**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH**
**NEW DELHI**

**O.A NO. 88 OF 2010**

NO.14496388P GNR (DMT) RAVINDER SINGH,
EX 153 MEDIUM REGIMENT, THEN C/O. 99 APO
R/O GAON SIPANPAT, P.O MOONDHI,
TEHSIL: PALAMPUR, DIST: KANGRA (H.P)

THROUGH: MR. M.G KAPOOR, ADVOCATE

.. **APPLICANT**

VS.

1. UNION OF INDIA THROUGH THE SECRETARY
MINISTRY OF DEFENCE, SOUTH BLOCK,
DHQ P.O., NEW DELHI – 110 011.

2. THE CHIEF OF ARMY STAFF,
ARMY HQ, SOUTH BLOCK, DHQ P.O,
NEW DELHI-110 011.

THROUGH: LT. COL. NAVEEN SHARMA

**.. RESPONDENTS**

**CORAM**

**HON'BLE MR. JUSTICE S.S KULSHRESHTHA, MEMBER**
**HON'BLE LT. GEN. S.S DHILLON, MEMBER**

**JUDGMENT**
26.3.2010

1. The challenge in this petition is directed against the order of the Chief of Army Staff (COAS, for brevity) dated 2.3.2008 whereby remitting the dismissal of the petitioner from service to discharge from service with effect from the date when he would have reached qualifying pensionable service to earn service pension and gratuity without any other consequential benefits on the principle of 'no work no pay'.

2. Counsel for the applicant has contended that the impugned order is violative of the provisions of law. The applicant was dismissed from service arbitrarily and the punishment of dismissal was shockingly disproportionate. Challenging his dismissal, the applicant had filed W.P (C) No. 4997 of 1993 before the Delhi High Court. A Division Bench of the Delhi High Court, vide its judgment dated 21.2.2002, held that for over-staying leave, the punishment of dismissal from service was harsh. It,

therefore, directed the respondents to pass appropriate orders after taking into account factors mitigating the punishment. Thereafter, vide order dated 19.2.2003, the Commanding Officer confirmed the punishment of dismissal. The applicant again took up the matter before the Delhi High Court by filing W.P (C) No. 6195 of 2003, which was disposed of by directing the respondents to take a fresh decision in the matter. Once the applicant is deemed to have been dismissed from service, the COAS does not have the power to have converted it to discharge, since 'discharge' is not figured in any categories of punishment. The applicant was incapacitated from doing work due to the punishment of dismissal, which was found to be harsh by the Delhi High Court. When the applicant was not allowed to work, the COAS was not justified to deny him monetary benefits on the principle of 'no work no pay'. The principle 'no work no pay' cannot be applied in the present case. The applicant would have become a Naik (Time Scale) after completion of 15 years of service on 17.7.1999 had he not been discharged from service.

3. The petition was resisted on behalf of the respondents contending, inter alia, that the punishment of dismissal was reconsidered by the COAS, pursuant to the direction of the Delhi High Court and a benevolent view was taken by deeming him to have been discharged from service for getting pensionary benefits. There could be no reason for assailing that order to have a fresh inning. No appeal could be filed against the order of discharge passed in the Summary Court Martial proceedings. When the order of dismissal was converted into discharge, that would be considered to be the order in SCM proceedings against the petitioner. That order alone could be executable and the jurisdiction of this Tribunal is to be determined from that basis.

4. In order to appreciate the points involved in this petition, it would be appropriate if brief facts of the case are stated. The applicant was working as Gunner in the Artillery Regiment when he was posted to 153 Medium Regiment deployed in the North Eastern Sector. He was in the 'Q' Battery of the Regiment deployed in Tawang. The rest of the Regiment was located in Dawang. It would take a day's time for one to

move from Tawang to Dawang under normal conditions. The applicant went to his village in Himachal Pradesh on leave from 27.1.1992 to 3.3.1992, where he fell into a 'Khud' on 26.2.1992 and suffered injuries. He was given medical treatment at Thural and since there was no relief, he was admitted in the Government Hospital in Thural. The matter of his admission in the hospital was informed to the Commanding Officer by sending a telegram. After discharge and when he became fit to travel, he reported to his unit at Dawang on 23.4.1992. He was tried for over-staying on leave. He was found guilty and ordered to be dismissed from service. On representation, the order of dismissal from service was remitted to discharge from service. Against the order of dismissal, the applicant filed W.P (C) No. 4997 of 1993 before the Delhi High Court. The writ petition was allowed holding that the punishment of dismissal from service was harsh and directed the matter to be reconsidered taking into account factors mitigating punishment. But the Commanding Officer in defiance of the direction of the Delhi High Court, confirmed the order of

dismissal. When that order was challenged by filing W.P (C) No. 6195 of 2003, another Division Bench observed thus:

> "Prima facie we are of the view that the order tantamount to contempt of the judgment dated 21.2.2002 of the Division Bench of this Court where it had specifically been observed that the punishment given to the petitioner was too harsh. Yet it has been repeated by the same officer.
>
> In these circumstances, learned counsel for the respondents correctly submits that the order dated 19.2.2003 may be set aside and that a fresh consideration of the case shall be carried out by the Appropriate Officer/Authority.
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> Keeping the factual matrix in view it would be desirable that the fresh decision is passed within eight weeks from today."

