RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 50 of 2018

Wednesday this the 28th day of November, 2018

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

No 15151113M, Gunner (DMT) Ajay Kumar K
S/o Late Shri Krishna Nair S
C/o Shri Vinay Sharma
House No. 1/173 (First Floor)
Viramkhand, Gomtinagar
District – Lucknow (UP)
PIN - 226010

…….. Applicant

Ld. Counsel for the Applicant : **Col Y.R. Sharma (Retd)**, Advocate

Versus

1. Union of India, Through Secretary,
Ministry of Defence, South Block,
New Delhi – 110011.

2. Chief of the Army Staff, Army Headquarters, South Block,
New Delhi – 110011.

3. General Officer Commanding in Chief,
HQ Central Command, Lucknow – 226002.

4. Commander, HQ 6 Mtn Arty Bde, PIN – 926906, C/o 56 APO.

5. Chief Record Officer, Artillery Records,
PIN – 908802, C/o 56 APO.

6. Commanding Officer, 57 Field Regiment, C/o 56 APO

…… Respondents

Ld. Counsel for the Respondents : **Shri Sunil Sharma**
Central Govt Counsel.

ORDER

"Per Hon'ble Mr. Justice S.V.S. Rathore, 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, whereby the applicant has sought following reliefs:-

> *"(a) Issue/pass an order or direction to Respondents to set aside the Show Cause Notice issued by Commander HQ 6 Mtn Arty Bde vide No. 30860124/A dated 17 March 2015. The Show Cause Notice is filed with the Original Application as Annexure A-1.*
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> *(b) Issue/pass an order or direction of appropriate nature to the respondents to quash/set aside the Sanction orders of Commander HQ 6 Mtn Arty Bde sanctioning the discharge of the applicant, being a non speaking order. The Sanction order dated 01 Aug 2015 is annexed with the Original Application as Annexure A-2.*
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> *(c) Issue/pass an order or direction of appropriate nature to the respondents to quash/set aside the Discharge Certificate dated 31 Aug 2015, discharging the applicant, being a non speaking and bald order. The Discharge Certificate dated 31 Aug 2015 is annexed with the Original Application as Annexure A-3.*
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> *(d) Issue/pass an order or direction of appropriate nature to the respondents to quash/set aside the orders of Chief record Officer dated 24 January 2017, rejecting the Statutory Petition of the applicant addressed to Chief of the Army Staff vide Statutory Representation dated 15 Dec 2016. The rejection order dated 24 Jan 2017 is annexed with the Original Application as Annexure A-4.*
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> *(e) Issue/pass an order or direction of appropriate nature to the respondents to re-instate the Applicant with al consequential benefits including pay and allowances, promotion and allied benefits.*
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> *(f) Issue/pass an order or direction as the Honourable Tribunal may deem fit in the circumstances of the case.*
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> *(g) Allow this Original Application with costs."*

2. In brief, the facts necessary may be summarised as under:

The applicant was enrolled in the Regiment of Artillery as Gunner DMT on 04.09.2001. After completing his training, he was posted to 57 Field Regiment in August 2002 in Western Sector in Operation RAKSHAK. During his service period from 14.03.2009 to 16.05.2009, the applicant was on annual leave and after completing the annual leave, he joined the unit well in time.

As pleaded in the O.A., in August 2009 the applicant received a phone call that his father was not well and was hospitalised, therefore, the applicant requested for casual leave, which was not granted to him. The applicant insisted for leave, then he was charged under Section 48 (Intoxication) and under Section 63 (Violation of good order and Military discipline) and was awarded 7 days R.I. on 29th August 2009. Thereafter the applicant absented from unit without leave and remained absent till he joined duty after 64 days. He was awarded 21 days R.I. and 7 days pay fine under Section 39(a) on 13th May 2010. His explanation for his absence without leave was not properly considered. Similarly the applicant was given annual leave in the year 2011, but he overstayed leave because his elder brother was sick and he was awarded 28 days confinement to lines and 14 days pay fine on 19th November 2011.

Again the applicant overstayed leave in 2012 when he had gone to look after his ailing father, who died during his leave. The applicant was punished with 28 days RI on 29th January 2013 and his explanation for his overstay leave was not accepted. In October 2013 on Sunday, the applicant consumed liquor which was duly issued to him, but Havildar asked him to go on duty in the unit and ultimately the applicant was awarded 7 days RI and 14 days pay fine under Section 48 of Army Act 1950 for Intoxication.

Lastly in the year 2015 the applicant was granted 20 days part of annual leave from 5th January 2015 to 24th January 2015, but unfortunately his sister whose husband was working overseas met with an accident and the applicant again overstayed his leave. He was awarded 28 days Confinement to lines and 14 days pay fine on 11th March 2015. On 17th March 2015 a show cause notice was issued to the applicant by the Commander HQ 6 Mtn Arty Bde and the applicant was given only 10 days time to forward reasons and show cause as to why his services should not be terminated.

3. It is argued on behalf of the applicant that the applicant submitted his explanation. No preliminary enquiry was conducted before issuing such show cause notice. The applicant was not permitted to take part in any such

preliminary enquiry and, therefore, in view of Policy dated 28th December 1988, the order of discharge of the applicant was not in accordance with law and deserves to be set aside.

