

RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 276 of 2018

Thursday, this the 7th day of July, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Ex Rect/Sol (GD) Tejinder Singh (No. 18016768N)
S/o Shri Chandan Singh
House No. A-21, Adarsh Shivaji Nagar,
Post Office ; Milap Nagar, Tehsil : Roorkee,
District : Haridwar (Uttarakhand) Pin – 247666

.... **Applicant**

Ld. Counsel for the Applicant : **Shri Lalit Kumar**, Advocate.

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi.
2. Commandant Bengal Engineer Group & Centre, Roorkee (Uttarakhand).
3. Commanding Officer, No. 1 Training Battalion, Bengal Engineer Group & Centre, Roorkee (Uttarakhand).

... **Respondents**

Ld. Counsel for the Respondents : **Ms. Appoli Srivastava**,
Central Govt Counsel

ORDER

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:-

- “(i) To quash and set aside the impugned order dated 29th November 2017 and to declare that the applicant had continued to be in service or alternatively direct the

respondents to reinstate the applicant in service with all consequential benefits.

- (ii) To direct the respondents particularly respondent No. 3 to release the pay of the applicant for 13 months, from October 2016 to November 2017, illegally withheld by the said authority.
- (iii) To accord provisional permission to the applicant to complete the remaining part of his recruit training without prejudice to the right and authority of the respondents to terminate his service if the applicant does not succeed in this OA.
- (iv) To award the cost of this litigation.
- (v) And to grant any other relief or reliefs which the Hon'ble Court may deem fit and proper and in the interest of justice."

2. Brief facts of the case are that the applicant was enrolled in the Indian Army on 08.04.2016. The applicant was caught in possession of one bottle of Whisky while undergoing Basic Military Training (BMT) phase on 21.05.2016 for which he was awarded 21 days RI on 23.05.2016. The applicant completed his BMT phase on 27.08.2016, thereafter, he was detailed for his CIF phase training w.e.f. 26.09.2016. The applicant was absent from STB(D) w.e.f. 08.12.2016 to 09.12.2016 and reported voluntarily to his Battalion on 09.12.2016 at 1500 hours. The applicant was again AWL on 10.12.2016 and voluntarily rejoined duty on 29.12.2016. The applicant was further AWL on 30.12.2016 and voluntarily rejoined duty on 10.01.2017. The applicant was put up on charge sheet for his AWL period and was awarded 28 days RI on 11.01.2017. The applicant again became AWL on 13.01.2017 at 2000 hours. Accordingly, after completion of

30 days, a Court of Inquiry was convened under Army Act, Section 106 for declaring him deserter. As per findings and recommendations of Court of Inquiry, applicant was declared deserter w.e.f. 13.01.2017. Thereafter, applicant reported to BEG & Centre, Roorkee on 22.07.2017 (after 192 days). The applicant was again put up on charge sheet for his 192 days AWL and was awarded 28 days RI and 14 days pay fine on 24.08.2017. The applicant was also caught for trespassing of perimeter wall/fencing of Centre on 07.10.2017. The applicant was again charge sheeted alongwith two other recruits and was awarded 28 days RI on 16.10.2017. Thus, he was awarded total four red ink entries punishments during training period. As per the provisions of Army Rule 13 (3) (III) (V), Army Rule 17, DSR Para 166 and ADG DV, AG's Branch, Army Headquarters letter dated 07.04.2004, his discharge was approved by Commandant BEG & Centre, Roorkee on 29.11.2017 and he was discharged from service. The applicant was handed over to his sister on 02.12.2017 alongwith discharge and medical certificate. Being aggrieved with discharge from service, applicant has filed this Original Application.

3. Learned counsel for the applicant submitted that applicant was enrolled in the Army in medically and physically fit condition on 08.04.2016. During the course of training in June 2016, applicant's batch mate, namely Bhupen Arya was caught with a bottle of whisky and applicant who was accompanying him being a friend was punished by respondent No. 3 with 21 days RI whereas the applicant had no involvement in the said offence. The applicant successfully

completed his BMT phase and entered into CIF phase. In January, 2017, applicant was attached to Special Training Battalion (STB) for guard and administrative duties. The applicant could not participate in an outdoor training due to some confusion for which he was repatriated from STB to No. 1TB and was punished with 28 days RI on the charge of absent without leave.

4. Learned counsel for the applicant further submitted that during quarter guard duties, applicant was manhandled by a defaulter NCO, Naik Sanjay Bohra during pack drill for which applicant reported the matter to Quarter Guard Commander who suggested to meet the Commanding Officer of 1 Training Battalion (TB) to apprise this matter. While going to meet the Commanding Officer of 1 TB, applicant was stopped by RP NCO and was asked to go back to his duty at Quarter Guard. The applicant instead of going to Quarter Guard, went to his home and apprised the matter to the Commanding Officer through his father who is an ex-serviceman. In April 2017, applicant's father took the applicant and explained everything to respondent no. 3 which happened with applicant. The respondent No. 3 agreed to give joining to the applicant on condition to undergo unexpired portion of earlier sentence and fresh sentence of 28 days RI and thus, applicant was lodged in Quarter Guard to undergo a total of 53 days of RI.

