

Court No. 1
Reserved Judgment

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

Original Application No. 290 of 2016

Thursday this the 18th day of January, 2018

Hon'ble Mr. Justice S.V.S.Rathore, Member (J)
Hon'ble Air Marshal B.B.P.Sinha, Member (A)

Harendra Vikram Singh (No. 14934995N Sep Ex), son of Dharvendra Vikram Singh, permanent resident of village Kheuti Post Office Nayagaon Mubarakpur District Hardoi (Uttar Pradesh)

..... **Applicant**

By Legal Practitioner: Shri Yash Pal Singh, Advocate
Learned Counsel for the Applicant.

Versus

1. Union of India through Secretary,
Ministry of Defence, Central Secretariat,
New Delhi-110001.
2. Chief of Army Staff, Integrated Headquarter, Ministry of
Defence (Army), DHQ, PO New Delhi 110011.
3. Deputy General Officer Commanding,
3 Infantry Division,
Pin 908403 C/O 56 APO.
4. Officer-in-Charge, Records, Mechanised Infantry Regiment,
Pin 900476, C/O 56 APO.
5. Commanding Officer, 11 Mechanised Infantry Regiment (18
Rajasthan Rifles), Pin 911711, C/O 56 APO.

..... **Respondents**

By Legal Practitioner: Shri VPS Vats,
Learned counsel for the Respondents

ORDER

Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

1. By means of this Original Application under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has made the following prayers :

“(a) Issue/passing of an order setting aside the order dated 15.01.2016 passed by the Officer-in-Charge, Records, Mechanised Infantry Regiment rejecting the statutory complaint dated 10.11.2015, and the order dated 18.10.2013 passed by the Deputy General Officer Commanding, 3 Infantry Division of the Army discharging the applicant from service.

(b) Issuing/passing of an order directing the respondents to reinstate the applicant with continuity of service and pay monthly salary regularly alongwith arrears thereof; and also provide all other consequential service benefits.

(c) Issuing/passing of any other order or direction as this Hon'ble Tribunal may deem fit under the circumstances of the case.

(d) allowing this Original Application with cost.”

2. In the instant case, the applicant had filed another O.A.No.259 of 2014 before this Tribunal. Vide order dated 13th October 2015, the said O.A. was disposed of with the consent of the learned counsel for the parties and the following order was passed :

“4. Accordingly, with the consent of Ld. Counsel for the parties dispose of the O.A. with a liberty to the applicant to file statutory complaint afresh within one month from today. In case such a statutory complaint is submitted by the applicant, the competent authority shall dispose it of expeditiously, say, within three months from the date of presentation of a certified copy of this order, by a reasoned and speaking order ignoring the delay in filing the statutory complaint and shall communicate the decision to the applicant.”

3. In compliance of the said order, the statutory petition filed by the applicant was dismissed vide order dated 15.01.2016. Feeling aggrieved by the said order, the instant O.A. has been preferred.

4. In brief, the facts necessary for the purpose of the instant O.A., may be summarised as under.

5. The applicant was enrolled in the Army on 07.10.2003 as a Soldier (GD) Driver. During his service period on five occasions, he overstayed leaves for which punishment of imprisonment was inflicted on him. On 29.10.2012 a show cause notice was issued to the applicant showing four red ink entries against the applicant. In reply to the said show cause notice, the applicant explained the compelling family circumstances and domestic problems as reason for overstaying the leave. The said reasons were neither deliberate nor intentional. The applicant prayed that in these circumstances, his case be considered for his retention in service. On 16.04.2013 the applicant was granted casual leave for 15 days, which was extended for 10 more days upto 10.05.2013 on the request of the applicant. However, despite his best efforts, he could not report to his unit within time. The applicant, for this over stay of leave, was again punished with seven days Rigorous Imprisonment. A show cause notice was issued on 30.09.2013 proposing to discharge the applicant alleging poor service record and that he was a habitual offender having five red ink entries. The applicant submitted his reply to this show cause notice explaining his family conditions, as reason for his over stay of leave. On 18.10.2013 on the direction of the Dy. General Officer Commanding-in-Chief, 3 Infantry Division, the applicant was discharged from service under Rule 13 (3) III (iv) of the Army Rules, 1954 and Army Headquarters letter dated 28.12.1988. Feeling aggrieved, the applicant preferred O.A., mentioned above, which was disposed of by a direction to the respondents to dispose of the statutory petition. The statutory petition of the applicant dated 10.11.2015 was rejected and the order of rejection was communicated by the Officer Incharge, Record, Mechanised Infantry Regiment. Feeling aggrieved thereby, the instant O.A. has been filed.