4. It has also been argued that at the time of discharge, the applicant had 13 years and 11 months of service to his credit and the policy of the Army on the point is that if a person is near completion of pensionable service, then he should not be discharged, unless and until there are very compelling reasons for the same. Thus, the argument of the learned counsel for the applicant is that the order of discharge of the applicant was passed in utter violation of the policy governing the field.

5. Per contra, learned counsel for the respondents has argued that in this case a preliminary enquiry was conducted. However, the copy of the same has not been filed alongwith the counter affidavit, but the same was produced before us during the course of arguments. During course of arguments, when we asked the question to the learned counsel for the applicant whether the copy of this preliminary report was annexed with the show cause notice, then he fairly conceded that the same was not annexed with the show cause notice. Again when we made a query to the learned counsel for the respondents whether the applicant was permitted to take part in this preliminary enquiry, then the reply was in negative. Even perusal of preliminary enquiry report shows that the applicant was not given an opportunity to participate in the preliminary enquiry.

6. Learned counsel for the respondents has tried to justify the order by arguing that in the policy dated 28.12.1988, there was no need for the respondents to permit the applicant to participate in the said enquiry. The argument of the learned counsel for the respondents is that before recommending the discharge or dismissal of an individual, the authority concerned is required only to ensure that the orders of punishment, which were passed earlier against the applicant, whether at that point of time, he was given due opportunity to represent and to explain his cause.

7. Before proceeding further, we would like to reproduce the relevant part of policy, which reads as under:

> ***"Procedure for Dismissal/Discharge of Undesirable JCOs/WOs/OR***.
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> *4.* ***AR 13 and 17 provides that a JCO/WO/OR*** *whose dismissal or discharge is contemplated will be given a show cause notice. As an exception to this, services of such a person* ***may be terminated*** *without giving him a show cause notice provided the competent authority is satisfied that it is not expedient or reasonably practicable to serve such a notice. Such cases should be rare, e.g. where the interest of the security of the state so requires. Where the serving of a show cause notice is dispensed with, the reasons for doing so are require to be recorded. See the provisions of AR 17.*
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> *5. Subject to the foregoing the procedure to be followed for dismissal or discharge of a person under AR 13 or 17, as the case may be is set out below:-*
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> > *(a)* ***Preliminary Enquiry****. Before recommending discharge or dismissal of an individual, the authority concerned will ensure :-*
> >
> > > *(i) That impartial enquiry (Not necessarily a court of enquiry) have been made into the allegations against him and that he as had adequate opportunity of putting of his defence or explanation and of adducing evidence in his defence.*
> > >
> > > *(ii) That the allegations have been substantiated and that the extreme step of terminations of 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 of discharge. In the instant case, though an enquiry has been conducted by the respondents before passing the order of discharge under Rule 13 (3) III (iv) of the Army Rules, 1954, but copy of the same was not provided to the applicant alongwith show cause notice nor the applicant was permitted to take part in any such enquiry.

9. Learned counsel for the respondents has tried to satisfy the Court only on the basis of the show cause notice and the enquiry report that the enquiry was conducted. 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 Veerandra 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:*
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> *"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."*
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> *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 :*
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> *"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. Thus, in the instant case, show cause notice and in the preliminary enquiry, the applicant was not given an opportunity to participate and put up his defence. Copy of such report was also not provided to the applicant alongwith the show cause notice.

12. The argument of the learned counsel for the respondents is that the requirement of policy is that the Commanding Officer, has to satisfy itself, as to whether the earlier orders of punishment were passed after giving a reasonable opportunity of hearing. We find absolutely no force in the submission, as this interpretation is against the aforementioned pronouncement of the Hon'ble Apex Court. The language dealing with the preliminary enquiry is absolutely clear on the point, which we have already quoted in the earlier part of the judgment. A bare reading of the said provisions makes it abundantly clear that the applicant had to be given an opportunity of hearing in the preliminary enquiry and given adequate opportunity of putting his defence and the explanation and of adducing

evidence in his defence. Copy of such enquiry report must also be provided to the applicant.

13. In the instant case, the applicant has completed 13 years and 11 months of service, i.e. he was only 13 months short of his pensionable service, therefore, the extreme action of discharge from service ought to have been avoided by the respondents. Since the procedure prescribed for discharge on the basis of the red ink entry, has not been duly followed, therefore, the said order of discharge is bad in law.

14. Accordingly, this O.A. is **partly allowed** and the order of discharge dated 31st August 2015, discharging the applicant from service, is hereby set aside. The applicant shall notionally be treated to be in service till he acquires pensionable service, thereafter, he shall be entitled to post retiral benefits including pension, in accordance with law. However, he shall not be entitled to the back wages for the said period of notional service on the principle of 'no work no pay', but shall be entitled for service pension of the rank which he held at the time of his discharge. The respondents shall calculate the pension of the applicant from the date of his notional discharge after acquiring pensionable service.

The respondents are directed to complete this exercise within a period of four months from today, failing which the applicant shall be entitled to fetch interest @ 9% per annum on the total amount accrued from due date till the date of actual payment.

Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order.

In the circumstances of the case, no order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : November ,2018
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