

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No 389 of 2021

Monday, this the 06th day of November, 2023

“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”
“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”

No. 14407582X Ex Gunner / DMA Kaleshwar Sah, Son of Jogendar Sah Residing at Village: Arangi Post: Usia, Tehsil: Jamania District: Ghazipur (UP)

..... Applicant

Ld. Counsel for the Applicant : **Col Ashok Kumar (Retd),
Shri Rohit Kumar, Advocates**

Versus

1. Chief of the Army Staff, DHQ PO, New Delhi - 110011.
2. Commandant - cum - Chief Record Officer and Centre Artillery Centre and Records Nasik Road Camp, Maharashtra.
3. Union of India Through Secretary Ministry of Defence New Delhi - 110011.

..... Respondents

Ld. Counsel for the Respondents : **Shri Amit Jaiswal,
Central Govt. Counsel.
Assisted by Maj Danish Farooqui
Departmental Representative for the
respondents.**

ORDER**“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”**

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

- “(a) To quash the rejection order signed by Capt, Records Officer, for, OIC Records Artillery Records, bearing No. 14407582X/T-13/UD/2019/NE-1 dated 24 Sept 2019 (-though the statutory complaint was addressed to the Chief of Army Staff - received by the counsel for the applicant on 23 Nov 2020 through the Counsel for the respondents) with all the consequential benefits to the applicant.*
- (b) To quash the premature discharge order bearing case file No. CF/14407582X/KS/A3 dated 21 Sept 2005 with all the consequential benefits to the applicant.*
- (c) Direct the respondents to treat the applicant in service till completion of minimum pensionable service, and transfer to pension establishment with all the consequential benefits to the applicant.*
- (d) To issue any other order or direction considered expedient and in the interest of justice and equity.*
- (e) Award cost of the petition.”*

2. The facts of the case, in brief are that applicant was enrolled in the Indian Army on 22.05.1992. He was awarded Rigorous Imprisonment in Military custody twice on 12.10.1998 and 05.05.2003 under Section 354 of IPC for using criminal force to a woman. He was dismissed from service on 21.09.2005. Applicant submitted Statutory Complain for reinstatement in service which was rejected vide letter dated 24.09.21019. Being aggrieved, the applicant has filed instant Original Application.

3. Learned Counsel for the applicant submitted that applicant was tried by Summary Court Martial (SCM) on 12.10.1998 under Section 69 read with Section 354 of IPC and he was awarded three months Rigorous Imprisonment (RI) in military custody violating the procedural safeguards and also without providing copies of all the documents as required under Army Order 51 of 1997 and Rule 147 of Army Rules 1954. He was again tried by SCM on 05.05.2003 and was awarded three months RI without providing copies of all the documents and also infringing the procedural safeguards. He was served with a Show Cause Notice dated 26.07.2005 to which he submitted his reply. His reply to Show Cause Notice was not considered and applicant was dismissed from service under Section 20 of Army Act 1950 read in conjunction with Rule 13 (3) Item III (v) of the Army Rules 1954 vide discharge order dated 21.09.2005. Learned counsel for the applicant submitted that

applicant was in low Medical Category, hence he should have been discharged on medical ground. He was having more than 13 years of colour service to his credit. He was dismissed from service violating principles of natural justice as well as Army Headquarters policy letter dated 28.12.1998. Preliminary enquiry before dismissing the applicant from service was not done in prescribed manner, hence dismissal of the applicant is not sustainable in the eye of law. Learned counsel for the applicant pleaded that discharge order dated 21.09.2005 passed by the respondents be set aside and applicant be reinstated in service.

4. On the other hand, learned counsel for the respondent submitted that applicant was a habitual offender having committed two offences with red ink entries during 13 years and 4 months of Army service. The policy letter dated 28.12.1988 enunciates that an individual who earns four red ink entries is considered as 'undesirable and inefficient' and such person may be dismissed from service after issuing a show cause notice. The case of the applicant being 'undesirable' was referred to the competent authority. A show cause notice dated 26.07.2005 was issued by Commandant, Artillery centre, Nasik Road Camp to explain the reason as to why his services should not be terminated to which he submitted his reply vide letter dated 01.08.2005. The competent authority after due consideration and completing all procedures as required by military

law sanctioned his discharge and applicant was discharged from service on 21.09.2005 being an undesirable soldier. He prayed that prescribed procedure was followed before discharging the applicant. Therefore, O.A. deserves to be dismissed.

5. We have heard learned counsel for the parties and perused the record.

6. It is not in dispute that at the time of dismissal, the applicant had already put in 13 years and 04 months of service. From perusal of record it transpires that in reply to show cause notice, the applicant has promised to serve with full devotion and discipline. He prayed that he should be given opportunity to complete pensionable service. It also appears that the applicant would have been entitled to pensionary benefits after 15 years of service.

7. The provision contained in policy letter dated 28.12.1988 for supply of preliminary inquiry report seems to be in tune with the constitutional spirit as affirmed by Constitution Bench in the case of ***Managing Director Ecil vs. B.K Karunakaran***, (1993) 4 SCC 727. In show cause notice it is nowhere mentioned that inquiry report was also handed over along with show cause notice. Perusal of preliminary enquiry, reveals that the applicant was not present there, as there are no signatures of the applicant on the said preliminary enquiry. Obtaining signatures of the delinquent on the Enquiry was

must to lend authenticity to the proceedings which was the bone/pillar of judicial system. This vagueness in the notice is clear breach of the policy letter of the Army Headquarter dated 28.12.1988, a copy of which has been produced before us. Para 5 (d) of the said policy letter of Army Headquarters states that the show cause notice should cover the full particulars of cause of action against the individual. A copy of the proceedings of the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge. Apart from it, Note No. 2 of the policy letter is also relevant. It reads as follows:-

“2. discharge from service consequent to four red ink entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service, and the discharge should be order only when it is absolutely necessary in the interest of service.”

