ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL BENCH
AT CHANDIMANDIR

…

OA No.2973 of 2012

…

Ajay Pal **...Applicant**

Versus

Union of India & others **…Respondent(s)**

…

For the petitioner : Maj Balbir Singh(Retd), Advocate
For the Respondent(s) : Mr.Gurpreet Singh, CGC

…

CORAM:HON'BLE MR. JUSTICE MS CHAUHAN, MEMBER (J)
HON'BLE LT GEN SANJIV CHACHRA, MEMBER(A)

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ORDER
12.09.2017

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By means of the present O.A., filed under Section(s) 14/15 of the Armed Forces Tribunal Act, 2007, the applicant has prayed for re-instatement into the Army service with all consequential benefits.

2. Briefly stated, the facts of the case are that the applicant was enrolled in the Indian Army w.e.f. 15.07.2003 as a Soldier (GD) AFV and discharged from service w.e.f. 02.06.2010 vide order dated 25.05.2010 (Annexure 2-A) under Army Rule 13(3)item III(v) being undesirable for having been awarded five red-ink-entries under Section 39(a) & (b) and Section 48 of the Army Act, in 06 years, 10 months and 17 days of military service after issuance of a Show Cause Notice on 18.05.2010 (Annexure A-1) and on consideration of his reply, dated 20.05.2010 (Annexure A-2).

3. The applicant has challenged the order of discharge from service on numerous grounds *inter alia* the plea that no effort was made at any level to consider his genuine request, despite the fact that he has an old mother and dependent family, comprising his wife and a son, to look after. The discharge

order has been passed with undue haste in a pre-planned manner in a short span when he was behind the bars, without complying with the relevant procedure. While awarding the five red-ink-entries, the hearing of charges was conducted under the authority of Army Order 24/1994 whereas the said order stood cancelled vide Para 10 of the Army Order 6/2009 and, therefore, the trial for the last three red-ink-entries stood vitiated for having been awarded afterwards the cancellation of AO 24/1994 w.e.f. April 2009, therefore, invalid and void and the punishment is liable to be quashed and set aside, justifying grant of the relief prayed for.

4. On notice, the respondents have filed a written statement enumerating the following delinquencies and punishments awarded to the applicant:-

Sl No.	**Section of the Army Act**	**Details of offences**	**Punishment awarded with date**
(a)	Section 39(a)	Absence without leave	14 days pay fine and seven days Rigorous Imprisonment (RI) in Military custody awarded on 15. 01. 2009. **(RED INK ENTRY)**
(b)	Section 39(b)	Overstaying leave without sufficient cause	Seven days Rigorous Imprisonment (RI) in Military custoday, awarded on 19.03.2009. **(RED INK ENTRY)**
(c)	Section 39(a) Section 54(b)	Absence without leave (Charge Sheet No.1) Negligent loss of Identity Card (Charge Sheet No.2)	15 days Rigorous Imprisonment (RI) in Military custody and 14 days pay fine awarded on 01.11.2009. **(RED INK ENTRY)**
(d)	Section 48	Intoxication	03 days Rigorous Imprisonment (RI) in Military custody, awarded on 18.11.2009. **(RED INK ENTRY)**

(e)	Section 48	Intoxication	14 days Rigorous Imprisonment (RI) in Military custody. Awarded on 11.05.2010 **(RED INK ENTRY)**

5. On the above basis, it is averred that the applicant was given ample opportunity to improve discipline and general conduct but he failed to do so. As per the existing provisions an individual can be discharged from service on award of four red ink entries during the period of service at his credit. The applicant herein was not discharged after awarding four red ink entries on humanitarian grounds and in order to afford him fair opportunities. In spite of this, the applicant did not show any improvement in his conduct and professional acumen and still committed offence of **"Intoxication"** on 10.05.2010 for which he was awarded punishment under Section 48 of the Army Act for the fifth time as an habitual offender during short span of service of 07 years, 10 months and 17 days. Thus, the retention of the applicant in service as an undesirable soldier, became detrimental to overall discipline and, therefore, Commander, 23 (Independent) Armoured Brigade issued a Show Cause Notice to him in accordance with Integrated HQs of MoD letter, dated 28.12.1988, requiring him to show cause as to why he should not be discharged from service under provisions of the Army Rule 13(3) Item III(v) of the Army Rules, 1954 as ***"Services no longer Required"*** vide letter, dated 18.05.2010, and on consideration of the reply given, the applicant was discharged from service on 02.06.2010 with due sanction of the competent authority i.e. the Commander, 23(1) Armoured Brigade.

