

RESERVED
Court No.3

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

Original Application No 147 of 2013

Tuesday, this the 17th day of November 2015

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

Ex. No. 1542093F Naik (Nursing Assistant),
V.K. Kushwaha, S/o Shri Prem Kumar Kushwaha,
R/o Village & Post Unchauri, Tehsil Saidpur,
DISTRICT GHAZIPUR (U.P.)

.....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.
2. Chief of Army Staff, Army Headquarters, DHQ, Post Office, New Delhi.
3. The General Officer Commanding, 9 Corps, C/o 56 APO.
4. The Station Commander, Station Headquarters, 21 Sub Area, C/o 56 APO.
5. The Commandant, 167 Military Hospital, C/o 56 APO.

...Respondents

Ld. Counsel for the : **Shri D.S. Tiwari, Central**
Respondents. **Govt Counsel assisted by**
Lt Col Subodh Verma,
Departmental Representative
for the respondents

“Hon’ble Air Marshal Anil Chopra, Member (A)”

1. This Original Application has been preferred by the applicant under Section 14 of the Armed Forces Tribunal Act 2007 with the following prayers :-

(i) The Hon’ble Tribunal may be pleased to quash the order dated 04 April, 2013 passed by respondent No. 4 (Annexure-A1).

(ii) The Hon’ble Tribunal may be pleased to direct the respondents to reinstate the applicant in service w.e.f. 04 April, 2013 alongwith arrears of salary, continuity of service and other service benefits etc.

(iii) 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. The brief facts of the case is that the applicant has challenged the order of discharge dated 04.04.2013 by which his services have been terminated under Section 20 (3) of the Army Act read with Army Rule 17 (**Annexure A-1**).

3. Ld. Counsel for the applicant submits that the applicant was enrolled in the Army in Army Medical Corps as Nursing Assistant on 17.09.2004 and in due course of time he was promoted to the rank of Naik. In the year 2005 the applicant was posted to 167 Military Hospital and he was assigned the duties in Central M.I. Room, Sujampur Cantt. On 25.04.2012 a complaint was made by

the Principal of the Army Public School, Pathankot wherein it was stated that on 23.04.2012 the applicant had given a chit in the hands of one Miss Soniya Salariya of Class 8th who had visited the M.I. Room as she was suffering from high fever. It was alleged that the chit contained the mobile number of the applicant. It was further alleged in the complaint that on 24.04.2014 the applicant had misbehaved with Miss Sohani. Again on 24.04.2012, the applicant had given his mobile number written on a chit to Miss Pooja of Class 12th. A copy of the complaint is marked as **AnnexureA-2**.

4. A Court of Inquiry was ordered on 23.04.2012. In the Court of Inquiry, the witnesses were examined in the absence of applicant and witnesses were made to sign on already written statement. No opportunity of cross examination was given to the applicant. However it was recorded in the proceedings of Court of Inquiry that the applicant was afforded opportunity to cross examine the witnesses. During the Court of Inquiry the provisions of Army Rule 180 were not complied with.

5. The applicant was issued notice on 15.01.2013 by Commandant 167 Military Hospital to show cause as to why his services be not terminated under Section 20 (3) read with Army Rule 17. It was stated in the Show Cause Notice that on perusal of inquiry the applicant has been found blameworthy for the lapses mentioned in the Show Cause Notice. Copy of the Show Cause Notice dated 15.01.2013 alongwith copy of Court of Inquiry is placed at **Annexure A-4**.

6. Reply to the Show Cause Notice was submitted by the applicant on 13.02.2013 and charges leveled against him were denied (**Annexure A-5**). The impugned order dated 04.04.2013 passed by the respondent No. 5 is illegal and arbitrary. The Court of Inquiry was held in utter disregard of the prescribed procedure and the applicant was not allowed to cross examine the witnesses. The impugned order of termination does not match with the Show Cause Notice, therefore, the order of termination of service is illegal. Before resorting to administrative action for termination of service of an individual, the authorities should have recorded reasons as to why they consider it impracticable to hold trial by a Court Martial. The applicant has completed more than 8 years of service. Charges were not established and the witnesses were not examined and he was not given opportunity to cross examine the witnesses. The applicant has been deprived by his livelihood and therefore he has approached the Hon'ble Tribunal.

