

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****TRANSFERRED APPLICATION No. 7 of 2021**

Thursday, this the 27<sup>th</sup> day of January, 2022

**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**

14925501X Ex Sep Shashi Kumar Dwivedi, S/o Sri Dashrath Lal Dwivedi, R/o Malen Ka Pura, Post-Anapur, Tehsil-Soraon, District-Prayagraj (Allahabad).

..... Petitioner

Learned counsel : **Shri Rang Nath Pandey**, Advocate  
for the Petitioner **Shri Rahul Pandey**, Advocate

Versus

1. Union of India through Secretary, Ministry of Defence, Room No 101A, South Block, DHQ, PO-New Delhi-110011.
2. The Chief of Army Staff, IHQ of Ministry of Defence (Army), DHQ, PO-New Delhi-110011.
3. The General Officer Commanding-in-Chief, Command HQ, Eastern Command, C/o 56 APO.
4. The Commander, Head Quarter 111 Sub Area, PIN-908111, C/o 99 APO.
5. The Officer Commanding, 21 Mech Inf, PIN-911721, C/o 56 APO.

.....Respondents

Learned counsel for the : **Shri Rajiv Pandey**, Advocate  
Respondents Central Govt Counsel

**ORDER (Oral)**

1. This petition (O.A. No. 33 of 2020) was initially filed in the Hon'ble AFT, Principal Bench at New Delhi which was transferred to this Tribunal and re-numbered as T.A. No. 7 of 2021. The petitioner has prayed for following:-

- (a) *Direction to the respondents to set aside the impugned order dated 09.02.2008 passed by respondent No 4 (Annexure A-1).*
- (b) *The petitioner may be granted any other relief which this Hon'ble Tribunal deem appropriate, just and proper in the interest of justice and in the facts and circumstances of the case.*
- (c) *Award the cost of the O.A. to the petitioner.*

2. Based on averments made in the T.A., the petitioner was enrolled in the Army on 12.01.1999. On completion of military training, petitioner served in 21 Mech Inf of the Army. During his 09 years of service, he was awarded 05 punishments in the form of red ink entries, pay fine and detention in military custody on account of various charges like overstaying leave and disobeying lawful command given by his superior officer. This petition has been filed for quashing discharge order dated 09.02.2008 passed by respondent No 4.

3. Submission of learned counsel for the petitioner is that on some occasions petitioner overstayed leave granted to him during his visit to native place due to ailment of his aged father and also due to some unavoidable domestic compulsions, as his family was residing at his native place and the petitioner could

not shift his family due to exigencies of service. His further submission is that the petitioner was awarded punishments on trivial grounds which may have been avoided keeping in view of his domestic problems. His other submission is that no preliminary inquiry was conducted prior to issuance of Show Cause Notice dated 12.01.2008, as such punishment awarded without giving opportunity to the petitioner is in violation of principles of natural justice. He pleaded that discharge order dated 09.02.2008 be quashed.

4. On the other hand, submission of learned counsel for the respondents is that the petitioner proved himself time and again as indisciplined soldier and was awarded four red ink entries and one black ink entry. His further submission is that the petitioner was counseled time and again by his superiors and in the year 2003 when he was awarded third red ink entry for overstaying leave he was warned that further red ink entry would be unsafe for his future retention in service. A Show Cause Notice dated 12.01.2008 was issued to the petitioner and in his reply dated 18.01.2008 he requested that he be provided one more chance. Respondents counsel further submitted that after taking sanction from the competent authority, the petitioner was discharged from service in terms of Rule 13 (3) III (v) of Army Rules, 1954 as an undesirable soldier. He pleaded for dismissal of O.A.