5. Learned counsel for the applicant further submitted that Commanding Officer under Section 80 of Army Act, 1950 is prohibited from awarding combined sentence exceeding 42 days. The applicant

remained in the Quarter Guard till 20.09.2017 and after his release, there was a rumour that applicant was not interested in service and he wanted to run away from the Centre. In October 2017, when applicant had gone to Sainik Institute near boundary wall of Centre, he was caught by two persons alleging that applicant had come to Sainik Institute in order to run away from Centre. This matter was reported to respondent No. 3. After waiting about two months, applicant was suddenly served with the impugned discharge order dated 29.11.2017 and was locally discharged from service on the same day. Thereafter on 01.12.2017, applicant was taken to Military Hospital, Roorkee for medical examination where he was medically examined and was declared fit in SHAPE-1.

6. Learned counsel for the applicant raised under mentioned issues/observation with regard to illegal discharge of the applicant from service during the course of final hearing :-

(a) The applicant continued to be borne on the strength of the Army till 01.12.2017 when he was medically examined at MH Roorkee but since he had already been discharged from the service retrospectively on 29.11.2017 then a person subject to the Army Act cannot be discharged from service retrospectively and if he so discharged against the specific provision of law which is contained in Army Rule 18, such discharge would be deemed to be invalid discharge in law.

(b) The applicant had not been paid salary since October 2016 till his discharge from service on 29.11.2017 without any reason.

(c) The impugned discharge order dated 29.11.2017 passed by respondent No. 3 is not sustainable in law under the provisions of Section 2, 13, 14 of Army Act, 1950 and Rule 3 of Army Rules, 1954?

(d) Para 166 of the DSR deals with the procedure of termination of service, clearly states that the said procedure will apply when the concerned person is being either dismissed from service or he is being discharged from service. He cannot be discharged and dismissed from service simultaneously, which appears to be the case of the applicant at the hands of the respondents.

(e) The impugned discharge order dated 29.11.2017 shows that none of the legal procedure prescribed under Rule 13 (III) (v) were followed in the case of the applicant.

(f) There is also no provision in the Army Act or Army Rules under which a person subject to the Army Act could be declared as '*Inefficient soldier*', however, under the provisions of para 135 of DSR, a recruit could be declared as '*unlikely to become an efficient soldier*'. When applicant was in medical category SHAPE-1 then it is impermissible in law for the respondents to discharge the applicant from service by declaring him as an '*Inefficient soldier*'.

(g) As per IHQ of MoD (Army) letter dated 28.12.1988, a soldier cannot be declared '*undesirable*' unless he has been awarded at least four red ink entries. Since the applicant had not been awarded the minimum of four red ink entries which are mandatory for declaring a person as '*undesirable soldier*' it was not open to the respondents to discharge the applicant from service as an '*undesirable soldier*'.

(h) The authority to order discharge/dismissal could be exercised only by an officer of the rank of Brigadier and above after following due procedure prescribed by law and not by an

officer of the rank of Colonel as was done in the applicant's case.

(i) In the instant case, neither a preliminary enquiry was held nor a Show Cause Notice was served to the applicant, therefore, impugned order of discharge dated 29.11.2017 passed by respondent No. 3 is illegal, arbitrary and unsustainable in law.

In view of aforesaid, learned counsel for the applicant pleaded to set aside impugned discharge order and to reinstate the applicant in service with all consequential benefits.

7. On the other hand, Ld. Counsel for the respondents submitted that applicant was enrolled in the Indian Army on 08.04.2016. The applicant was caught in possession of one bottle of Whisky while undergoing Basic Military Training (BMT) phase on 21.05.2016 for which he was awarded 21 days RI under Army Act 63 on 23.05.2016. The applicant completed his BMT phase on 27.08.2016. Thereafter, he was detailed for his CIF phase training w.e.f. 26.09.2016. The applicant was absent from STB(D) w.e.f. 08.12.2016, 0500 hours to 09.12.2016 and reported voluntarily to his Battalion on 09.12.2016 at 1500 hours. The applicant was again AWL on 10.12.2016 at 0900 hours and voluntarily rejoined duty on 29.12.2016. The applicant was further AWL on 30.12.2016 and voluntarily rejoined duty on 10.01.2017. The applicant was put up on charge sheet for his AWL period and was awarded 28 days RI on 11.01.2017. The applicant again became AWL from Battalion Quarter Guard on 13.01.2017 at 2000 hours. Accordingly, after completion of 30 days, a Court of

Inquiry was convened under Army Act, Section 106 for declaring him deserter. As per findings and recommendations of Court of Inquiry, applicant was declared deserter w.e.f. 13.01.2017. Thereafter, applicant reported to BEG & Centre, Roorkee on 22.07.2017 (after 192 days). The applicant was again put up on charge sheet for his 192 days AWL and was awarded 28 days RI and 14 days pay fine on 24.08.2017. On 07.10.2017, applicant and two other recruits were caught by patrolling party of No. 2 Training Battalion for trespassing of perimeter wall/fencing of Centre. The applicant was again charge sheeted alongwith two other recruits and was awarded 28 days RI on 16.10.2017.