6. It is further submitted by the respondents that discharge of the applicant has been ordered after following the due procedure and in accordance with the rules & regulations and adherence of the principles of natural justice by affording him sufficient opportunity to improve himself. Therefore, he does not deserve reinstatement into service. The discharge order is legally valid and justified which cannot be taken as a punishment. Reliance is placed upon the judgments/ orders of this Tribunal in the following cases:-

(i) **O.A. No.281 of 2012,** titled **Ex Swr Ajay Kumar vs. Union of India,** decided on **22.01.2013;** and,

(ii) T.A. No.28 of 2009 (Civil Writ No.6715 of 2008), decided by the **Jaipur Bench of AFT on 27.05.2013.**

7. It is further submitted by the respondents that the applications made by the applicant for reinstatement have been suitable replied to. No statutory complaint under Sections 26 and 27 of the Army Act, 1950, for quashing the punishment order and/ or to reinstate him into service, which under the rules is required to be filed within 90 days from the date of discharge/ dismissal/ termination etc., has been made. Accordingly it is prayed that the O.A. lacking substance is liable to be dismissed.

8. We have heard learned counsel for the parties and have perused the record.

9. Ld. counsel for the applicant argued that the authorities without following the rules rather determinedly declared the applicant as an undesirable soldier in order to throw him out of service. The five red ink entries have been awarded to the applicant illegally and without following Army Order 24/94 specifically provided for guidance of Commanding Officers with the instructions to be strictly complied with at the time of hearing of the charges, as provided under Army Rule 22(1). However, no care was taken to comply with the procedure outlined before disposing of the disciplinary cases against the applicant and there are instances of violation of the stipulated rules and regulations which vitiated the red ink entries and the punishments awarded to the applicant.

10. It is further argued by the learned counsel that the impugned discharge of the applicant deserves to be set aside in view of the Larger Bench judgment of the Hon'ble Supreme Court, dated **16.10.2015,** in **Civil Appeal D.No.32135 of 2015** titled **Veerendra Kumar Dubey vs. Chief of Army Staff & others** as followed by this Tribunal in **OA No.381 of 2016**, titled **Sanjeev Kumar vs. Union of India & others**, decided on **02.06.2016**.

11. Per contra, the learned counsel for respondents argued that discharge of the applicant has been ordered after adopting due procedure under the rules and the law, therefore, calls for no interference by this Tribunal.

12. Let it be stated at the very outset that the cases, as the present one, are to be considered by this Tribunal under powers of judicial review under which we cannot act as an appellate authority to re-appreciate the evidence and to arrive at our own independent findings on the evidence. This Tribunal can, of course, interfere where the authority held the proceedings against the delinquent applicant in a manner inconsistent with the rules of natural justice or in violation of any statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence and if the conclusion or finding is such as no reasonable person would have ever reached and/ or the punishment awarded is found to be disproportionate and not commensurate with the misconduct proved against the delinquent and is shocking to the conscience of the Court. Keeping this in mind, we proceed to consider the rival submissions made on both sides in this case and in the process, we have also carefully gone through the judgments relied upon by the parties on both sides.

13. We have utmost respect for the verdict given by the Hon'ble Supreme Court in *Veerendra Kumar Dubey's case (supra)* in which the law on the subject, as followed by this Tribunal in *Sanjeev Kumar's case (supra)*, has been laid in a great detail, upholding the procedural mandate whereby the competent authority can direct discharge after giving to the person whose discharge is contemplated, an opportunity to show cause against the same provided the circumstances of the case permit the grant of such opportunity. Not only the show cause notice which is an indispensable part of the requirement of Rule 13 but also an impartial enquiry is required into the allegations in which the delinquent 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 red ink entries have also to be followed. An unequivocal declaration has been made that mere award of four red ink entries to an individual does not make his discharge mandatory. It 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 has further been ruled that it is one thing to qualify for consideration and entirely different to be found fit for discharge. The competent authority is required to consider the nature of the offence for which such entries have been awarded. Termination of the individual's service is an extreme step which ought to be taken only if the facts of the case so demand.

