduct of the appellant, namely, securing 4 Red Ink Entries in the service record is the reason for not considering the intervening period even for the purpose of terminal benefits. We hold that the said reasoning adopted by the Division Bench of the High Court cannot be sustained in view of its own authoritative conclusion in setting aside the discharge/termination order.

11. In the light of the above discussion, while upholding the order of the Division Bench setting aside the termination order, we hold that for the purpose of terminal benefits, the "intervening period" for which the appellant remained out of job shall be counted. In view of the same, respondents Nos. 1 and 2 are directed to pass appropriate orders fixing terminal benefits within a period of two months from the date of receipt of copy of this judgment and intimate the same to the appellant."

16. In the case of **Surinder Singh Sihag v. Union of India,** reported in **2003(1)S.C.T. 697** in Paras 13 and 15 of the Judgment, the observations made by Hon'ble Delhi High Court are as under :

> *"13. It is not in dispute that an order of discharge casts a stigma. Having regard to 14 years of service rendered by the Applicant, he was otherwise entitled to pension. An order of discharge of service without following the procedure prescribed, therefore, in our opinion, therefore, cannot be sustained. It is now trite he who carries the procedural sword must perish with it (See* ***Vitarelli v. Seaton (1959 359 US 535:3 L.Ed. 2nd 1012).***

> *15. In SPRY on Equitable Remedies, Fifth Edition at Page 5, referring to* ***Moody v. Cox, (1917) 2 Ch. 71 at pp. 87-88*** *and* ***Meyers v. Casey, (1913) 17 C.L.R. 90,*** *it is stated* ***:***

> *".....that the absence of clean hands is of no account "unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". When such exceptions or qualifications are examined it becomes clear that the maxim that predicates a requirement of clean hands does not set out a rule that is either precise or capable of satisfactory operation."*

17. This Tribunal in O.A. No. 168 of 2013, Nk Abhilash Singh Kushwaha vs. Union of India and others, decided on 23.09.2015, has held that discharge from Army without following the additional procedure provided by the Army HQ Policy letter dated 28.12.1988 seems to suffer from vice of arbitrariness. Para 75 of the judgment is reproduced as under:

> "75 In view of above, since the applicant has been discharged from Army without following the additional procedure provided by A.O. 1988 (supra) seems to suffer from vice of arbitrariness. ***<u>Finding with regard to applicability of Army Order 1988 (supra) is summarized and culled down as under</u>****:*
>
> *(i) In view of provision contained in sub-rule 2A read with sub-rule 3 of Rule 13 of the Army Order (supra), in case the Chief of the Army Staff or the Government add certain additional conditions to the procedure provided by Rule 13 of the Army Rule 1954 (supra), it shall be statutory in nature, hence*

shall have binding effect and mandatory for the subordinate authorities of the Army or Chief of the Army Staff himself, and non compliance shall vitiate the punishment awarded thereon.

(ii) The Chief of the Army Staff as well as the Government in pursuance to Army Act, 1950 are statutory authorities and they have right to issue order or circular regulating service conditions in pursuance to provisions contained in Army Act, 1950 and Rule 2A of Rule 13 (supra). In case such statutory power is exercised, circular or order is issued thereon it shall be binding and mandatory in nature subject to limitations contained in the Army Act, 1950 itself and Article 33 of the Constitution of India.

*(iii) The case of **Santra** (supra) does not settle the law with regard to applicability of Army Order of 1988 (supra), hence it lacks binding effect to the extent the Army Order of 1988 is concerned.*

*(iv) The judgment of Jammu & Kashmir High Court and Division Bench judgment of Delhi High Court as well as provisions contained in sub-rule 2A of Rule 13 of the Army Act, 1950 and the proposition of law flowing from the catena of judgments of Hon'ble Supreme Court and High Court (supra) relate to interpretative jurisprudence, hence order in **Ex Sepoy Arun Bali** (supra) is per incuriam to statutory provisions as well as judgments of Hon'ble Supreme Court and lacks binding effect.*

(v) The procedure contained in Army Order of 1988 (supra) to hold preliminary inquiry is a condition precedent to discharge an army personnel on account of red ink entries and non-compliance of it shall vitiate the order. Till the procedure in Army Order of 1988 (supra) continues and remain operative, its compliance is must. None compliance shall vitiate the punishment awarded to army personnel.

(vi) The procedure added by Army Order of 1988 is to effectuate and advances the protection provided by Part III of the Constitution of India, hence also it has binding effect.

(vii) Order of punishment must be passed by the authority empowered by Rules 13, otherwise it shall be an instance of exceeding of jurisdiction, be void and nullity in law."