6. The submission of the learned counsel for the applicant is that in pursuance of the Headquarters Letter No.A/13210/159/AG/PSD2(c) dated 28.12.1988, the procedure prescribed for disposal of undesirable and inefficient JCOs, WOs and OR was not followed and no preliminary enquiry in this matter was conducted. Therefore, the order of discharge was arbitrary and illegal. In the impugned order dated 15.01.2016, it was stated that the matter was investigated by the Headquarter, 3 Infantry Division, but details of the said investigation have not been brought on record and even if it is presumed that any preliminary enquiry or investigation had taken place, then the applicant was not made a part of that. The aforementioned Army Headquarter letter provides for impartial enquiry into the allegation with the individual having adequate opportunity of putting up his defence.

7. During the course of arguments, we repeatedly asked the learned counsel for the respondents to give a specific reply whether any preliminary enquiry as envisaged under the aforementioned Army Headquarter letter, was conducted before passing the order of discharge, learned counsel for the respondents could not give any specific reply. However, he has drawn our attention towards a letter dated 30th July 2013 whereby the Record Officer has asked the competent authority to examine the matter in the light of the Army Headquarter letter dated 28th December 1988. Even in the counter affidavit, no specific plea has been taken on behalf of the respondents that any preliminary enquiry, as required under the aforementioned Army Headquarter letter, was conducted.

8. Before proceeding further, we would like to quote the procedure for dismissal. We may at this stage consider it appropriate to extract the relevant portion of the procedure prescribed for dismissal or discharge as under :

“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 enquiry. Before recommending discharge of dismissal of an individual the authority concerned will ensure :-

- (i) *That an impartial enquiry (not necessarily a Court of inquiry) has been made into the allegations against him and that he has had adequate opportunity or 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 on the merits of the case."*

9. A careful reading of the aforementioned procedure clearly shows that the officer competent to direct discharge or dismissal of an individual should not only issue a show cause notice, but an enquiry into the allegations made against the individual concerned, in which he must be given an opportunity of putting his defence and the allegation must stand substantiated for ordering of discharge. In the instant case, absolutely no enquiry has been conducted by the respondents before passing the order of discharge under Rule 13 (3) III (iv) of the Army Rules, 1954.

10. Learned counsel for the respondents has tried to satisfy the Court only on the basis of the show cause notice that the enquiry was conducted and the applicant was given an opportunity to put his defence. But this submission of the learned counsel for the respondents is devoid of merits.

11. Learned counsel for the applicant, in support of his submission, has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Veerendra Kumar Dubey v Chief of Army Staff** (2016 (2) SCC 627). The case of Veerendra Kumar Dubey (supra) was again considered by the Hon'ble Apex Court in the case of **Vijay Shanker Mishra vs. Union of India & ors** (Civil Appeal Nos.12179 and 12180 of 2016) decided on 15th December 2016. In the said judgment, the Hon'ble Apex Court in paras 7 and 8 observed as under :

*" 7 The issue which arises in the present case is not res integra. A Bench of three learned Judges of this Court including one of us (the learned Chief Justice) in **Veerendra Kumar Dubey v. Chief of Army Staff** held as follows :*

