Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION NO 888 OF 2010

Tuesday, this the 4th day of July 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

(Ex-Sepoy-Cook) Ranbir Singh, son of Late Shri Ramjilal, resident of village Paisai Nagla Roondh, P.O. Chokda, Teh- Etamadpur, District Agra, U.P.

…. Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. G.O.C., MB Area, Jabalpur, MP.
4. Commander, 90 Infantry Brigade, c/o 56 APO.
5. The Commanding Officer, 13 Sikh Regiment, C/o 56 APO.

…..Respondents

Counsel for petitioner: **Shri Yash Pal Singh**, Advocate.

Counsel for respondents: **Shri Yogesh Kesarwani** assisted by Maj Salen Xaxa, OIC Legal Cell

ORDER (ORAL)

1. Being aggrieved with the impugned order of discharge from service dated 04.11.2003, the petitioner preferred Writ Petition No. 18097 of 2006 (S) in the High Court at Jabalpur which has been transferred to this Tribunal in pursuance to provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and has been renumbered as Transferred Petition No. 888 of 2010.

2. We have heard Shri Yashpal Singh, learned counsel for the petitioner and Shri Yogesh Kesarwani, learned counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

3. A recruitment rally was held in November 1995 for screening of soldiers (GD) and solider (Tradesman) for enrolment in Sikh Regiment against unit Headquarters Quota. Applications were invited. The petitioner submitted his application dated 18.09.1995 (Exhibit-1 to counter affidavit) and applied for enrolment in Sikh Regiment for soldier (Tradesman) declaring his address as of village and post Sudhir, Tehsil Kangra, district Dharmashala, Himanchal Pradesh. He was found to be fit for enrolment; hence call letter was issued to him to report at Sikh Regimental Centre. Call letter was posted to his Himanchal Pradesh address (Exhibit 2 to the counter

affidavit) The petitioner declared his domicile address of Himanchal Pradesh though he belonged to district Agra of State of Uttar Pradesh as claimed by him.

4. Learned counsel for the respondents submits that it is not the place of duty but the residential certificate which should have been taken into consideration for utilization of vacancies of particular State. However, the petitioner stated that he belonged to district Agra, State of Uttar Pradesh and mentioned his home address of Agra along with character certificate and other details duly verified by authorities of home address at Agra. Preliminary medical examination was held on 23.11.1995. There also, according to learned counsel for the petitioner, the petitioner has disclosed his address at Agra. In pursuance thereto, the petitioner was enrolled as Sepoy/Cook and posted at 13, Sikh Regiment on 01.01.1996.

5. Learned counsel for the respondents further submits that the height of the petitioner was 159 cms. (Exhibit 4 to the counter affidavit). For the hill areas, the height prescribed is 158 cms. Whereas for the plains, the height prescribed is 165 cms. To avail the benefits of concession in height of hill areas, the petitioner is alleged to have given his address of Himanchal Pradesh. In any case, the petitioner was enrolled and after due training was assigned unit. He also participated in Kargil operation and according to

learned counsel for the petitioner; petitioner's performance of duty in Kargil was exemplary.

6. A Court of Inquiry was held in the year 1998 to investigate irregularities committed during recruitment on the basis of a complaint. In the Court of Inquiry, it is alleged that it was found that the petitioner has given address of Himanchal Pradesh. After issuing show cause notice in pursuance of findings of the Court of Inquiry, the petitioner was discharged from service by the impugned order dated 04.01.2003. Statutory complaint filed by the petitioner remained pending in consequence to which the petitioner approached the High Court by filing a Writ Petition (supra) which has been transferred to this Tribunal.

7. While assailing the impugned order of discharge, learned counsel for the petitioner invited attention to Section 122 of the Army Act, 1950 which provides that a person, in the present case a soldier having exemplary record, could not have been discharged on account of alleged fraud in case satisfactory period of service rendered by him is more than three years. Admittedly, the petitioner has served for eight years at the time when he was discharged from service with effect from 04.11.2003.

8. Learned counsel for the petitioner invited attention of the Tribunal to final judgment/order dated 03.02.2016 passed in Original

Application No. 139 of 2015 Sep/Mt Sunil Kumar Singh vs. The Union of India and others. The provisions of Section 122 of the Army Act, 1950 has been considered in the case of Sunil Kumar Singh (supra) and findings recorded thereof are reproduced as under:-

> *"19. Attention has been invited by Ld. Counsel for the applicant to Section 122 of the Army Act which deals with the period of limitation of trial which commence from the date of offence. Sub Section 4 of Section 122 of the Army Act provides 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. For convenience sake Section 122 of the Act is reproduced as under :-*
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> *"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 offence; or*
>
> *(b) where the commission of the offence was known to the period aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or*
>
> *(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.*
>
> *(2) The provision of sub section (1) shall not apply to a trial for an offence of desertion of fraudulent enrolment or for any of the offences mentioned in section 37.*

(3) In the computation of the period of time mentioned in sub –section (1), any time spent by such person as a prisoner of war, or in enemy territory or in evading 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".

