

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No. 272 of 2018**Thursday, this the 17th day of February, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

1. Smt Vimlesh W/o Late Prem Kishore
2. Ms Payal D/o Late Prem Kishore
3. Master Dushyant Kumar S/o Late Prem Kishore
4. Master Ajay S/o Late Prem Kishore
5. Mastser Sagar S/o Late Prem Kishore
6. Master Shvam S/o Late Prem Kishore

..... Applicants

Learned counsel for the : **Shri Rohit Kumar**, Advocate
Applicant

Versus

1. Chief of Army Staff, DHQ, PO-New Delhi-110011.
2. Commandant cum Chief Records Officer, Sikh Regimental Centre and Records, Ramgarh, PIN-908762, C/o 56 APO.
3. Union of India through, Secretary Ministry of Defence, DHQ, PO-New Delhi.

.....Respondents

Learned counsel : **Shri GS Sikarwar**, Advocate
Respondents Central Govt Counsel

ORDER (Oral)

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

(i) Quash the cryptic rejection order of the Senior Records Officer for Officer in Charge Sikh Regimental Centre bearing No 3390111/SR/NER-2 dated 03 Mar 2018 with all the consequential benefits to the applicant.

(ii) Quash the movement order issued by 13, Bn the Sikh bearing file No 1112/13S/A dated 03 Dec 2004 with all the consequential benefits to the applicant.

(iii) To issue any other order or direction considered expedient and in the interest of justice and equality.

(iv) Award cost of the petition.

2. Brief facts of the case are that No 3390111X Ex Sep (Safai) Prem Kishore was enrolled in the Army on 03.10.1988 and he was locally discharged from service w.e.f. 07.12.2004 under Rule 13 (3) III (v) of Army Rules, 1954. While serving in the Army at different parts of the country he was awarded 05 red ink entries from the year 1994 to 2004. Since he was short of 02 years, 07 months and 29 days of qualifying service, he was not granted service pension w.e.f. the next date of his discharge. Thereafter, he preferred an appeal dated 22.03.2006 to the respondents which when not decided he filed writ petition No 7668 of 2009 in the Hon'ble Delhi High Court which was decided on 23.03.2009 directing the respondents to decide his appeal and accordingly, vide order dated 26.10.2009 (Appendix C) the appeal was dismissed. On 30.09.2017 the ex soldier submitted a representation to Records, the Sikh

Regiment for grant of service pension but the same was denied vide letter dated 03.03.2018 (page 30 of paper book). Applicant's husband had filed this O.A. for grant of service pension but during the pendency of this O.A. he died on 17.06.2020 and present applicants were substituted vide order dated 15.10.2020.

3. Submission of learned counsel for the applicants is that on some occasion applicant's husband overstayed leave granted to him during his visit to native place due to unavoidable domestic compulsions, as his family was residing at his native place. His further submission is that the applicant's husband 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, as such punishment awarded without giving opportunity to the petitioner is in violation of principles of natural justice. He pleaded for quashing of discharge order/movement order dated 03.12.2004 and rejection order dated 03.03.2018 and grant of consequential benefits. In support of his contention learned counsel for the applicants has cited various judgments i.e. this Tribunal's judgment in T.A. No. 922 of 2010, **Arjun Singh**, T.A. No. 161 of 2010, **Ram Narayan Singh**, O.A. No. 168 of 2013, **Abhilash Singh Kushwaha**, Hon'ble Delhi High Court judgment reported in 2002 DLT 705, **Surinder Singh Sihag**, Hon'ble Delhi High Court judgment reported in Mil LJ 2005 Delhi 48, **Rajesh**

Kumar, Hon'ble J&K High Court judgment reported in 2009 (4) SCT 645, **Ex Tfn Tilak Raj**, Hon'ble Delhi High Court judgment in writ petition (c) No 3618 of 2010, **Rambir Singh vs UOI & Ors**, Hon'ble Delhi High Court judgment reported in 2009 (2) SCT 343, Hon'ble Delhi High Court judgment reported in 2003 (1) DLT 697, Hon'ble J&K High Court judgment reported in 2009 (3) SCT 1, Hon'ble Apex Court judgment in Civil Appeal D No 32135 of 2015, **Veerendra Kumar Dubey**.

