

RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 226 of 2020

---, this the---day of July, 2023

Hon'ble Mr. Justice Ravindra Nath Kakkar, Member (J)

Hon'ble Maj Gen Sanjay Singh, Member (A)

Dharmendra Singh Bhadoria (No. 3000096W Ex Sepoy), Son of Om Pal Singh, Resident of : Near Gumti No. 151/B, Nekpur Chaurasi, Fatehgarh, District: Farrukhabad (Uttar-Pradesh)-209601.

..... Applicant

Ld. Counsel for the Applicant : **Shri Yashpal Singh, Advocate**

Versus

1. Union of India, through Secretary, Ministry of Defence, Central Secretariat, New Delhi - 110001
2. Chief of Army Staff, Integrated Headquarters, Ministry of Defence (Army), DHQ PO, New Delhi - 110011.
3. Additional Director General, Personal and Service, ADGPS (PS-5), AG's Branch, IHQ of MoD (Army), A Wing, Sena Bhawan, DHQ PO, New Delhi - 110 011.
4. Officer-in-Charge, Records, The Rajput Regiment, PIN -900427, C/o 56 APO.
5. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Prayagraj.
6. Commander, Headquarters 115 Infantry Brigade, PIN - 908115, C/o 56 APO.

..... Respondents

Ld. Counsel for the Respondents : **Shri Shailendra Sharma Atal, Central Govt. Counsel.**

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) Issuing / Passing of an order directing the respondents to notionally treat the applicant in service till completion of normal tenure of service in the rank he held at the time of discharge by setting aside his premature discharge from service with effect from 09.01.2008, and provide pension and all other consequential service / retiral benefits.

(ai) Issue / pass an order setting aside the order dated 08.01.2008 passed by the Commander, Headquarters 115 Infantry Brigade, after summoning the relevant records.

(b) Issuing / passing of any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.

(c) Allowing this Original Application with cost.”

2. There is delay of 11 years in filing of this Original Application. In this application prayer has been made to notionally re-instate the applicant in service and grant him service pension. In pensionary matters cause of action does not accrue on a fixed date. The matter being a case of continuing wrong, cause of action accrues from month to month. Considering this aspect and explanation of delay offered by the applicant being

sufficient, delay condonation application is allowed and delay in filing of application is condoned.

3. Brief facts of the case giving rise to this application are that the petitioner was enrolled in the Army in 10.09.1999. He was locally discharged from service on the ground of red ink entries on 09.01.2008 under Rule 13 (3) III (v) of Army Rules 1954 as an undesirable soldier after rendering 08 years and 4 months of service. The applicant submitted detailed representation to Chief of Army Staff for notional reinstatement in service and grant service pension. He was informed that since he has not completed minimum pensionable service of 15 years, he is not entitled for grant of service pension. Being aggrieved, applicant has filed this application petition for notional reinstatement in service till completion on normal tenure of service and provide pension and all other consequential benefits.

4. Learned counsel for the applicant further submitted that applicant during his service participated in various Army Operations such as Operation Parakram in Jammu and Kashmir, Operation Rhino in Assam and Operation Hifazat in Manipur. He was awarded SSM and Operation Parakram Medal. Applicant was discharged from service as an undesirable soldier for rendering red ink entries. While discharging the applicant, mandatory conditions as contained in Army Headquarters letter dated 28.12.1988 were not followed. Since he had not rendered minimum qualifying service of 15 years, he was not provided pensionary benefits as an ex-serviceman. Before discharge from service as an undesirable soldier the applicant was neither issued a show cause notice nor he was provided opportunity to defend himself nor provided any order of Brigade/ Sub

area Commander who was the competent authority to authorize discharge of the applicant. After filing of present Original Application, the order dated 08.01.2008 issued by the Commander Headquarters 115 Inf Bde discharging the applicant from service was brought on record. On perusal of order dated 08.01.2008 it reveals that although the order was passed under the provisions of Army Rule 13 (3) III (v) discharging the applicant from service, but there was no reference of Army headquarters letter dated 28.12.1988. The discharge order passed by the respondents is in gross violation of principles of natural justice, hence illegal, arbitrary, unreasonable and non speaking and therefore, not sustainable in the eyes of lawwas.

5. Learned counsel for the applicant submitted that discharge of the applicant from service is illegal keeping in view the judgment and order dated 23.09.2015 passed by this Tribunal in O.A. No 168 of 2013 Nk Abhilash Singh Kushwah versus Union of India and Others and judgment and order dated 16.10.2015 passed by Hon'ble Apex Court in Civil Appeal D No. 32135 of 2013, Veerendra Kumar Dubey versus Chief of Army Staff and others. Army Headquarters letter dated 28.12.1988 prescribes the procedure to be followed for disposal of undesirable and inefficient Junior Commissioned Officers, Warrant Officers and Personnel of Other Ranks.