14. The Hon'ble Supreme Court has further ruled as under:-

> *"11. ... What is evident from the procedural mandate given to the authorities is to ensure that discharge is not ordered mechanically and that the process leading to the discharge of an individual is humanized by the requirement of an impartial enquiry into the matter and fair opportunity to the concerned especially when he is about to complete his pensionable service. Equally significant is the fact that the authority competent to discharge is required to take into consideration certain factors made relevant by the circular to prevent injustice, unfair treatment or arbitrary exercise of the powers vested in the Authority competent to discharge. For instance Note 2 to Rule 5(supra) requires the competent authority to take into consideration the long service rendered by the individual, the hard stations he has been posted to and the difficult living conditions to which the individual has been exposed during his tenure. It is only when the competent authority considers discharge to be absolutely essential after taking into consideration the factors aforementioned that discharge of the individual can be validly ordered."*

15. We proceed to consider this case keeping the above law in mind. According to the facts of the present case, an opportunity to show cause has been given to the applicant as per Annexure A-1, dated 18.05.2010. The reply of the applicant thereto is noteworthy and is reproduced below for purposes of reference:-

"1. Please refer to your letter No.4036/3/A dt 18 May 10.

2. ***I accept the fact that I have failed to improve my discipline despite the punishments and cautions given to me by my superiors including the last chance given by you.***

3. May I request you to kindly give me a final chance to improve myself. I assure you that I will try my best to be a more discipline soldier.

4. ***If my retention in service is not acceptable, I may be discharged from the service.***

5. xxx xxx".

16. The above reply, given by the applicant to the show cause notice, in clear and unequivocal terms amounts to admission and acceptance of the applicant that he remained undisciplined during the short span of the service rendered by him and despite punishments, cautions and last chance afforded to him by his superiors, did not improve. In this regard, the observations made by the competent authority in the impugned order of discharge, are also relevant which are reproduced below:-

"… Inspite of having been repeatedly counselled to improve his conduct and discipline, the individual has neither shown improvement in his behaviour nor shown any desire to improve his military discipline. Hence retention of the said individual in the service is considered undesirable being an indisciplined soldier."

Thus, on the own admission of the applicant that he failed to maintain discipline despite last chance afforded to improve, nothing remained to be inquired into and the view taken by the competent authority that he is an undesirable soldier to be retained in service, can not be faulted with. As such, no benefit can be drawn by the applicant of the judgement of the Hon'ble Supreme Court in *Veerendra Kumar Dubey's case (supra)*, followed by this Tribunal in *Sanjeev Kumar's case* (supra). Even otherwise, there is departure of facts from that case inasmuch as the offence therein for awarding red ink entries was merely related to overstaying on leave whereas the applicant herein has been punished

for more grievous offence of *'intoxication'* twice. Long service had been rendered by the appellant therein in difficult living conditions at the hard stations, which is not the case herein and it was in these facts and circumstances that the Apex Court took a view that there was nothing on record to suggest that the nature of the misconduct leading to the award of red ink entries was so unacceptable that the competent authority had no option but to direct his discharge to prevent indiscipline in the force. In the facts and circumstances of the present case, we feel convinced otherwise and are of the considered view that no interference in the order of discharge of the applicant is called for by this Tribunal and it is to be held legally valid and justified.

17. For taking the above view, we draw support from an earlier judgment of this Tribunal in **T.A. No.1254 of 2010***(arising out of CWP No.1666 of 2004*), **Raj Kumar vs. Union of India & others**, decided on **07.03.2014,** the relevant part of which is reproduced below:-

> *"13. The above two questions namely as to whether the instructions issued by the Authorities over-riding the rules which only provide for issuance of show cause notice before passing the impugned order and no holding of inquiry in such cases of red-ink entries were duly considered by a Division Bench of Delhi High Court in the case of* ***Partap Singh vs. Chief of Army Staff and others****, decided on* ***30.06.2011****. A reference was also made to an earlier Division bench Judgment of the Court and the decision of the Hon'ble Supreme Court in the case of* ***Deepak Kumar Santra, 2009(7) SCC 370*** *wherein it was held that no inquiry was required under Rule 13 and, therefore, the Delhi High Court had observed that the Division Bench judgment in the earlier case holding that no action could be taken under Rule 13 without an inquiry was held to be incorrect in view of the judgment of the Hon'ble Supreme Court in* ***Deepak Kumar Santra's case*** *(supra). The judgment cited by the Delhi High Court was the one in the case of* ***Surinder Singh Sihag vs. Union of India, 100(2002) DLT 705***

which was held to be not correct in view of the judgment of the Hon'ble Supreme Court.