8. Learned counsel for the respondents further submitted that as per the provisions of Army Rule 13 (3) (III) (V), Army Rule 17, DSR Para 166 and ADG DV, AG's Branch, Army Headquarters letter dated 07.04.2004, a noting sheet dated 21.11.2017 was put to Commandant BEG & Centre, Roorkee for approval of his discharge being an inefficient/undesirable soldier. Approval of discharge of the applicant was accorded by the competent authority (Commandant) on 29.11.2017 and he was discharged from service. The applicant was taken to medical examination on 01.12.2017 and was handed over to his sister on 02.12.2017 alongwith discharge and medical certificates. He also submitted that applicant was discharged from service and not dismissed from service.

9. Learned counsel for the respondents further submitted that according to IHQ of MoD (Army), New Delhi letter No.

41776/48/AG/DV-1(P) dated 07.04.2004, the services of such personnel who are habitual offenders and are undesirable for retention in service having four or more red ink entries will be terminated. The ibid letter is quoted below :-

“Tele No. 23018192

Additional Directorate General
Discipline & Vigilance (DV-1P)
Adjutant Generals Branch,
Integrated HQ of MoD (Army),
New Delhi – 110011
07 Apr 2004

No. 41776/48/AG/DV-1(P)
Headquarters
Southern Command
Eastern Command
Western Command
Central Command
Northern Command
Army Trg Command
ARTRAC (A Branch)
Andaman & Nicobar Command

DISCIPLINE PBOR : RED INK ENTRIES

1. Reference :-
 - (i) Army HQ/PS-2 letter No. A/13210/159/AG/PS-2c dt 28 Dec 88.
 - (ii) Para 387 of the regulation for the Army 1987.
2. In recent past, few cases have been received by this Dte/Army HQ, wherein the defaulters with serious offences had a past record of four or more red ink entries. Having being allowed to continue in the service, such pers have indulged in grave incidents such as forgeries, theft, deserting with or without wpns, etc. In a case, an individual with six red ink entries got involved in serious offences such as stealing of an Identity Card of a senior officer and selling it. He again indulged in forgery with a bank, whereas in another case, an individual after five red ink entries has deserted the Army. One sepoy in a CI environment first stole an AK 47 Rifle and was punished with pay fine (penal deduction) a punishment which was not commensurate with the offence committed. Later, the same individual was arrested with an LMG, 11 magazines and 322 rounds of ammunition. He was trying to sell the same for Rs 1 crore.
3. In order to curb this tendency, Commanders at all levels be advised to terminate the services of such personnel who are habitual offenders and are undesirable for retention in service especially after four red ink entries. This will prevent these personnel from committing bigger crimes which affect the image of the organisation as a whole.
4. Provisions as laid down vide letter quoted in (i) above be complied with.

Sd/- x x x x x x
(Rajiv Chopra)
Maj Gen
ADG D&V
For Adjutant General

Copy to :-
PS Dte (PS-2) - For info please.”

10. In regard to serving of Show Cause Notice to the applicant, learned counsel for the respondents further submitted that according to IHQ of MoD (Army), New Delhi letter No 35418/27/AG/DV-1(P) dated 16.11.2015, Show Cause Notice is not required to be served to a recruit when discharging from service. The ibid letter is quoted below :-

“Tele No. 23018186

Additional Directorate General
 Discipline & Vigilance (DV-1P)
 Adjutant Generals Branch,
 Integrated HQ of MoD (Army),
 New Delhi – 110001

35418/27/AG/DV-1(P)

16 Nov 2015

Headquarters
 Southern Command (DV)
 Eastern Command (DV)
 Western Command (DV)
 Central Command (DV)
 Northern Command (DV)
 South Western Command (DV)
 ARTRAC (A Branch)
 A & N Command (A Branch)
 Strategic Forces Command (A Branch)

**ADVISORY : SHOW CAUSE NOTICE NOT REQUIRED
 TO BE SERVED WHEN DISCHARGING A RECRUIT**

1. In a landmark Judgment dated 28 Oct 2015, in Civil Appeal No 5015/2008, Union of India and Ors Vs Manoj Deswal & Ors, the Hon’ble Supreme Court has upheld the Appeal filed by the Union of India against the Hon’ble High Court of Delhi Order dated 17 Aug 2007. Vide its Judgment dated 17 Aug 2007, the Hon’ble High Court of Delhi in Writ Petition (C) No 8004/2006 had set aside the discharge order of a Recruit dated 27 Aug 2005 by the Commanding Officer, citing among other reasons non-issuance of Show Cause Notice to the Recruit, prior to discharge from service, as a reason for quashing the discharge of the individual.