"10. The Government has, as rightly mentioned by the learned counsel for the appellant, stipulated not only a show-cause notice which is an indispensable part of the requirement of the Rule but also an impartial enquiry into the allegations against him in which he is entitled to an adequate opportunity of putting up his defence and adducing evidence in support thereof. More importantly, certain inbuilt safeguards against discharge from service based

on four red ink entries have also been prescribed. The first and foremost is an unequivocal declaration that mere award of four red ink entries to an individual does not make his discharge mandatory. This implies that four red ink entries is not some kind of Laxman rekha, which if crossed would by itself render the individual concerned undesirable or unworthy of retention in the force. Award of four red ink entries simply pushes the individual concerned into a grey area where he can be considered for discharge. But just because he qualifies for such discharge, does not mean that he must necessarily suffer that fate. It is one thing to qualify for consideration and an entirely different thing to be found fit for discharge. Four red ink entries in that sense take the individual closer to discharge but does not push him over. It is axiomatic that the Commanding Officer is, even after the award of such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects made relevant by the Government in the procedure it has prescribed."

This Court has in the above judgment construed the provisions of Rule 13 of the Army Rules, 1954 together with a letter of the Army Headquarters dated 28 December 1988 (bearing No. A/15010/150/AG/PS-2(c). Emphasising the factors which have to be borne in mind, this Court held thus :

"16. The procedure prescribed by the Circular dated 28-12-1988 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."

8 In the present case, it is evident that there was no application of mind by the authorities to the circumstances which have to be taken into consideration while exercising the power under Rule 13. The mere fact that the appellant had crossed the threshold of four red entries could not be a ground to discharge him without considering other relevant circumstances including (i) the nature of the violation which led to the award of the red ink entries; (ii) whether the appellant had been exposed to duty in hard stations and to difficult living conditions; (iii) long years of service, just short of completing the qualifying period for pension. Even after the Madhya Pradesh High Court specifically directed consideration of his case bearing in mind the provisions of the circular, the relevant factors were not borne in mind. The order that was passed on 26 February 2007 failed to consider relevant and germane circumstances and does not indicate a due application of mind to the requirements of the letter of Army Headquarters dated 28 December 1988 and the circular dated 10 January 1989."

12. Before proceeding further in the matter, we would like to quote para 5 of the aforementioned judgment, which reads as under :

"5 The contention of the appellant is that his discharge shortly before he would complete qualifying service for the grant of pension was grossly disproportionate. Moreover, reliance was placed on behalf of the appellant on circular No.0201/A/164/Admn-1 dated 10 January 1989 which provides as follows:

"Discharge from service consequent to four red 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".

13. Now in the aforementioned legal background, if the facts of the instant case are testified, then it is abundantly clear that the applicant was discharged from service only after issuance of show cause notice and receiving his reply. No enquiry at all was conducted in this matter. The purpose of such an enquiry is two folds. First to place a check on the arbitrary powers of the competent authority to order discharge or dismissal of an individual and on the other hand, it requires the competent authority to consider the circumstances, the length of service of the applicant, the effect of the order which the applicant would suffer, so that a reasonable and appropriate decision may be taken in this regard. Admittedly no such enquiry has been conducted in this case, which has rendered the impugned order unsustainable.

14. The applicant has more than ten years of service to his credit. He was discharged on 18.10.2013. He has not yet crossed the age of superannuation. A period of about five years has elapsed, since his discharge from the Army.

15. Thus, this Original Application deserves to be allowed and is hereby **allowed**. The impugned order of discharge dated 18.10.2013 passed by the Deputy General Officer Commanding, 3 Infantry Division and the order rejecting the statutory petition dated 15.01.2016 passed by the Officer-in-Charge, Records, Mechanised Infantry Regiment are hereby set aside. The applicant shall] be reinstated in service forthwith in the last rank he held at the time of discharge and he shall continue to be in service till he attains the qualifying service entitling him to pension for that rank. The applicant, for the aforesaid period of his service till reinstatement, shall get 30% of the salary and after completing the qualifying service entitling him for pension, he shall be paid all the financial benefits, to which the applicant is entitled after his retirement including pension. The respondents are directed to give

effect to this order within a period of six months from the date a certified copy of this order is produced before them.

No order as to costs.

(Air Marshal B.B.P.Sinha)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: January ,2018
PKG