7. On the other hand Ld. Counsel for the Respondents submitted that the applicant was posted with 167 Military Hospital since 05.06.2009 and was performing the duties of NCO I/C Central Medical Inspection Room, Sujapur. On 23.04.2012 few minor girls of Army Public School had reported sick to the M.I. Room where Nk VK Kushwaha was Nursing Assistant Incharge. He on the pretext of examination of the girls touched them inappropriately and solicited them by handing over his mobile number to the teenage girls. These girls in turn complained about

the incident to the Principal, Army Public School who forwarded the complaint to Station Commander 21 Sub Area. On the basis of above complaint a Staff Court of Inquiry was ordered by the Station Commander on 24.04.2012. Convening Order is at **Annexure (A)**. On conclusion of said Court of Inquiry the following lapses were established on the part of the applicant :-

(a) Deliberately and with ulterior motive gave his mobile number to Ms Sonia Salaria daughter of Naik Vijay Kumar of 10 Jammu and Kashmir Rifles and Ms Pooja Nandawale daughter of Naib Subedar PJ Nandawale, minor girls, in the month of April 2012 when they had gone to Central Medical Inspection Room, Sujampur to report sick.

(b) He on 16 Apr 2012, improperly carried out medical examination of Ms Komal Saini, daughter of Naik Subhas Chander, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Services of the Armed Forces, 2010. He also deliberately pinched her on right loin and her chest.

(c) He on 21 Apr 2012, improperly carried out medical examination of Ms Jyoti Singh, daughter of Havildar SK Singh of 106 Engineer Regiment, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Services of the Armed Forces, 2010.

(d) He on 21 Apr 2012 improperly carried out medical examination of Ms Suhani Chand, daughter of Shri Ajay Kumar, a minor girl in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Services of the Armed Forces, 2010. He also repeatedly touched her thighs with his hand and pushed her with his elbows.

(e) On 23 Apr 2012, improperly carried out medical examination of Ms Sonia Salaria, daughter of Naik Vijay Kumar, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Services of the Armed Forces, 2010.

8. Administrative action in the form of termination of service under Army Act Section 20 (3) read with Army Rule 17 was directed against the applicant. To give a fair justice to the NCO a Show Cause Notice, was served to the applicant and his reply was considered by Commandant 167 Military Hospital in higher hierarchy and was found to be devoid of any merit.

9. On seeing the background of the case and delicate nature of duties of a Nursing Assistant, particularly dealing with female patient and interest of the organization the service of applicant was terminated in accordance with the provisions of Army Act Sec 20 (3) read with Army Rule 17 by the competent authority.

10. Ld. Counsel for the Respondents further stated that in the Show Cause Notice (**Annexure CA-2**) the applicant was granted

30 days time to reply to Show Cause Notice. The full Court of Inquiry proceedings including remark of the General Officer Commanding were annexed. The reply submitted by the applicant was devoid of merit. The provisions of Army Act Section 20 (3) read with Army Rule 17 was applied and a Court of Inquiry was held. The applicant was given opportunity to cross examine each of the witnesses and the statement was recorded in his presence. Detailed record of each witness and the applicant is endorsed in the Court of Inquiry. Relevant extracts from the Court of Inquiry are placed at **Annexure CA-3**.