5. Heard learned counsel for both the sides and perused material placed on record.

6. Written statement filed by the respondents clearly mentions that petitioner was tried summarily five times and awarded four red ink punishments and one black ink punishment by the Commanding Officer for the offences committed under various sections of the Army Act. Details of offences and punishments awarded to the petitioner are given as under:

Sr. No.	Date of offence	AA Sec under which punishment awarded	Date of award	Punishment awarded	Remarks
(i)	23.03.2002	Sec 39 (b)	06.05.2002	14 days RI	Red Ink Entry
(ii)	02.08.2002	Sec 63	14.08.2002	03 days pay fine	Black Ink Entry
(iii)	19.04.2003	39 (b)	19.07.2003	14 days RI & 14 days pay fine	Red Ink Entry
(iv)	26.06.2005	39 (b)	21.09.2005	07 days RI	Red Ink Entry
(v)	22.08.2007	39 (b)	22.11.2007	28 days RI and 14 days pay fine	Red Ink Entry

7. In respect of each of the above offences culminating in red/black ink entries, the charges against the individual were heard by the Commanding Officer in accordance with Army Rule 22 where the individual was given full liberty to cross examine the witnesses and make any statement in his defence and after following the due procedure appropriate punishment was awarded. It is thus, found that there was no illegality in the punishments awarded and the red/black ink entries earned. In

spite of being given ample opportunities to improve his conduct and military discipline, the petitioner had failed to bring out changes in his conduct of overstaying leave. The petitioner was suffering from 'Diffuse Gastritis with Gerd' and 'Somato Form Disorder' from the year 2004 and 2006 respectively. He was hospitalized and granted 28 days sick leave for the period 14.03.2006 to 10.04.2006, 56 days sick leave for the period 19.08.2006 to 13.10.2006 and 21 days sick leave for the period 07.11.2006 to 27.11.2006 in addition to his due leave. Thus, the petitioner's contention that he was not granted leave in time is baseless.

8. Relying upon this Tribunal's order dated 27.01.2017 passed in T.A. No. 77 of 2013, **Jainendra Kumar vs UOI & Ors**, order dated 21.07.2017 passed in O.A. No. 125 of 2013, **Abhishek Pandey vs UOI & Ors**, and the Hon'ble Supreme Court judgment in the case of **Vijay Shanker Mishra vs UOI & Ors**, reported in 2017 (1) SCC 795, learned counsel for the petitioner submitted that the petitioner be re-instated in service with all consequential benefits. We have gone through the above referred cases and find that facts of the aforesaid cases are different with the case in hand.

9. Vide para 4.7 of transferred application, learned counsel for the petitioner has submitted that since Show Cause Notice was issued without conducting preliminary inquiry, therefore procedure for discharge has not been followed as per Army HQ

letter dated 28.12.1988. We have thoroughly perused the Army HQ letter dated 28.12.1988 and we find that it has got no statutory force and cannot prevail over the statutory Rules and Regulations. The relevant Rules do not provide for holding of preliminary enquiry in a matter of discharge when the discharge is sanctioned on the basis of past service record of the petitioner.

10. In regard to non holding of preliminary enquiry prior to discharge from service, the Hon'ble Apex Court passed order dated 02.09.2019 in Civil Appeal No 1857 of 2018 in the case of **Sep Satgur Singh vs Union of India & Ors.** Para 7, 8 and 9 of the aforesaid judgment is reproduced as under:-

*"7. We do not find any merit in the present appeal. Para 5(a) of the Circular dated December 28, 1988 deals with an enquiry which is not a court of inquiry into the allegations against an army personnel. Such enquiry is not like departmental enquiry but semblance of the fair decision-making process keeping in view the reply filed. The court of inquiry stands specifically excluded. What kind of enquiry is required to be conducted would depend upon facts of each case. The enquiry is not a regular enquiry as para 5(a) of the Army Instructions suggests that it is a preliminary enquiry. The test of preliminary enquiry will be satisfied if an explanation of a personnel is submitted and upon consideration, an order is passed thereon. In the present case, the appellant has not offered any explanation in the reply filed except giving vague family circumstance. Thus, he has been given adequate opportunity to put his defence. Therefore, the parameters laid down in para 5(a) of the Army Instructions dated December 28, 1988 stand satisfied.*

*8. In reply to the show-cause notice, the appellant has not given any explanation of his absence from duty on seven occasions. He has been punished on each occasion for rigorous imprisonment ranging from 2 days to 28 days. A Member of the Armed Forces cannot take his duty lightly and abstain from duty at his will. Since the absence of duty was on several different occasions for which he was imposed punishment of imprisonment, therefore, the order of discharge cannot be said to be unjustified. The Commanding Officer has recorded that*