(Emphasis supplied)

20. It is vehemently argued by Ld. Counsel for the respondents that provisions contained in Section 122 of the Army Act relates to counting the period of limitation for trial. No doubt had note of section 122 of the Army Act speaks of period of limitation for trial, but sub-section (4) of Section 122 (supra) provides that after three years of service a non commissioned officer like soldier in the present case shall not be tried for any fraudulent act in case he or she has served the Army with unblemished record in exemplary manner for not less than three years. It is further argued by Ld. Counsel for the respondents that sub-section relates to trial and not discharge from Army and no show cause notice is required. The arguments advanced by Ld. Counsel for the respondents seem to be misconceived. We have to see the intent of the legislature. The intent of legislature should be inferred from the language and the entire statute must be read as a whole then section by section, phrase by phrase and word by word.

21. According to Maxwell, any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected. Relevant portion from Maxwell on the Interpretation of Statutes (12th edition page 36) is reproduced as under:-

> *"A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision,*

through extraordinary and perhaps an oversight, could not be eliminated."

*22. In AIR 2005 SC 1090**, Manik Lal Majumdar and others Vs. Gouranga Chandra Dey and others,** Hon'ble Supreme Court reiterated that legislative intent must be found by reading the statute as a whole.*

*23. In 2006 (2) SCC 670**, Vemareddy Kumaraswami and another Vs. State of Andhra Pradesh,**their Lordship of Hon'ble Supreme Court affirmed the principle of construction and when the language of the statute is clear and unambiguous court can not make any addition or subtraction of words.*

*24. In AIR 2007 SC 2742**, M.C.D. Vs. Keemat Rai Gupta** and AIR 2007 SC 2625**, Mohan Vs. State of Maharashtra**, their Lordship of Hon'ble Supreme Court ruled that court should not add or delete the words in statute. Casus Omisus should not be supplied when the language of the statute is clear and unambiguous.*

*25. In AIR 2008 SC 1797**, Karnataka State Financial Corporation vs. N. Narasimahaiah and others**, Hon'ble Supreme Court held that while constructing a statute it can not be extended to a situation not contemplated thereby. Entire statute must be first read as a whole then section by section, phrase by phrase and word by word. While discharging statutory obligation with regard to take action against a person in a particular manner that should be done in the same manner. Interpretation of statute should not depend upon contingency but it should be interpreted from its own word and language used.*

*26. House of Lord in the case of **Johnson Vs. Marshall, sons and Co. Ltd.** reported in (1906) AC 409 (HL) where the issue was whether the workmen was guilty of serious and willful misconduct their Lordships held that burden of proving guilt was on employer. Misconduct is reduced to the breach of rule, from which breach injuries actionable or otherwise could reasonably be anticipated is depend upon each case.*

*27. In the case of **Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal** Corporation reported in (1985) 2 SCC 35, (Para 5) Hon'ble Supreme Court has*

held that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct.

28. In the case of ***Union of India Versus J. Ahmed,*** *(1979) 2 SCC 286****,*** *Hon'ble Supreme Court has held that, deficiency in personal character or personal ability do not constitute misconduct for taking disciplinary proceedings.*

29. In the case of ***A.L. Kalara Vs. Project & Equipment Corporation*** *(1984) 3 SCC 316****;****Hon'ble Supreme Court has held that acts of misconduct must be precisely and specifically stated in rules or standing orders and cannot be left to be interpreted ex-post facto by the management.*

30. In the case of ***Rasik Lal Vaghaji Bhai Patel Vs. Ahmedabad Municipal Corporation,****(1985) 2 SCC 35, the apex Court has held that it is well settled that unless either in the certified standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and would not be comprehended in any of the enumerated misconduct. (Para 5).*

31. In case we see the intent of the legislature, the purpose of sub-section (4) of Section 122 of the Army Act is that Army personnel who are not officers should not be tried after three years in case they have served Army in an exemplary manner even if they have committed some fraud and the purpose of trial is to punish guilty persons.

