

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

**T.A NO. 678 of 2009
(WRIT PETITION (CIVIL) NO. 8334 of 2009)**

IN THE MATTER OF:

Ex. Rfn, Mukesh Rawat

.....APPLICANT

Through : Shri S.M. Dalal, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS

...RESPONDENTS

Through: Dr. Ashwini Bhardwaj, counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 20.09.2011

1. This petition was first filed in the Hon'ble High Court as WP(C) No.8334/2009 on 21 Apr 2009 and was subsequently transferred to the Armed Forces Tribunal on 02.01.2010.
2. The applicant vide his petition has prayed for quashing of the impugned discharge order dated 08.05.2005 (Annexure P-5) passed by Respondent No.3. The applicant has also prayed that he be reinstated in the service with all consequential benefits.
3. Brief facts of the case are that the applicant was enrolled in the Army as Sepoy Musician in the Rajputana Rifles on 24.4.1996. He

attended the Musician Course from 06.9.1999 to 08.7.2000 at AEC Training College and Centre, Pachmarhi and the applicant qualified the said course. On completion of the course, where he had learnt to play the instrument Saxaphone, he was asked to play other instruments like Clarinet or Dhol and was also detailed to perform duties of general nature. On 05 Jan 2002, the applicant was sent on attachment to Army HQ Liaison Cell at Army HQ to perform duty of office Runner (Annexure-P-2). The applicant remained attached their till Dec 2002.

4. On 05 Oct 2002, a show cause notice was issued by the Deputy Commandant (Annexure-P-3) wherein it was shown that applicant did not want to enhance the performance, as he was found absent on 16-17 May 2002 at the time of test which was responded to by the applicant vide reply dated 09 Oct 2002 (Annexure-P-4) submitting that he was on duty with Army Liaison Cell on 16-17 May 2002 when the test was held.

5. It has also been stated that a similar show cause notice was issued to one Rfn Devi Singh, colleague of the applicant which was also based on wrong facts. Based on the replies given by the applicant and Rfn Devi Singh, an inquiry was held in the matter and it was established in the said inquiry report that on 05 Nov 99 the applicant was attending YB Course at Pachmarhi and on 16-17 May 02 the applicant was attached with Army HQ Liaison Cell and due to that was

not present in the Centre. Consequently, the contemplated action against the applicant and his colleague Rfn Devi Singh were dropped.

6. However, the applicant was suddenly discharged under Rule 13(3)III(V) of Army Rules read with Policy dated 28.12.1988 from the service pre-maturely on 08 Nov 2005. He was given only a discharge certificate and was not given the order of discharge (Annexure-P-5). The applicant was also not given any opportunity of being heard by respondent No.3 before passing the said impugned order of discharge. By this time the applicant had already put in 9 years and 6 months of service. The applicant also pleaded for an interview with respondent No.3 but the same was denied.

7. It has also been submitted by the applicant that his colleague Rfn Devi Singh who was also discharged from service on 17 Nov 2005 under similar circumstances filed a **writ petition (Civil) No.12928 of 2006** against his illegal discharge before the Hon'ble High Court of Delhi. The applicant awaited the outcome of the Rfn Devi Singh's case instead of approaching himself in the Hon'ble High Court simultaneously under a bonafide belief that same treatment would be given to the applicant at par with Rfn Devi Singh. The Hon'ble High Court of Delhi vide its order dated 19 Sep 2008 (Annexure-P-7) was pleased to allow the writ petition quashed the order of discharge and directed the respondents to restore Rfn Devi Singh in service with all

consequential benefits. Ref Devi Singh was reinstated in the service by the respondents.

8. The applicant expected that the benefit of this judgment would also be given to him automatically by the respondents. However, the benefit of said judgment was not granted to the applicant and the applicant was compelled to approach the Hon'ble Court.

9. Ld. Counsel for the applicant argued that the show cause notice issued by the Deputy Commandant was illegal as Deputy Commandant is not a competent authority to issue a show cause notice as per Army Rule 13. A mere examination of the contents of the show cause notice indicate that the respondents were not giving out the correct facts when they charged him for being absent during the tests held on 5.11.99 and 16-17 May 2002. In fact the applicant was away on duty at AEC Pachmarhi and Army HQ Liaison Cell respectively.

10. Ld. Counsel for the applicant further argued that the Army HQ letter of 28.12.1988 deals with the "Procedure for the removal of undesirable and inefficient JCOs, WOs and ORs". This policy letter in para 3(a) gives out "who have proved inefficient".

11. It is quite clear that since the applicant had passed the Musicians Course from AEC Training College and Centre, Panchmarhi (Annexure-P-1), he could not have been found as 'inefficient'. Besides,

as an alternative, he was not given an opportunity for suitable extra-regimental employment.

12. Ld. Counsel for the applicant also cited **2009(1) SC 371 in the matter of Union of India & Ors. Vs Tarsem Singh** wherein it was held that the delay and laches need not to come in the way of continuing wrong e.g., pensionary benefits and its arrears come within the ambit of "continuing wrong".

