

Reserved
Court No. 2

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 619 of 2017

Monday, this the 12th day of February, 2018

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

No. 2690055M Ex- Naik Anil Kumar S/o Shri Ved Prakash R/o
Village- Badnoli Mandiya, Post- Shrawa, District Hapur (UP)

....Applicant

Ld. Counsel for the: **Shri R. Chandra**, Advocate
Applicant

Versus

1. Union of India through, the Secretary, Ministry of Defence, Government of India, New Delhi-110011.
2. Chief of the Army Staff Integrated Headquarters New Delhi-110011.
3. The Officer-In-Charge The GRENADIERS Records PIN -908 776 C/o 56 APO.
4. The Commanding Officer 22 GRENADIERS C/o 99 APO.

.....Respondents

Ld. Counsel for the: **Shri Bhanu Pratap Singh, CGSC**
Respondents. Assisted by **Maj Rajshri Nigam**,
OIC, Legal Cell.

ORDER

Per Justice SVS Rathore, Member (J)

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

“A. The Hon’ble Tribunal pleased to quashed the Show Cause Notice dated 19/04/2010 (Annexure No A-1), Order dated 25/03/2017 (Annexure No A-2) be set. Further Discharge Order dated 30/04/2010 is summon from custody of the respondent and be set aside.

B. To direct the respondents to re-instate the applicant in the service with all consequent benefits as given to his batch mates with the interest of 24 percent per annum.

C. Any other appropriate order or direction which the Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case.

2. In brief, the facts giving rise to the instant OA may be summarised as under:-

The applicant was enrolled in the Indian Army on 29.08.1996 as a General Duty Soldier. On completion of basic military training, he was posted to 22 GRENADIERS on 07.08.1997. In the year 2008, he was promoted to the rank of Naik. It transpires from the record that during the tenure of service, he overstayed the leave several times, for which he earned six red ink entries and one black ink entry. Despite several warnings, the applicant failed to improve himself, hence he was issued a show cause notice on 19.04.2010 requiring him to submit his reply within seven days. The applicant submitted his reply on 23.04.2010. He was thereafter discharged from service on 30.04.2010 as per Army Rule 13(3) Item (III) (V) being “Service No Longer Required”. Till the date of discharge, the applicant had rendered 13 years, 08 months and 01 day of service in the Indian Army. In March 2011, the applicant approached 22 GRENADIERS to know about his pension. On 04.02.2017, the

applicant preferred a statutory appeal against his discharge on the ground of alleged procedural irregularities and illegalities committed by the respondents while dispensing with his service and requested for his reinstatement notionally. The respondents rejected the said appeal vide order dated 25.03.2017, stating that all procedures were followed.

3. The delay in filing the OA has already been condoned vide order dated 07.12.2017.

4. We have heard learned counsel for the parties at length and perused the record.

5. Submission of learned counsel for the applicant is that only on the basis of six red ink entry and one black ink entry, the applicant was discharged from service after giving a show cause notice and without conducting any preliminary enquiry as per Government Policy. It is further submitted that in para 9 of the counter affidavit, the respondents have admitted that in this case no written enquiry was held.

6. **Per contra**, learned counsel for the respondents has submitted that that a show cause notice was given to the applicant. He was punished seven times during his service tenure of 13 years, 06 months and 01 day. Several opportunities were given to the applicant for improvement, but he failed to improve himself and, therefore, after issuing a show cause notice, he was discharged from service as per Army Rule 13(3) Item (III) (V).

7. In reply, learned counsel for the applicant has submitted that the Government Policy dated 28.12.1988 is very clear on the subject that before dispensing with the services of a soldier, preliminary enquiry is a must and admittedly in this case no preliminary enquiry has been held. Learned counsel for the applicant has drawn our attention towards Para 5 of the said policy, which reads 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 or 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.”*

8. 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 discharge. In the instant case, admittedly no enquiry has been conducted by the respondents before passing the order of discharge as required under Army HQ order dated 28.12.1988.

9. 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.

10. 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."

11. 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".

12. Now, in the aforementioned legal background, when 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.

13. Thus, it is clear that no preliminary inquiry, as envisaged under Army letter/order dated 28.12.1988, on which the respondents have placed reliance, was conducted and without such an inquiry, the impugned order of discharge was passed against the applicant. The applicant had served for more than 13 years but before completing the qualifying service for pension, he was discharged from service on 30.04.2010. The applicant has attained the age of superannuation from Army; therefore, there is no question of his reinstatement in service. Thus, a period of about 08 years has lapsed since his discharge from Army. Since we are of the view that the discharge of the applicant from service was not in accordance with the established procedure for the Army, therefore, the shortfall in qualifying service of the applicant for getting pension deserves to be condoned.

14. Accordingly, this OA deserves to be allowed and is hereby **allowed**. The impugned order of discharge dated 30.04.2010 is set

aside. The applicant shall be treated to be in service notionally from the date of discharge 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 and all other associated benefits in accordance with law and rules. The respondents are directed to comply with this order within a period of four months from the date a copy of this order is produced before them. The entire arrears of pension shall be paid to the applicant within the aforesaid period of four months. If the same are not paid within the time stipulated, then the respondents shall also be liable to pay interest at the rate of 9% per annum on the amount due from the date of its accrual till the date of its actual payment.

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

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

February 12, 2018

LN/-

Form No. 4

{See rule 11(1)}
ORDER SHEET

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Cases of Court No.2 taken in Court No.1**O.A.No. 619 of 2017****Ex Naik Anil Kumar****Applicant**

By Legal Practitioner for the Applicant

Versus

Union of India & Others**Respondents**

By Legal Practitioner for Respondents

Notes of the Registry	Orders of the Tribunal
	<p data-bbox="586 1249 760 1284"><u>12.02.2018</u></p> <p data-bbox="586 1287 1352 1322"><u>Hon'ble Mr. Justice S.V.S. Rathore, Member (J)</u></p> <p data-bbox="586 1325 1305 1360"><u>Hon'ble Air Marshal BBP Sinha, Member (A)</u></p> <p data-bbox="683 1430 1032 1464">Judgment pronounced.</p> <p data-bbox="683 1486 932 1521">O.A. is allowed.</p> <p data-bbox="586 1548 1520 1642">For orders, see our judgment and order of date passed on separate sheets.</p> <p data-bbox="605 1766 1000 1843">(Air Marshal BBP Sinha) Member (A)</p> <p data-bbox="1086 1766 1474 1843">(Justice S.V.S. Rathore) Member (J)</p> <p data-bbox="586 1884 613 1903">LN/</p>