18. The Hon'ble Apex Court in the case of ***Veerendra Kumar Dubey vs. Chief of Army Staff and others*** (Civil Appeal D No.32135 of 2015 decided on 16.10.2015 has also held that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable. For convenience Para 12 of aforesaid judgment of the Hon'ble Supreme Court is reproduced as under :-

> *"12. The argument that the procedure prescribed by the competent authority de hors the provisions of Rule 13 and the breach of that procedure should not nullify the order of discharge otherwise validly made has not impressed us. It is true that Rule 13 does not in specific terms envisage an inquiry nor does it provide for consideration of factors to which we have referred above. But it is equally true that Rule 13 does not in terms make it mandatory for the competent authority to discharge an individual just because he has been awarded four red ink entries. The threshold of four red ink entries as a ground for discharge has no statutory sanction. Its genesis lies in administrative instructions issued on the subject. That being so, administrative instructions could, while prescribing any such threshold as well, regulate the exercise of the power by the competent authority qua an individual who qualifies for consideration on any such administratively prescribed norm. In as much as the competent authority has insisted upon an inquiry to be conducted in which an opportunity is given to the individual conducted in which an opportunity is given to the individual concerned before he is discharged from service, the instructions cannot be faulted on the ground that the instructions concede to the individual more than what is provided for by the rule. The instructions are aimed at ensuring a non-discriminatory fair and non-arbitrary application of the statutory rule. It may have been possible to assail the circular instructions if the same had taken away something that was granted to the individual by the rule. That is because administrative instructions cannot make inroads into statutory rights of an individual. But if an administrative authority prescribes a certain procedural safeguard to those affected against arbitrary exercise of powers, such safeguards or procedural equity and fairness will not fall foul of the rule or be dubbed ultra vires of the statute. The procedure prescribed by circular dated 28th December, 1988 far from violating Rule 13 provides safeguards against an unfair and improper use of*

the power vested in the authority, especially when even independent of the procedure stipulated by the competent authority in the circular aforementioned, the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and that he may be completing pensionable service are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge. Inasmuch as the procedure stipulated specifically made them relevant for the exercise of the power by the competent authority there was neither any breach nor any encroachment by executive instructions into the territory covered by the statute. The procedure presented simply regulates the exercise of power which would, but for such regulation and safeguards against arbitrariness, be perilously close to being ultra vires in that the authority competent to discharge shall, but for the safeguards, be vested with uncanalised and absolute power of discharge without any guidelines as to the manner in which such power may be exercise. Any such unregulated and uncanalised power would in turn offend Article 14 of the Constitution".

19. In the instant case, at the risk of repetition, it may be mentioned that out of six punishments, four punishments are of red ink entries and two punishments are of black ink entries of which one punishment of black ink entry has been expunged. According to Note 2 of Para 5 of Army Headquarters letter dated 28 Dec 88, discharge after four red ink entries is not mandatory. Though there is no tangible criterion laid down for considering person 'undesirable', this Note leads us to infer that a minimum of four red ink entries would not qualify a person as an 'undesirable'. In the instant case, the Applicant had four red ink entries which made him an undesirable soldier. It is observed that discharge as per policy has not been followed wherein no impartial inquiry as mandated in the policy has been conducted as also proper procedure for issue of Show Cause Notice has not been followed and further that, adequate time has not been provided to the Applicant to put forward his

case. Besides, it suffers from evident legal infirmities and also from the principles of natural justice. As per Army Headquarters policy letter dated 28 Dec 1988 in Para 5, it is clearly mentioned that ***"Before recommending discharge or dismissal of an individual the authority concerned will ensure that an impartial inquiry (not necessarily a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity for putting his defence or explanation and of adducing evidence in his defence, that the allegation have been substantiated and that the extreme steps after termination of the individual's service is warranted on the merits of the case".*** **In Para 5 (b) of the policy letter it is also mentioned that-** ***"The recommendation 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, along with a copy of the proceedings of the inquiry".***

20. The Show Cause Notice was issued to the applicant on 22.01.2008 and the same was to be replied by the applicant on or before 31.01.2008 (within 08 days). It may be recalled that in the Show-Cause Notice, there is mention of six entries in relation to the offences alleged to have been committed by the applicant, out of which four are red ink entries and two are black ink entries, whereas punishment with regard to one black ink entry has been set aside by the competent authority. Inclusion of non-existent entry in the Show-Cause Notice renders it erroneous and illegal.

21. Once a Show-Cause Notice is served on army personnel, in pursuance of provisions contained in rule 13 (3) III (v) of the Army Rules, 1954, it is incumbent upon the competent authority to pass a speaking and reasoned order, rejecting or accepting the grounds pleaded in the reply to the Show-Cause Notice. Mere entry in movement order (local discharge) seems to be not sufficient and is violative of principles of natural justice and is hit by Article 14 of the Constitution of India.