2. The Hon’ble Supreme Court has set aside the above mentioned Hon’ble High Court of Delhi Order observing that the status of unattested soldier is just like a probationer, whose services could be terminated without holding an inquiry. It further observed that inspite of the fact that services of the Respondent No 1 (unattested recruit) could be terminated without an inquiry, an enquiry was held in this Case. The Apex court, therefore, held that, “no special notice is required to be given before discharge of a person who is not attested, especially in view of the fact that

a Court of Inquiry had already been held on 29 Jul 2005 and Respondents No 01 (ie. Recruit Manoj Deswal) had been declared deserter by an order dated 30 Jul 2005". The Supreme Court acknowledged the reference made by the Counsel for the Union of India to Judgments made by them in Ram Sundar Ram 2007 (13) SCC 255 & Dipak Kumar Santra (2009 (7) SCC 370), which substantiated the case that "if an enquiry is made and thereafter a non attested trainee is discharged, it is not necessary to issue a notice calling upon him to show Cause as to why his service should not be terminated".

3. The above Judgment(s) be given wide publicity as a future reference, please.

Sd/- x x x x x x
(AK Singh)
Brig
Offg ADG D&V
For Adjutant General

Internal
JAG Dept
All Line Dtes"

11. Learned counsel for the respondents also submitted that applicant being recruit has been discharged from service as an inefficient/undesirable soldier under the authority of IHQ of MoD (Army) letter dated 07.04.2004 and Noting Sheet dated 23.11.2017 approved by Commandant BEG & Centre, Roorkee as per Army Rule 13 (3) III (v), Army Rule 17 and DSR Para 166. Hence, there is no illegality or indiscretion in discharging the applicant from service without serving a Show Cause Notice being a recruit and therefore, applicant is not eligible for reinstatement into service. He pleaded for dismissal of Original Application being misconceived and devoid of merits.

12. We have heard learned counsel for both sides and perused the material placed on record.

13. In the instant case, we observe that applicant was a habitual offender. He was AWL on many occasions and he has been awarded punishment of four red ink entries as per details given in Noting Sheet

dated 21.11.2017, processed for his discharge from service which was approved by the Commandant, BEG & Centre, Roorkee :-

- (a) 21 days RI on 24.05.2016.
- (b) 28 days RI on 11.01.2017.
- (c) 28 days RI and 14 days pay fine on 24.08.2017.
- (d) 28 days RI on 16.10.2017.

14. We find that a Court of Inquiry was conducted in the instant case and there being no requirement to serve a Show Cause Notice to a recruit under the provisions of IHQ of MoD (Army), New Delhi letter No 35418/27/AG/DV-1(P) dated 16.11.2015, no Show Cause Notice was served to the applicant being a recruit before discharging him from service.

15. We also find that under the provisions of Army Rule 13 (3) (III) (v), Army Rule 17, DSR Para 166 and ADG DV, AG's Branch, Army Headquarters letter dated 07.04.2004, a Noting Sheet dated 21.11.2017 was put up to Commandant BEG & Centre, Roorkee for approval of his discharge being an inefficient/undesirable soldier. The approval of discharge of the applicant was accorded by the competent authority (Commandant) on 29.11.2017 (and not by an officer of the rank of Colonel as alleged by the applicant) and thereafter, he was discharged from service/struck of strength on 29.11.2017. The applicant was taken to MH Roorkee for medical examination on 01.12.2017 and was handed over to his sister on 02.12.2017 alongwith discharge and medical certificate of his fitness in SHAPE-1.

16. The applicant's discharge from service being recruit is legally and procedurally correct as per Army Act and Army Rules and as per IHQ of MoD (Army) policy letters on the subject. It is also clarified that applicant's discharge was not retrospectively but he was discharged from service on 29.11.2017 as per rules. The applicant was discharged from service and not dismissed from service.

17. In the result, we do not find any illegality or infirmity in discharging the applicant from service. The reliefs prayed by the applicant to quash his discharge order and to reinstate him in to service are not sustainable. The O.A. deserves to be dismissed. It is accordingly **dismissed**.

18. No order as to costs.

19. Pending Misc. Applications, if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve) **(Justice Umesh Chandra Srivastava)**

Member (A)

Member (J)

Dated: July, 2022

SB