6. Learned counsel for the applicant submitted that as per para 5 (a) of Army headquarters letter dated 28.12.1988, before recommending discharge of an individual the authority concerned will ensure that impartial enquiry has been made into the allegations against him and that he has been given opportunity of putting his defence or explanation and of

adducing evidence in his defence. It further provides that the authority concerned will also ensure 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. The recommendations for dismissal or discharge should then be forwarded through normal channels to the authority competent to authorize dismissal or discharge along with a copy of the proceedings of the preliminary inquiry. The intermediary authorities are required to make their own recommendations with regard to the disposal of the case. When the case reaches to the competent authority, the authority is required to consider the case, and if the authority is satisfied that the services of the individual are warranted to be terminated, then the authority would direct to issue the show cause notice to the individual in accordance with the Army Rules, 13 or Army Rules, 17 as the case may be. While issuing the show cause notice, the individual will also be given the copy of the preliminary inquiry report or other material against him to enable him to give reply to the show cause notice. The reply received from the individual will then be processed through normal channel to the competent authority. Thereafter the competent authority would pass the final order and while doing so it would record why the authority considers the retention of the individual unwarranted in service. In the instant case, before recommending the discharge of the applicant from service such procedure was not followed by the respondents as no preliminary enquiry was held nor opportunity of defence was afforded to the applicant. Learned counsel for the applicant pleaded that discharge order passed by the respondents be quashed and applicant be notionally reinstated in service with all consequential benefits.

7. On the other hand, learned counsel for the respondent submitted that army is primarily meant to defend the country from external aggression and this goal can be achieved with the superlative degree of discipline, moral character, which the Indian Army is known for. In the instant case, the applicant has been highly undisciplined soldier and a perpetual offender of deserting the service/ violating the oggd order and military discipline, which is detrimental to the overall discipline of the Indian Army. Minimum 15 years of qualifying service is required to earn service pension for those who are enrolled in the Army on regular terms of engagement under the provisions of para 132 of Pension Regulations for the Army 1961 (Part-1) which further stands revised vide para 47 of Pension Regulations for the Army 2008 (Part I). The applicant is not at all entitled for service pension as he had been discharged from service before completion of 15 years of service being an undesirable soldier. The applicant was a habitual offender having awarded 4 red ink entries within a short span of 8 years of service. The policy letter dated 28.12.1988 enunciates that an individual who earns four red ink entries in his entire service is considered as 'undesirable and inefficient' and such person may be discharged from service after issuing a show cause notice. The case of the applicant being 'undesirable' was referred to the competent by his unit. Discharge order was issued by Headquarters 115 Inf Bde vide letter dated 12.01.2008 and applicant was discharged from service from 09.01.2008. The competent authority after due consideration and completing all procedures as required by military law sanctioned his discharge from service and he was locally discharged from service on 09.01.2008 being an undesirable soldier having only 8 years of service. 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 documents available on record.

6. From perusal of record it transpires that before discharge, neither applicant was issued show cause notice nor any inquiry was held. It is not in dispute that at the time of discharge, the applicant had already put in more than 8 years of service. It also appears that the applicant would have been entitled to pensionary benefits after 15 years of service. Before discharge, There is no evidence that inquiry report was submitted to concerned authority. What is the precise nature of the Red Ink Entry and the offence for which those entries were given and the period to which they relate has not been elucidated. Learned counsel for the applicant submitted that it clear breach of the policy letter of the Army Headquarter dated 28.12.1988, a copy of which has been produced before us. In the said policy letter of Army Headquarters, para 5 (d) provides that 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. That apart, 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.”

7. Learned counsel for the applicant placed reliance upon the decision of the Delhi High Court in **Surinder Singh Sihag Vs. Union of India and Others**, and **All India Services Law Journal**, 2003 (2), page 154 in support of his contention and the procedure provided in the policy letter dated 28.12.1988 is required to be followed. In this case, we find that show cause notice was not issued to the applicant and no inquiry was held before discharging the applicant and we also find that the applicant has put in more than 08 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 is not mandatory and mind has to be applied by the concerned authority to the nature of the offences and length of service etc. 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 cover full particulars of the cause of action against the individual and the allegations 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 show cause notice.

8. Learned counsel for the respondents produced before us the record relating to the red ink entries awarded to the applicant. The record refers to four red ink entries. The record reveals that almost all entries against him are in respect of minor offences or for short absence. It is to be noted that the policy letter provides that discharge 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 nature of the entries and the fact that requirement of policy letter dated 28.12.2008 were not complied with, the order of discharge passed against the applicant is arbitrary and cannot be sustained.

9. In the result, we allow the application and quash the impugned order of discharge of the applicant dated 12.01.2008. The applicant shall be treated to be in service notionally in the same rank from the next 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 of the rank held and all other associated benefits (ECHS, CSD, ESM status) in accordance with law and rules. Applicant shall be granted pension from the date of attaining pensionable service. 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.

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

11. No order as to costs.

12. Pending applications, if any, stand disposed off.

(Maj Gen Sanjay Singh)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated: July, 2023

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