Hon'ble Supreme Court in a recent judgment rendered in the case of ***Veerendra Kumar Dubey vs. Chief of Army Staff & others*** (Civil Appeal D No.32135 of 2015, decided on 16.10.2015) has held that before passing discharge order compliance of rule 13 (3) III (v) of the Army Rules, 1954 and the principles of natural justice is necessary. Principles of natural justice include communication of decision taken by the authority by passing a speaking and reasoned order. It shall be obligatory on the part of the competent authority to hold preliminary inquiry with due opportunity and communication to the applicant and only thereafter, to issue Show Cause Notice.

22. The punishment order indicates that with regard to offence of 19.11.1999, the prosecution witnesses and the independent witnesses are the same, with regard to punishment of 25.06.2002 one of the prosecution witness and independent witness is the same, whereas in regard to punishment of December, 2007, Lt. Col. Pradeep Lamba, Sqn Commander had himself ordered the applicant to run BPET, with personal weapon as a measure of punishment and later on, the same very officer conducted investigation under rule 22 (1) of the Army Rules and also signed the order on 08.12.2007 punishing the applicant, thus, the punishment is a nullity in the eyes of law, as the cliché goes, one cannot be judge in his own cause. It is worthy of notice that procedural errors and legal infirmities highlighted in awarding other punishments have also not been contested or repudiated by the learned counsel for the respondents. However, no prayer has been made by the applicant to set aside red ink entries/black ink entries, hence we are disinclined to interfere with the red ink entries.

23. A strenuous effort has been made by the learned counsel for the respondents to convince that discipline is hallmark of an organization like Armed Forces and that the discipline and commitment towards duty cannot be compromised at any cost. While there is no scope for any disagreement with learned counsel for the respondents that indiscipline

and dereliction of duty is unacceptable in Government service and much less acceptable in Armed Forces, yet concern for discipline must not prompt the competent authority to give the procedure a complete go by.

24. In the case of **Delhi Transport Corpn. v. D.T.C. Mazdoor Congress (supra),** Hon'ble The Apex Court has observed that matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavor. The power to terminate the service of an employee/workman in accordance with just, fair and reasonable procedure is an essential inbuilt of natural justice. Also in the case of The Hon'ble Apex Court in the case of ***Veerendra Kumar Dubey vs. Chief of Army Staff and others*** (Civil Appeal D No.32135 of 2015 decided on 16.10.2015 has held that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable.

25. It is apparent from the pleadings and submissions made on behalf of the parties that before recommending the case of the applicant for discharge, no preliminary inquiry was held. Therefore, admittedly the procedure outlined in the policy letter dated 28.12.1988 was not followed. Since no preliminary inquiry was held, the applicant did not get opportunity to defend himself during the preliminary inquiry. The contention of the learned counsel for the applicant that no inquiry was held is also supported from the facts that had inquiry been held, the copy of the inquiry report would have been enclosed with the Show-Cause. It is worthy of notice herein that this issue has not been contested, in fact, the learned counsel for the respondents minced no words to concede it. It is significant to note that punishment with regard to one black ink-entry inflicted upon the petitioner had been expunged by the competent

authority, even then it was included in the Show Cause Notice. Apart from it, proper opportunity was not provided to the applicant to submit reply to the Show-Cause Notice. Even in award of punishment, there have been procedural errors, legal infirmities and arbitrariness. Thus, in totality of the circumstances, the impugned discharge order suffers from malice and deserves to be set aside.

26. In view of the above, we are of the considered view that the impugned character certificate dated 29.02.2004 at Annexure 1 of the Original Application, where different date of discharge is given, has already been cancelled by the respondents (Para 20 of the counter affidavit) and they have also submitted that the applicant was discharged on 12.04.2008, as such the said certificate already stands set aside. As regards, discharge order dated 13.04.2008 at Annexure -2 is not only unjust, illegal but also were not in conformity with rules, regulations and law. The impugned orders deserve to be set aside. The applicant would have been entitled to pension on completion of 15 years of service, had he not been discharged illegally. We are of the considered view that the applicant shall be notionally treated in service till he would be entitled for service pension. In view of the facts and circumstances of the case, the applicant shall not be entitled for back wages from the date of discharge to the date he reaches pensionable service. However, the applicant shall be entitled to terminal benefits and pension as per Pension Regulations for the Army, 1961 along with 9% interest on arrears.

ORDER

27. Thus in the result, the Original Application succeeds and is allowed. The impugned discharge order dated 13.04.2008 at Annexure-2 of the Original Application is set aside. The applicant shall be notionally treated in service till he would be entitled for service pension. The applicant shall not be entitled for back wages from the date of

discharge to the date he reaches pensionable service. The applicant shall be entitled to terminal benefits and pension as per Pension Regulations for the Army, 1961 along with 9% interest on arrears. The Respondents are directed to comply with the order within four months from the date of production of a certified copy of this order.

28. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice V.K. DIXIT)
Member (J)

Sry
Dated : Dec. 2015