32. Rule 17 of the Army Rules speaks for court martial which seems to not have been done in the present case. The proviso of Rule 17 mandates that all cases of dismissal or removal where the prescribed procedure has not been complied with shall be reported to the Central Government. Once a person cannot be convicted after due trial, then how he can be convicted by adopting administrative procedure has not been satisfactorily explained by the respondents. The statutory bar of trial under sub-section (4) of Section 122 of the Army Act means that a soldier may not be punished after three

years of exemplary service in the Army for defect in recruitment. Latitude given by the Parliament seems to be for the soldiers keeping in view that they belong to the lower rung of the Army and in view of the latitude given by the Parliament, it is not open for the Tribunal to record a finding otherwise. It is for the respondents to approach the Legislature for amending the provision of sub-section (4) of Section 122 of the Army Act."

9. In the aforesaid case we have held that legislature to its wisdom has created legal fiction providing that no action shall be taken against a person with regard to any fault in the enrolment who has rendered more than three years' of satisfactory service and also is not an officer of the Indian Army. The finding with regard to legal fiction has been recorded in para-33 of the aforesaid judgment. The same is reproduced as under:-

*"33. It is well settled that the Legislature is quite competent to create a legal fiction, in order words, to enable a deeming provision for the purpose of assuming existence of a fact which does not really exist provided the declaration of non-existent facts as existing does not offend the Constitution. Although the word 'deemed' is usually used, a legal fiction may be enacted without using that word. (See **CIT vs. Urmila Ramesh**, AIR 1998 SC 2640). While interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so constructing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. The principles stated above are well settled. A legal fiction may also be interpreted narrowly to make the statute workable. A legal fiction in terms enacted for purposes of this Act will cover the entire Act. (See **State of West Bengal vs. Sadam K. Bormal,** AIR 2004 SC 3666)."*

10. Apart from above, our attention has been invited to Section 43 of the Army Act, 1950 which provides that a person against whom allegation of fraud is raised for the purpose of fraudulent enrolment shall be tried by Court Martial. He/she, as the case may be, cannot be discharged merely on service of notice. The discharge shall be only on the basis of Court Martial. Admittedly, in the present case, no Court Martial was held and merely on the basis of report of Court of Inquiry and follow up notice, the petitioner has been discharged from service. For convenience sake, paras 34, 35, 36 and 37 of the judgment in Sunil Kumar Singh (supra) are reproduced as under:-

> *"34. Under Section 43 of the Army Act, a person committing fraud is required to be tried by court-martial. For convenience sake Section 43 of the Army Act is reproduced as under:*
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> ***"43. Fraudulent enrolment.—****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 corps or department or any part of the naval or air forces of India, or the Territory Army; or*
>
> *(b) is concerned in the enrolment in any part of the Forces or 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."

(Emphasis supplied)

35. In the present case, the provisions contained sub-section (4) of Section 122 of the Army Act are contrary to the provisions of Section 43 of the Army Act which provides initiation of court-martial proceedings for the for the offences enumerated therein. It means that exception has been given by the Legislature itself with regard to fraudulent enrolment and consequently action taken thereon. We feel that the provisions of sub-section (4) of Section 122 of the Army Act is exception to Section43 of the Army Act which goes to the root of the matter in the event of commission of fraud and in case Army personnel has served for more than three years in an exemplary manner, he may not be punished with order of dismissal in the garb of statutory power. In this view of the matter, the Army authorities are not empowered to proceed with trial in view of Section 43 of the Army Act.

36. Needless to say that policy letters are subordinate legislation and policy letters being subordinate legislation, or executive instructions cannot go against the statutory mandate of the Army Act. The provisions contained in the statute, i.e. the Army Act in question, is binding on the respondents and no guideline or policy letter may be issued against statutory provision unless the Act itself permits to do so.

37. Attention of the Tribunal has not been invited to any statutory provision in the Army Act, 1950 or the Rules framed there under which may indicate that the respondents have right to issue letter in contravention of the statutory mandate contained in the Army Act. Otherwise also, as we have observed above, dismissal without holding a regular inquiry is permissible, but that should be done with due communication to the Central Government and the notice may contain brief material facts to apprise the incumbent of the charges arraigned so that he may give reply to the show cause notice which seems to not have been done."

11. In view of law settled by the Tribunal in the case of Sunil Kumar Singh (supra), discharge of the petitioner merely on the basis of show cause notice, that too after lapse of three years' satisfactory service seems to be not sustainable and suffers from vice of arbitrariness. Discharge being in contravention of statutory mandate, vitiates.

12. A conceptus of our observations made above is that the O.A. deserves to be allowed.

13 It is accordingly allowed. Impugned order dated 04.11.2003 is set aside with all consequential benefits. However, we confine payment of back wages to 50% as admissible under the Rules. The petitioner shall be taken back in service on the rank which he held at the time of discharge for the purpose of restoration in service or for payment of post retiral dues, as the case may be. Let consequential benefits be provided to the petitioner expeditiously, say, within four months from the date of production of a certified copy of this order. OIC Legal Cell shall also communicate the order.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

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