*the appellant is a habitual offender. Such fact is supported by absence of the appellant from duty on seven occasions.*

*9. In view thereof, we do not find any error in the order of discharge of the appellant. Appeal is dismissed."*

11. In this context we would also like to refer to the Hon'ble Delhi High Court judgment in the case of **Pratap Singh vs Chief of Army Staff and Ors**, LPA 136/2013, decided on 03.06.2011 which has held that no enquiry is required to be conducted when a person is being discharged from service with reference to his past service record. The relevant paragraphs of the aforesaid judgment are reproduced as under:-

*"8. ....Lastly it was urged that in view of the law laid down by a Division Bench of this Court in the decision reported as 100 (2002) DLT 705 Surender Singh Sihag vs UOI & Ors, without conducting an inquiry the service of the petitioner could not be discharged.*

*x x x x x x x x x x*

*14. The decision deals with the right of competent authority to discharge a force personnel who has earned 5 red ink entries, a power under Rule 13 of the Army Rules. The Division Bench noted that the army authorities had issued an administrative instruction by way of a letter circular dated 28.12.1988 which contemplated an inquiry before discharging or dismissing a person concerned.*

*15. The Division Bench took the view that no action could be taken under Rule 13 without an inquiry and since no inquiry was held against Surender Singh Sihag when his services were dispensed with by way of discharge pursuant to a show cause notice alleging against him that he had earned 5 red ink entries, the order was quashed.*

*16. But we find that the Supreme Court, in the decision reported as 2009 (7) SCC 370 UOI & Ors vs Deepak Kumar Santra, has taken a view contrary to the one taken by the Division Bench of this Court.*

*17. Pertaining to a discharge of an Army Officer exercising power under Rule 13 of the Army Rules, the Supreme Court held that once statutory Rules occupy the field, there is no place for a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters whether a policy guideline is not followed.*

*18. Relevant would it be to state that where a Rule deals with subject matter and the procedure to be*

*followed with respect to the subject matter is also prescribed by the Rule, there is no scope to issue a policy guideline with respect to the procedure to be followed.*

*19. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule.*

*20. That apart, it escaped the notice of the Division Bench of this Court as to what was the scope of the inquiry to be conducted if the power to discharge a force personnel was being exercised with respect to the service profile which shows that the person concerned had earned 5 red ink entries and the requirement of the rule was to consider whether such a person is required to be discharged from service.*

*21. Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.*

*22. We see no scope for any inquiry to be conducted where a person is being discharged from service with reference to his past service record.*

*23. x x x*

*24. Noting in the instant case that before taking the action a show cause notice was served upon the petitioner and after considering the reply filed by him the action was taken, meaning thereby procedures of the law were followed. We dismiss the appeal but refrain from imposing any cost."*

12. The Hon'ble AFT, Principal Bench, New Delhi in T.A. No. 592 of 2010 decided on 08.02.2012, titled **Ex Sep Ahibaran Singh vs Union of India & Ors**, has held that main object and aim behind the said inquiry is to find out the existence of punishments, which has not been disputed by the applicant. Therefore, holding of inquiry was not necessary. It was also held that the applicant was in the zone of being declared habitual offender and he filed reply to the show cause notice and after considering his reply, the impugned order was passed.

13. Additionally, this Tribunal vide order dated 13.11.2014 while dismissing T.A. No 1442 of 2010, titled **Upendra Kumar**

**Singh vs UOI & Ors**, has held that a preliminary inquiry is not mandatory prior to issue of show cause notice. Paras 25, 26 and 27 of the aforesaid judgment are reproduced as under:-