4. On the other hand, submission of learned counsel for the respondents is that husband of the applicant No. 1 proved himself time and again as indisciplined soldier and was awarded five red ink entries under section 39 (b) of the Army Act, 1950 solely on the ground of overstaying leave. His further submission is that the applicant's husband was counseled time and again by his superiors and in the year 2002 when he was awarded fourth red ink entry for overstaying leave he was warned that further red ink entry would be unsafe for his future retention in service. After award of fifth red ink entry, a Show Cause Notice was issued to applicant's husband and thereafter, he was discharged from service being unsuitable/undesirable soldier after taking appropriate sanction from the competent authority. A movement order dated 03.12.2004 mentioning therein his date of struck of strength (SOS) from the Army w.e.f. 07.12.2004 was issued to him to proceed to his home town. He pleaded for dismissal of O.A.

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

6. In para 3 (C) of O.A. learned counsel for the applicants has conceded that applicant's husband was awarded five red ink entries on account of overstaying leave. Written statement filed by the respondents clearly mentions that applicant's husband was tried summarily five times and awarded five red ink punishments by different Commanding Officers for the offences committed under Section 39 (b) of the Army Act. Details of offences and punishments awarded to the petitioner are given as under:-

Offence	AA Sec	Punishment awarded	Date of award	Unit
OSL for 31 days (30.12.93 to 29.01.94)	39 (b)	14 days RI	02.02.94	HQ 8 Mtn Div Camp
OSL for 09 days (17.05.95 to 25.05.95)	39 (b)	14 days RI	03.06.95	HQ 8 Mtn Div Camp
OSL for 44 days (28.10.99 to 10.12.99)	39 (b)	14 days RI	31.12.99	13 SIKH
OSL for 873 days (22.03.2000 to 11.08.2002)	39 (b)	28 days RI and 14 days pay fine	05.09.2002	13 SIKH
OSL for 12 days (21.09.2004 to 02.10.2004)	39 (b)	07 days RI	07.10.2004	13 SIKH

7. In respect of each of the above offences culminating in red 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 punishments were awarded. It is thus, found that there was no illegality in the punishments awarded and the red ink entries earned. In spite of being given ample opportunities to improve his conduct and military discipline, the applicant's husband had failed to bring out changes in his conduct of overstaying leave.

8. Relying upon various judgments as enumerated in para 3 above, learned counsel for the applicants submitted that the applicant's husband was discharged from service without following due procedure as no preliminary inquiry was conducted which was mandatory prior to discharge in terms of policy 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 inquiry in a matter of discharge when the discharge is sanctioned on the basis of past service record (overstaying leave) of applicant's husband.

9. Additionally, in regard to non holding of preliminary enquiry prior to discharge from service, the Hon'ble Apex Court in the case of **Sep Satgur Singh vs Union of India & Ors**, Civil Appeal No 1857 of 2018 decided on 02.09.2019 has held 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."

10. 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.

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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."*

11. 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 preliminary inquiry was not necessary.

12. 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.

13. Applicant's husband was issued a Show Cause Notice and sanction to discharge him was obtained from the competent authority i.e. Brigade Commander 120 Infantry Brigade on 09.11.2004 (Annexure R-2). Accordingly, he was discharged from service w.e.f. 07.12.2004 (FN) and in the movement order it was also mentioned 'to proceed direct to home being undesirable soldier'. The policy letter dated 28.12.1988 cannot override statutory rule as it is only to supplement and not to supplant. Also, learned counsel for the applicants has not disputed that the deceased soldier was not punished five times on account of overstaying leave.

14. 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

applicant's husband and after following due procedure he was discharged from service as an undesirable soldier.

15. 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). Red ink entry is only a minimum punishment for an offence and guideline to improve one's conduct. 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 applicant's husband. It cannot be construed as a punishment.

16. The individual was given ample opportunities to mend his ways and improve his conduct. It is not in dispute that he was earlier 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 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.

17. 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 applicant's husband. 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."

18. The deceased soldier had rendered 16 years 02 months and 04 days service which includes a period of 02 years, 08 months and 24 days as non qualifying service. Thus, he had a qualifying service of 13 years, 05 months and 09 days only which does not qualify him for grant of service pension under

Rule 132 of Pension Regulations for the Army, 1961 (Part-I). Further, even if the provisions under Rule 125 of the aforesaid Pension Regulations are invoked for condonation of shortfall in service, nevertheless, he is still not eligible for pension since a maximum of one year period of deficiency in service may be condoned by the competent authority.

19. In the result applicants are not entitled to any relief as claimed.

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. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

Dated: 17th February, 2022
rathore

(Justice Umesh Chandra Srivastava)
Member (J)