11. Misconduct of the applicant was established beyond reasonable doubt in the Court of Inquiry proceedings. The Show Cause Notice clearly mentioned the lapses on part of the applicant and after considering all issues in the reply of the applicant the order for termination of the services was passed. In the instant case considering the facts of the case, involving minor girls of teenager age it was decided to terminate the services of applicant administratively. Further the trial of the applicant by way of a Court Martial was held to be impracticable and inexpedient as the same would have entailed in subjecting 6-7 minor girls of teenager age to repeated examination at various stages of disciplinary proceedings, which would be traumatic and reliving the unsavory incident for them. Further considering the repeated indecent acts of the applicant, as established at the Court of Inquiry, who was a nursing assistant who in course of his duty come across a large number of female patients, his further

retention in service was not found fit. Ld. Counsel for the Respondents further submitted that accordingly administrative action in the form of termination of service under Army Act Section 20 (3) read with Army Rule 17 was directed against the applicant. To give a fair justice to the applicant a Show Cause Notice was served and his reply was considered by Commandant 167 Military Hospital in higher hierarchy and was found to be devoid of any merit. Seeing the background of the case and delicate nature of duties of a Nursing Assistant, particularly dealing with female patients and interest of the organization the service of applicant was terminated in accordance with the provisions of Army Act Section 20 (3) read with Army Rule 17 by the competent authority. The case is devoid of merit and deserves to be dismissed.

12. Heard the Learned Counsels of both the parties, and perused the records.

13. The applicant has been discharged under Army Act Section 20 (3) read with Army Rule 17. For convenience the same are reproduced as under :-

“20. Dismissal, removal or reduction by the Chief of the Army Staff and by other officers

3. Any officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving

under his command other than an officer or a junior commissioned officer”.

“17. Dismissal or removal by Chief of the Army Staff and by other officers-Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section (3) of section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service:

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government”.

14. The above rule allows dismissal or removal without following provisions provided it is certified that it was inexpedient or reasonably impractical to comply with the provisions.

15. A Court of Inquiry was ordered through a convening order dated 24.04.2012. (**Annexure CA-1**) The convening order clearly mentions that Army Rule 180 will be invoked by the court. For convenience Army Rule 180 is reproduced below :-

“180. Procedure when character of a person subject to the Act is involved. Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule”.

16. A certificate of compliance of Army Rule 180 is annexed as part of **Annexure A-4** and same has been duly signed by the applicant. Perusal of the detailed Court of Inquiry indicates the presence of applicant during the proceedings. He has been given opportunity to make statements in self defence against statements made by witnesses. All documents have been signed

by the applicant. Based on the opinion of the Court of Inquiry, the Station Commander made the following recommendations:-

“RECOMMENDATIONS OF THE STATION COMMANDER PATHANKOT ON THE COURT OF INQUIRY CONVENED TO ASCERTAIN THE ACCUSATION AGAINST NO 5420935F NK/NA VK KUSHWAHA OF 167 MH FOR HANDING OVER HIS MOBILE NUMBER TO MINOR GIRL STUDENT OF ARMY PUBLIC SCHOOL PATHANKOT

1. *I agree with the opinion of the Court.*
2. *On going through the Findings and the Opinion of the Court the following may be adduced:-*

(a) Nk/NA VK Kushwaha of 167 MH displayed improper conduct by handing over his mobile number to Miss Pooja Manwale and Miss Sonia Salaria both minor girl students of Army Public School Pathankot with a malafide intention, in separate incidents at the Central MI Room Pathankot.

(b) Nk/NA VK Kushwaha of 167 MH outraged the modesty of Miss Komal Saini and Miss Suhani Chaand, both minor girl students of Army Public School Pathankot in separate incidents at the Central MI Room Pathankot.

3. *I recommend that discipline action be taken against No 15420935F Nk/NA VK Kushwaha of 167 MH.*

Station : C/O 56 APO

Dated : 09 Oct 2012

Sd/- x x x x x
(RK Raina)
Brig
Stn Cdr”

17. The directions of the General Officer Commanding 9 Corps after going through the Court of Inquiry are reproduced below:-

“DIRECTIONS OF THE GENERAL OFFICER COMMANDING, 9 CORPS ON THE COURT OF INQUIRY CONVENED TO ASCERTAIN THE ACCUSATIONS OF MISCONDUCT AGAINST NUMBER 15420935F NAIK (NURSING ASSISTANT) VK KUSHWAHA OF 167 MILITARY HOSPITAL