14. Both the above questions were duly considered by the Delhi High Court in the case of ***Partap Singh*** *(supra) and the judgment of Hon'ble Supreme Court in* ***Deepak Kumar Santra's case****(supra) and the following observations were made which are relevant and are reproduced below:-*

> *"17. Pertaining to discharge of an Army Officer exercising power under Rule 13 of the Army Rules, the Supreme Court held that once statutory rules occupy the field, there is no place a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters where a policy guideline is not followed.*
>
> *18. Relevant would it be to state that where a Rule deals with subject matter and the procedure to be followed with respect to the subject matter is also prescribed by the Rule, there is no scope to issue a policy guideline with respect to the procedure to be followed.*
>
> *19. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule.*
>
> *20. That apart, it escaped the notice of the Division Bench of this Court as to what was the scope of the enquiry to be conducted if the power to discharge a force personnel was being exercised with respect to the service profile which shows that the person concerned had earned five red ink entries and the requirement of the rule was to consider whether such a person is required to be discharged from service.*
>
> *21. Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.*

22. We see no scope for any inquiry to be conducted where a person is being discharged from service with reference to his past service record.

23. We note that under Rule 13(3) Item III(4) the Commanding Officer has to exercise the power upon being satisfied that the desirability to retain the person concerned on the strength of the Unit is no longer there. The objective material obviously has to be the service record. It is a power akin to the power exercised in civil service under Rule 56(j) of the Fundamental Rules.

24. Noting in the instant case that before taking the action a show cause notice was served upon the petitioner and after considering the reply filed by him the action was taken, meaning thereby the procedures of the law were followed we dismiss the appeal but refrain from imposing any costs."

*15. The above decision, therefore, lays down the correct law and in view of the red ink entries which are there on the record and have not been set aside and a show cause notice was issued and considered, there was no scope for inquiry and the instructions issued cannot be supersede the Rules which provides for only a show cause notice to be issued and does not necessitate any inquiry. The above decision, therefore, clearly lays down the law. Since the judgment cited in **AK Bakshi's case** (supra) was in regard to an Airman while in the present case it pertains to an Army man and Rule 15(2) was duly considered.*

*16. Reference was also placed upon another judgment of the Delhi High Court in the case of **Om Lat vs. Union of India and others W.P.(C) No.5747/2011**, decided on **02.07.2012** wherein the decisions of Delhi High Court in **Surinder Singh Sihag's case (supra), Partap Singh's case (supra) and Depak Kumar Santra's case** of the Hon'ble Supreme Court were considered and the*

decision of the Armed Forces Tribunal that the petitioner had failed to make out any such illegality, irregularity or perversity, which will require any interference by the Court in the writ jurisdiction, was held to be not attracted.

*17. The Court had agreed with the decision of the Coordinate Bench in **Partap Singh's case** (supra) that there is no scope to rely upon the policy guidelines with respect to the procedure to be followed. Inquiry to be held if the facts were in dispute or blameworthiness of the petitioner was to be ascertained. The petitioner could not challenge the earlier punishment awarded to him since these were not challenged and there was no scope for any inquiry and only a show cause notice was to be issued and the past service record was to be considered.*

18. In view of the above discussion, it is clear that due procedure was followed before passing the impugned order for discharge which was issued after issuance of show cause notice to the petitioner and considering his reply and, therefore, the discharge was sanctioned which order does not suffer from any illegality."

17. The support is also drawn from the judgment of the Hon'ble Supreme Court in Union of India & Ors. V. Corporal A.K.Bakshi and Anr. (1996) 3 SCC 65 wherein the question before the Court was whether an order of discharge passed in pursuance of the policy for discharge of habitual offenders could be considered a *discharge simplicitor* as envisage in 15(2)(g)(ii) or if it would tantamount to termination of service by way of punishment under Rule 18 of the said Rules. The Court came to the conclusion that it was a discharge simplicitor and as such it could not be held as termination of service by way of a punishment for misconduct.

18. By applying the same analogy to the present case, we hold that due procedure was followed before passing the impugned order for discharge of the applicant which has been issued after issuance of show cause notice to the

applicant and considering his reply and, therefore, discharge order is found to be suffering from no illegality. The O.A., thus, is found bereft of any merit, is hereby dismissed.

18. In the facts and circumstances of the case, the parties are left to bear their own costs.

(Sanjiv Chachra)
Member (A)

(MS Chauhan)
Member(J)

Chandigarh

Dated: 12.09.2017

`bss'

Whether the judgment for reference to be put on internet – Yes/ No