13. Ld. Counsel for the applicant also cited **2002 (2) All India Services Law Journal page 337 in the matter of H.C. Chandel Vs Union of India and Others** in which it was observed that the statutory powers given to a competent authority cannot be further delegated. In this case per se, it has been held that even the Central Government cannot delegate the power to Chief of Army despite the fact that he is the top brass of the Military.

14. Ld. Counsel for the applicant further cited **(2006) 2 SCC 747 in the matter of State of Karnataka and others Vs C. Lalitha** wherein it was averred that Article 14 and 16 ordain parity in employment, and therefore, relief given to one person under similar circumstances or similarly situated people should be treated similarly irrespective of the fact that only one person has approached the Court.

15. Ld. Counsel for the respondents stated that it is not disputed that the applicant had attended the Musicians Course (YB-21) at AEC

Training College and Centre, Panchmarhi from 06.09.1999 to 8.7.2000 and that he had also qualified the said course.

16. Ld. Counsel for the respondents further stated that during the course of time, applicant was given adequate opportunity to train in his trade, however, he did not show keenness and desire to learn. The applicant was verbally warned by the Deputy Commandant to show progress failing which he would be forced to take action. A show cause notice was thus issued to the applicant by the Deputy Commandant on 05 Oct 2002 for not showing any improvement and unwillingness to learn.

17. The case of the applicant was examined by the Commandant and he found that no interest was being shown by the applicant to learn his trade. As such, the Commandant after considering the material available on record ordered that the applicant be discharged from service w.e.f. 08 Nov 2005.

18. Ld. Counsel for the respondents further argued that when the performance test was conducted by the Inspector of Band, Western Command, the applicant was on course. Thereafter, the applicant was given ample opportunity to train in his trade and despite having been granted enough opportunities, the applicant did not care to learn his trade resulted in his becoming "inefficient".

19. Having heard both the parties at length and keeping in view the law laid down in the judgments cited by the applicant and having

examined the documents available on records, we are of the opinion that the show cause notice issued by the Deputy Commandant was legally infirm both qua the contents and qua the competency of the Deputy Commandant to issue a show cause notice. As per Army Rule 13(3)(III)(v), the competent authority to issue the show cause notice is Brig/Sub Area Commander. In this case, it should have been the Commandant of the Rajputana Rifle Centre who could have issued this show cause notice.

20. The contents of the show cause notice are also grossly incorrect. On 05 Nov 1999, the applicant was on annual leave but attended YB Course at Panchmarhi which has been conceded by the respondents in notice itself. Therefore, he could not have been present for the test conducted by the Inspector of Bands, Western Command, Delhi.

21. The second gravamen of the allegation is that the applicant was again absent from the test which was conducted on 16-17 May 02. The documents produced by the applicant vide Annexure-P-2 clearly states that he was attached for administrative duties to Army HQ Liaison Cell on 05.1.2002 and was still on attachment with the Army HQ Liaison Cell on 16-17 May 2002. He also replied and copy of the reply is Annexure P-4. Therefore, to say that he purposely avoided the second test taken by the Inspector of Bands is factually not correct.

Thus, the contents of notice itself were misconceived and against record, that shows lacking of proper application of mind.

22. Be that as it may, no disciplinary action was taken against the applicant on being absent from the tests conducted on 5.11.1999 and 16-17 May 2002. As such, action under the category of 'inefficient and undesirable' cannot be taken against the applicant.

23. As for as invoking the provisions of policy letter of 28.12.1988 is concerned, para 3(a) clearly gives out the procedure which needs to be followed. Para 3(a) reads as under:-

"3 (a) Before recommending or sanctioning discharge, the following points must be considered:-

- (i) If lack of training is the cause of his inefficiency, arrangement will be made for his further training.
- (ii) If an individual has become unsuitable in his arm/services through no fault of his own, he will be recommended for suitable extra-regimental employment."

24. Since the applicant has already put in over 9 years and six months of service, he should have been given adequate opportunity to work in an extra-regimental employment if he was found inefficient in his trade. The inability of the applicant to learn his trade i.e., Musician cannot be just because he was not willing to learn. It is quite possible that "it did not have in him" to become a Musician. It is quite normal to say that everyone is unable to become a good musician as he does

not have the aptitude for the same. In this case, the applicant should have been adjusted in some other trade so that he could have completed his terms of engagement as per the spirit of said policy letter.

25. We have also gone through the judgment of Hon'ble High Court of Delhi dated 19.9.2008 passed in the matter of Rfn Devi Singh (supra) who was reinstated in the service consequent to this order. There is a close similarity between the applicant's case and that of Rfn Devi Singh. Thus, we have no hesitation in saying that the discharge order/certificate issued by the Commandant (Annexure-P-5) is illegal and it is hereby quashed.

26. In view of the above, the applicant be notionally reinstated into the service and will be deemed to continue in service and be discharged on attaining the minimum pensionary service in his rank at the time of discharge but the applicant will not be entitled to back pay and allowances as he himself is responsible for not taking action in time. He will be entitled to pensionary benefits available from the deemed date of retirement as per law.

27. The respondents are directed to complete this exercise within 180 days failing which the amount payable shall attract an interest of at the rate of 12%.

28. The TA is partly allowed accordingly. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)
Announced in the open Court
on this 20th day of August, 2011

(MANAK MOHTA)
(Judicial Member)