1. I have perused the court of inquiry along with the recommendations of Station Commander, Pathankot.

2. I find Number 15420935F Naik (Nursing Assistant) VK Kushwaha of 167 Military Hospital blameworthy for the following lapses:-

(a) Deliberately and with ulterior motive gave his mobile number to Ms Sonia Salaria, daughter of Naik Vijay Kumar of 10 Jammu and Kashmir Rifle and Ms Pooja Nandwale daughter of Naib Subedar PJ Nandwale, minor girls, in the month of April 2012 when they had gone to Central Medical Inspection Room, Sujanpur to report sick.

(b) He, on 16 April 2012, improperly carried out medical examination of Ms Komal Saini, daughter of Naik Subhash Chander, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Service of the Armed Forces, 2010. He also deliberately pinched her on right loin and her chest.

(c) He, on 21 April 2012, improperly carried out medical examination of Ms Jyoti Singh, daughter of Havildar SK Singh of 106 Engineer Regiment, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Service of the Armed Forces, 2010.

(d) He, on 21 April 2012, improperly carried out medical examination of Ms Suhani Chand, daughter of Sh Ajay Kumar, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Service of the Armed

Forces, 2010. He also repeatedly touched her thighs with his hands and pushed her with his elbows.

(e) On 23 April 2012, improperly carried out medical examination of Ms Sonia Salaria, daughter of Naik Vijay Kumar, a minor girl, in the absence of female attendant in contravention of Para 51 (b) of Regulations for the Medical Service of the Armed Forces, 2010.

3. Keeping in view the repeated misconduct and indecent acts on the part of Number 15420935F Naik (Nursing Assistant) VK Kushwaha of 167 Military Hospital with minor girls, I direct that in order to avoid undue trauma to minor girls by subjecting them to repeated examination, administrative action under Army Act Section 20 (3) read with Army Rule 17, for termination of his service be taken.

Station : Yol Cantonment sd/- x x x x x

*Dated : 06 December 2012 (Anil Bhalla)
Lieutenant General
General Officer Commanding”*

18. It is clear from the aforesaid that the reason for dispensing the provisions as mentioned in Rule 17 have been clearly specified.

19. The Show Cause Notice dated 15.01.2013 was issued to the applicant by Brigadier, Commandant 167 Military Hospital **(Annexure CA-2)** The full proceedings of Court of Inquiry were annexed. The applicant was given one month time to reply. The applicant's reply to Show Cause Notice is dated 13.02.2013 is placed at **Annexure A-5**. The applicant's reply is generic and he contents that this whole exercise was done to frame him because he refused to give medicines to a lady whom he failed to identify

by name. He further contends that he was coerced to sign a large number of papers, many of which were blank. However, at no stage thereafter the applicant lodged any complaint with Army or with civil/police authorities against this allegation. The order for termination of service of applicant dated 04.04.2013 (**Annexure A-1**) was signed by Brigadier, Commandant of 167 Military Hospital.

20. From the aforesaid, it is clear that all the provisions of Army Act have been followed by the respondents. Fair chance was afforded to the applicant during the Court of Inquiry. The applicant has signed all the documents including the application of Army Rule 180. The applicant seems to have taken undue advantage of his post of Nursing Assistant and committed immoral and indecent acts with a large number of young/minor girls. To avoid undue trauma to minor girls who had already been subjected to detailed questioning in the Court of Inquiry, the authorities decided to take administrative action under Army Act Section 20 (3) read with Rule 17 to terminate the services of the applicant.

21. In view of the aforesaid, we feel that the authorities have followed the statutory provision to terminate the services of the applicant. Impugned order does not seem to suffer from any impropriety or illegality. Original Application lacks merit. O.A. No. 147 of 2013 is dismissed.

No orders to costs.

(Air Marshal Anil Chopra)
(Member A)

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