*"25. The punishments awarded earlier to the applicant were not challenged and the same have attained finality. The preliminary enquiry is conducted in respect of disputed facts, but in the instant case, the facts are not disputed and under these circumstances, there was no scope for conducting preliminary enquiry before issuing show cause notice to the applicant. The administrative action under Rule 13(3)(III)(v) of the Army Rules, 1954 has been taken by the competent authority on the basis of previous service record of the applicant and there was no need to hold preliminary enquiry as provided in Army Headquarters Letter dated 28.12.1988, particularly, when relevant statutory Rule does not provide for holding such preliminary enquiry.*

*26. The discipline is required to be maintained in the Indian Army. The past service record of the applicant indicates that he was a habitual offender. The competent authority, after considering the past service record of the applicant, came to the conclusion that he is an undesirable soldier and hence, he has taken appropriate action against him, after following the prescribed procedure.*

*27. After considering the record thoroughly, we are of the view that the competent authority had sanctioned the discharge of the applicant from service after following the prescribed procedure as provided in the relevant Army Rules. Relying upon the decisions rendered by the Division Bench of the Hon'ble Delhi High Court, Principal Bench of the Armed Forces Tribunal and this Regional Bench of the Tribunal, in the cases of Pratap Singh vs. Chief of Army Staff & others (supra), Ex Sep Ahibaran Singh vs. Union of India & others (Supra) and Rajesh Kumar Awasthi vs. Chief of Army Staff & others (supra), we hold that under the facts and circumstances of the case, preliminary enquiry was not mandatory before issuing show cause notice to the applicant and no interference is warranted in the impugned discharge order on the said ground. The applicant has himself alleged in the instant Transferred Application that the Army Headquarters Letter dated 28.12.1988 has no statutory force of law and the said letter cannot supersede the provisions of law laid down in the Army Rules and Regulations.*

14. The competent authority issued a Show Cause Notice dated 12.01.2008 to the petitioner as per the provisions of Rule 13 (3) III (v) of the Army Rules, 1954 and policy letter dated 28.12.1988 issued by the Army HQ. The applicant submitted a reply to the said show cause notice, and it was after due consideration of the reply given by the applicant, the competent authority passed the discharge order to be discharged from service w.e.f. 10.02.2008 under the provisions of Rule 13 (3) III (v) of the Army Rules, 1954. The policy letter dated 28.12.1988 cannot override statutory rule as it is only to supplement and not to supplant. In his reply dated 18.01.2008 the petitioner though mentioned that he wanted to serve further but he has not disputed that he was not punished previously for his mistakes mainly on account of overstaying leave. Extracts of Show Cause Notice and reply received from petitioner are reproduced as under:-

SHOW CAUSE NOTICE

*"1. It has been intimated to us by 21 MECH INF vide their letter No 14925501X/SKD/A dt 31 Dec 2007 that you have been awarded four red ink entries and one black ink entry during military service which is a bad example for other personnel of the unit. Counseling, warning and punishment seem to have no impact on your conduct in the Army. In accordance with Integrated HQ of MoD (Army) letter No A/13210/159/AG/PS-2 (C) dated 28 Dec 1988 and Army Rule 13 (3) (III) (v) you are being declared as undesirable soldier, unfit for mil duty.*

*2. You are likely to be discharged locally being an undesirable soldier.*

*3. In view of the above, you are hereby called upon to show cause as to why your service should not be terminated in terms of letters quoted at para 1 above.*

4. *Your reply to this 'Show Cause Notice' should reach this office within 15 days from the date of receipt of this Show Cause Notice i.e. by 27 Jan 2008."*

*"Reply to Show Cause Notice*

*Humbly requested that petitioner service No 14925501X Shashi Kumar Dwivedi is posted to 21 Mech Inf Bn since last 9 years. Due to the personal problem of the petitioner he has been awarded punishment of 4 red ink entries and one black ink entry earlier but even today petitioner honour the force as he has honored at the time of recruitment. I have joined the army with proud and even today give full respect. It is not out of place to mention here that my blood has also become OG colour, and inspite of facing multiple problems I have trust on my unit and consider it as my home and no any member of a home can be ousted like this. Sir, I have fully devoted myself for Army and I was born also for Army only and wish to die as a soldier. But due to misbehavior done by the unit about which I informed to Commanding Officer, and first time my heart has been broken towards the unit but still I have faith and enthusiasm towards Army. But I am not able to express the same in this unit because I never got justice from this unit and my good works have been ignored.*