8. Para 5 of Army Headquarters Policy letter dated 28.12.1988 reads as under:-

Paragraphs 5. Subject to foregoing the procedure to be followed for dismissal/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 an 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 individuals service is warranted on the merits of the case.

(b) **Forwarding of recommendations.** The recommendation for dismissal or discharge will be forwarded, through normal channels, to the authority competent to authorise the dismissal or discharge, as the case may be, along with a copy of the proceedings of the enquiry referred to in (a) above.

(c) **Action by intermediate authorities.** Intermediate authorities through whom the recommendations pass will consider the case in the

light of what is stated in (a) above and make their own recommendations as to the disposal of the case.

(d) **Action by Competent Authority.** *The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is warranted, he should direct that a show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings of the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.*

(e) **Action on Receipt of the Reply to the Show Cause Notice.** *The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorize his dismissal/discharge together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.*

(f) **Final Orders by the Competent Authority.** *The authority competent to sanction the dismissal/discharge*

of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. If the competent authority considers that termination of the individual's service is not warranted but any of the actions referred to in (b) to (d) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactory, he will pass orders accordingly.

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

2. Discharge from service consequent to four red ink entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service, and the discharge should be ordered only when it is absolutely necessary in the interest of service. Such discharge should be approved by the next higher commander.

9. The decision of the Delhi High Court passed in the case of ***Surinder Singh Sihag Vs. Union of India and Others***, and ***All India Services Law Journal***, 2003 (2), page 154 states that the procedure provided in the policy letter dated 28.12.1988 is required to be followed. In the case in hand, we find that applicant has put in more than 13 years of service and he was to acquire pensionary entitlement after putting in total 15 years of service. The policy letter also provides that even if there are four red ink entries awarded to the person, discharge/dismissal is not mandatory and mind has to be applied by the concerned authority to the length of service. The only procedural safeguard provided under these provisions is the issuance of a show cause notice for obtaining the explanation of the individual concerned. It is for this reason it appears that para 5 (d) of the policy letter dated 28.12.1988 requires that the show cause notice must be specific and supported by sufficient details to enable the individual to understand and reply to them. Non-compliance with the requirement would vitiate the order of dismissal/discharge passed against the applicant.

10. Army Headquarter Policy letter No 48931/AG/DV-1 (P) dated 25.06.1999 deals with discharge and dismissal. Relevant para of said letter reads as under:-

1. While examining a Post Confirmation Petition under AA Section 164 (2), it was revealed that an OR having five

red ink entries was tried by a Summary Court Martial for an offence of overstaying of leave by 20 days and awarded the sentence of "Dismissal". The said individual has about 13 years of service to his credit at the time of trial. In this case the punishment of dismissal appeared to be harsh when compared to the nature of offence. Perhaps, the Court considered the previous record of service as the dominating factor to determine the sentence vis a vis the merit of a particular act of omission or commission for which the individual was being tried.

2. In such situations where the individual has more than four red ink entries it is most appropriate to examine the case under Army Rule 13 on its merits for discharge instead of awarding a sentence of dismissal which is strikingly disproportionate to the nature of offence.

3. The contents of this letter may be disseminated down to unit commanders.

Sd. X x x x

11. It is also to be noted that the policy letter provides that discharge/dismissal is required to be ordered only when it is absolutely necessary. The authorities can, under clause (b), (c), and (d) of para 2 of the policy letter take lenient action such as transfer of an individual or reducing him to lower rank. In view of the fact that the applicant had already put in more than 13 years of service as such inflicting such a harsh punishment is against the doctrine of proportionality as also does not conform to the requirement of the policy letter, the order of discharge passed against the applicant is

arbitrary and cannot be sustained. In similar matters, Hon'ble Apex Court in Civil Appeal D. No. 32135 of 2015, ***Virendra Kumar Dubey Versus Chief of Army Staff***, this Tribunal in O.A. No 168 of 2013 ***Abhilash Singh Kushwaha versus Union of India*** and in T.A. No 1288 of 2010, ***Chandra Bhushan Yadav Vs Union of India*** have quashed the punishment and reinstated the applicants in service.

12. In the result, we partly **allow** the application and quash the impugned discharge order dated 21.09.2005 and rejection order dated 24.09.2019. The applicant shall be treated to be in service notionally till the date of attainment of required qualifying pensionable service, for which he shall not be paid back wages on the principle of 'no work no pay'. From the date of attainment of such qualifying service for pension, the applicant shall be entitled to pension of the rank held at the time of dismissal and all other associated benefits (ECHS, CSD, ESM status) in accordance with law and rules. We clarify that the applicant shall not be paid salary during the period of notional service. Due to law of limitation arrears of pension shall be restricted w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 01.02.2021.

13. Let the entire arrears of pension be paid to the applicant within the period of four months from the date of communication of order. If the same are not paid within the time stipulated, then the

respondents shall also be liable to pay interest at the rate of 8% per annum on the amount due from the date of its accrual till the date of its actual payment.

14. The Registry is directed to provide a copy of this order to learned counsel for the respondents for its onwards transmission and necessary compliance.

15. No order as to costs.

16. Learned counsel for the respondents orally submitted to grant Leave to Appeal against the above order which we have considered and no point of law of general public importance being involved in the case the plea is rejected.

(Vice Admiral Atul Kumar Jain)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated: 06th Novembers, 2023
UKT/-