On the basis of the direction of the Delhi High Court and in supersession of the order dated 23.4.1993, the matter was reconsidered by the Chief of the Army Staff and remitted the sentence of dismissal from service to discharge from service with effect from the date when the applicant

would have reached qualifying pensionable service to earn service pension and gratuity without any other consequential benefits i.e. pay and allowances, etc. on the principle of 'no work no pay'.

5. The material question that arises for consideration is whether the deemed order of discharge is innocuous or could it be considered to be punishment though awarded by way of remitting the sentence of dismissal from service into discharge?

6. The dicta in **Parshotam Lal Dhingra** v. **Union of India** (AIR 1958 SC 36) followed in **Union Public Service Commission** v. **Girish Jayanti Lal Vaghela and others** (AIR 2006 SC 1165) and **B. Srinivasa Reddy** v. **Karnataka Urban Water Supply & Drainage Board Employees' Association and others** (AIR 2006 SC 3106) principle was enunciated that the use of the innocuous expression 'discharge' is not conclusive and that discharge on grounds of misconduct, negligence, etc 'to be an indelible stigma on the army personnel could arise. The use of the expression

'discharge' is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests, viz. (i) whether the officer has a right to the post or the rank? and (ii) whether he had been visited with evil consequences of the kind herein before referred to? As has already been mentioned, the Delhi High Court, in its judgment in W.P (C) No. 4997 of 1993, held that the punishment of dismissal was harsh for over-staying leave and directed the respondents to reconsider the matter afresh. Here, the expression 'deemed discharge' has been used, which would amount to dismissal for all purposes, as the applicant was denied all the service benefits. As has been referred to above, the petitioner filed W.P (C) No. 6195 of 2003 challenging the order of the Commanding Officer and subsequently, on filing contempt petition, other pensionary benefits were made admissible to the applicant. But the pay for the period from the date of his dismissal to the date of his superannuation was not made admissible. Learned counsel for the respondents contended that the COAS has authority to decide whether or not an

employee deserves salary for the interregnum period after his sentence of dismissal is converted into discharge.

7. It is settled principle in service jurisprudence that a person must be paid if he has worked and should not be paid if he has not. In other words, the doctrine “no work no pay” is based on justice, equity and good conscience and in the absence of valid reasons to the contra it could be applied. Here, in this case, the Delhi High Court had held that the punishment of dismissal for over-stayal was harsh and, therefore, the matter was directed to be reconsidered. But the authority took the same stand and confirmed the order which resulted in the filing of W.P (C) No. 6195 of 2003 and Civil Contempt Petition No.57 of 2008. Only when notice on the contempt petition was given, the impugned order was passed. The fault was on the part of the respondents since they refused to reinstate the applicant in service. Time and again the applicant was moving the Delhi High Court. That itself would show that he was willing to work, but he was not allowed to do so. In that situation, the principle ‘no

work no pay' was illegally resorted to by the COAS while issuing the impugned order. It cannot be construed, in the given circumstances of the case, that the principle would not make any bar if directions are given for making payment of salary for that period. Reliance may be placed on the decision reported in **Commissioner, Karnataka Housing Board** v. C. **Muddaiah** (2007(7) SCC 689), wherein the apex Court held thus:

> "34. We are conscious and mindful that even in absence of statutory provision, normal rule is 'no work no pay'. In appropriate cases, however, a court of law may, nay must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The court may in the circumstances, direct the authority to grant him all benefits considering 'as if he had worked'. It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a court of law and if such directions are issued by a court, the authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant Board, therefore, has no substance and must be rejected".

8. Since the petitioner had over-stayed on leave and taking into account the fault on his part, it would have been appropriate if a reasonable portion of his pay for the interregnum period was deducted or it would have been in the fitness of things, if 50% of deduction from his pay for that interregnum period was made.

9. The petition is allowed and the impugned order dated 2.3.2008 is modified to the extent that the applicant is entitled to 50% of his pay and allowances for the interregnum period i.e. from the date of his dismissal to the deemed date of his superannuation.

**(S.S DHILLON)**
**MEMBER**

**(S.S KULSHRESHTHA)**
**MEMBER**