*Sir, I may be deployed anywhere out of the unit whether it is High Altitude or CI Operation Area, I volunteer to serve anywhere but I may be posted from this 21 Mech Inf Unit to elsewhere I will serve with dignity in the Army. Petitioner have faith on your decisions and justice so before taking any decision please afford me any opportunity to hear my submission so that I be able to share as an example to everyone.*

*At last petitioner humbly request that please afford a chance to the petitioner."*

15. Thus, from the above, an inference may be drawn that after receipt of Show Cause Notice dated 12.01.2008, petitioner submitted his reply dated 18.01.2008 in which he himself admitted award of four red ink entry punishments but requested to be posted out from his parent unit apprehending that he would not get justice in the unit.

16. Military discipline is a state of order and obedience existing within a command and maintenance of discipline is of

paramount importance in the Army. Being a habitual offender with no regard to military discipline and maturity, petitioner's retention in service was considered detrimental for the troops. Based on past record, a Show Cause Notice was served to petitioner by Commander, 111 Sub Area and after receipt of reply from the petitioner, order of discharge dated 09.02.2008 was passed.

17. In the light of the foregoing, we are of the view that the number of red ink entries alone is not the criteria for discharge under Army Rule 13 (3) III (v). Four red ink entries are only a guideline. The disciplinary conduct of the individual as reflected in the service record and the requirement of maintaining discipline would decide if services are no longer required. This is an administrative action resulting from an unsatisfactory service record of the petitioner. It cannot be construed as a punishment.

18. The individual was given ample opportunities to mend his ways and improve his conduct. It is not in dispute that he was tried summarily by then Commanding Officers and awarded punishments which were not challenged and by the pass of time they have attained finality. Further, he was advised several times to improve himself and mend his ways but he never paid any attention to the advice of his superiors and continued with committing offences like overstaying leave. Since he became a perpetual offender, his retention in the service was considered

inadvisable as he was setting bad example for others in the Unit.

19. We could lay our hands on a judgment of the Hon'ble Apex Court in ***Union of India & Ors v. Rajesh Vyas***, (2008) 3 SCC 386, which clinches the issue against the petitioner. It is also the case of red ink entries. The Hon'ble Apex Court has upheld the impugned order therein based on red ink entries. The relevant portion of the judgment is reproduced below:

*" That the red ink entries are for punishment higher in the scale of the punishment under Section 82 of the Air Force Act, 1982 (in short the 'Act') while the black ink entries are for punishment lower in scale in Section 82. The detailed actions and procedure which were required to be followed to implement the policy for discharge are given in the appendix to the policy which was known as the 'Procedure for Discharge". Habitual offenders who were not found suitable for retention in service were initially placed in two categories, (a) habitual offenders who have already crossed the criteria as laid down vide paragraph 4(a), (b) and (c) of the policy guidelines, and (b) offenders who are on the threshold. Warning had to be given as per the procedure to an Airman who was on the threshold and he was called upon to improve his conduct and behaviour and that in case he committed any further offence, and came within the purview of an habitual offender, he would be liable to be discharged. In case he commits any further offence then would be given a show cause notice and, thereafter discharge was to be ordered by the competent authority under Rule 15(2) (g)(ii).*

*As noted above, policy for discharge of habitual offender was considered by this Court in A. K. Bakshi's case (supra). After analyzing the policy, it was observed that the whole idea underlying the policy was to weed out the indisciplined personnel from the force. It was further observed that it was a discharge simplicitor and as such it cannot be held as termination of service by way of punishment for misconduct."*

20. In light of above facts, we find no reason to interfere with the discharge order of the petitioner which was ordered as per procedure on the subject. The O.A. is **dismissed**.

21. There shall be no order as to costs.

22. Pending application(s), if any, stand disposed off.

**(Vice Admiral Abhay Raghunath Karve)**  
**Member (A)**

**(Justice Umesh Chandra Srivastava)**  
**Member (J)**

Dated: 27<sup>th</sup> January, 2022  
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