ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR

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TA 47 of 2013 (arising out of RSA 3994 of 2003) (O&M)

Paramjit Singh ..... Petitioner(s)
Vs
Union of India and others ..... Respondent(s)

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For the Petitioner (s) : Mr. Ashok Bakshi, Advocate
For the Respondent(s) : Mr. Anil Khurana, CGC.

Coram: Justice Prakash Krishna, Judicial Member.
Lt Gen (Retd) NS Brar, Administrative Member.

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JUDGMENT
25.11.2013

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This case has been received by transfer from Punjab and Haryana High Court and it arises out of original Suit No. 107 of 13.5.1998 which was instituted by the present petitioner. The suit was instituted seeking certain declaratory reliefs for declaration to the effect that the order passed by the defendants to discharge the plaintiff from army service on 13.8.1994, is illegal and that he is entitled for reinstatement in service.

The aforesaid suit was instituted on the pleas inter-alia that the plaintiff was enrolled in the army on 4th January, 1980 (7th Sikh Light Infantry) and had been discharged on 13.8.1994 after completion of 14 years and 212 days of service. In the month of March, 1987, he was promoted to the rank of Naik. It was further stated that the petitioner was granted balance of annual leave for the year 1991 with effect from 1.11.1991 to 30.11.1991. It was further stated that during the period of leave, plaintiff/petitioner was awarded punishments in papers only for an offence punishable under Section 80 (c) of Army

Act and he was severally reprimanded and fined for 14 days. The petitioner has been discharged from the service without any valid reasons. The plaintiff-petitioner filed an appeal before the Chief of the Army Staff which has not been decided, inspite of the repeated reminders. Subsequently on 26.6.1996, defendant No. 4 informed him that he is eligible to earn pension only. Hence the suit.

The suit was contested by filing a joint written statement wherein the maintainability of the suit was questioned. It was further pleaded that the suit is barred by time as the plaintiff was discharged from the service on 13.8.1994 under the Army Rule 13(3) Item No. III(v). Several punishments were awarded to the plaintiff during his service and his services not found satisfactory. It was further stated that due to clerical error, period of balance leave was published as 1.11.1991 to 30.11.1991 instead of 1.9.1991 to 30.9.1991. The mistake was rectified by correcting the DO Part II order. The allegation that the plaintiff was discharged from service without any reason or ground was denied and was stated that the plaintiff by his own action has become unfit and was rightly discharged.

On the pleadings of the parties, the following issues were framed by the learned trial court :-

1. Whether discharge of plaintiff from service dated 13.8.1994 and subsequent order dated 21.12.1997 are illegal, null and void ?

2. Whether suit of plaintiff is within limitation ?

3. Whether notice served upon defendants is illegal and invalid ?

4. Whether plaintiff is entitled to declaration, prayed for ?

5. Relief.

Issues No. 1 and 4 were decided together by holding that plaintiff has failed to prove that his discharge from Army on 13.8.1994 is illegal, null and void. The suit is beyond time as it was filed beyond three years from the date of discharge from the Army vide finding under Issue No. 2. The Issue No. 3 was decided in favour of the plaintiff as no evidence in support of the said issue was led by the defendants. The trial court has held that the plaintiff is not entitled for the declaration prayed for and hence the suit was dismissed vide judgment and decree dated 4.5.2002.

The matter was carried in appeal being Civil Appeal No. 21 of 8.6.2002 before the Additional District Judge, Ludhiana who vide its judgment and decree dated 22.1.2003 dismissed it after confirming the findings of trial court on Issue Nos. 1 and 4 by holding that the impugned orders are not illegal, null and void and the plaintiff is not entitled to the declaration prayed for. The matter was carried in further appeal by way of second appeal before the Punjab and Haryana High Court, registered as RSA No. 3994 of 2003. The above mentioned appeal has been transferred to this Tribunal vide order dated 17.12.2012 passed by the High Court.

Heard the learned counsel for the parties and perused the record. The learned counsel for the appellant/petitioner submits that the impugned order of discharge, discharging the appellant from the Armed Forces is wholly illegal and without jurisdiction. The appellant completed 14 years and 212 days in service. The appellant availed the sanctioned leave and has committed no illegality in proceeding on the leave. During the leave period, he fell ill and got the treatment from the Army Hospital. The Photostat copies of medical record were filed before the trial court which were accepted without being there any objection with regard to their admissibility in evidence by the either side. However, those documents have been wrongly ignored by the two courts below on the ground that in the absence of the original documents, Photostat copies are not admissible in evidence. The plaintiff/appellant is entitled to full back wages along with interest from the date of his discharge i.e. from 13.8.1994 till the decision taken by the respondents on 26.6.1996, making him eligible to earn pension. He may be granted pensionary benefits by counting the period commencing from 13.8.1994 to 26.6.1996 as continuous in service.

In reply, the learned counsel for the respondents refuted the aforesaid arguments of the appellant and submitted that the impugned order of discharge is perfectly justified. During the course of service, the appellant-petitioner suffered as many as four red-ink entries to this credit. These red-ink entries were never challenged or disputed by the

appellant-petitioner at no point of time. Nor they have been questioned in the suit. Taking into consideration the overall performance of the appellant, a decision was objectively taken to discharge him from the service. The appellant never discharged his duties properly. Further the appellant was granted 30 days annual leave for the year 1991. Due to clerical error, period of balance leave was published as 1.11.1991 to 30.11.1991 instead of 1.9.1991 to 30.9.1991. The said mistake was rectified subsequently by passing an order.

We have given careful consideration to the submissions of the parties. The following two questions fall for consideration before us:-

(i) Whether the suit of the plaintiff is within period of limitation ?

(ii) Whether the discharge of plaintiff from service vide order dated 13.8.1994 and its confirmation by the subsequent order dated 21.12.1997 are illegal, null and void ?

So far as Question No. (i) is concerned, we find that the said issue has been decided against the appellant by both the courts below on the premises that the plaintiff was admittedly discharged from service on 13.8.1994 and the suit giving rise to the present appeal (case) was filed on 13th May, 1998. It is not in dispute that against the said discharge order dated 13.8.1994, the appellant had filed a petition on 18.10.1994.

On 17.1.1995, the plaintiff alleges that he filed an appeal addressed to the Chief of Army Staff for redressal of his grievances which remained undecided, vide para 7 of the plaint. In para 8 of the plaint, it is mentioned that on 26.6.1996, the defendant No. 4 informed the plaintiff that he is made eligible for pension. This fact has been admitted. The plaintiff/petitioner still felt aggrieved and he is seeking the remaining relief.

The case of the defendant/respondents is that the suit was filed after expiry of three years from the discharge order dated 13.8.1994. The said plea has been found favour with the Trial Judge as well as by the First Appellate Court. We find that it is not disputed by the defendants that vide Army HQ letter No. B-6013/2416/Inf-6(Pers.) dated 13.6.1996, the action to condone the shortfall of the service was taken and subsequently he was granted service pension, as per para 9 of the written statement. Period of limitation for filing a suit for declaration is three years from the date of the accrual of the cause of action. The relevant Article 113 of the Limitation Act, provides that any suit for which no period of limitation is provided elsewhere in this schedule, the period of limitation would be three years, "when the right to sue accrues". In the case in hand, it should be taken to the date on which the representation/appeal filed by the petitioner was finally decided by the order of the Army HQ referred to here in above i.e. 13.6.1996. The suit having been filed on 13th May, 1998 within three years from that date, it would be within the period of limitation. The civil courts have failed to take a note of the order dated 13.6.1996,

therefore, the findings recorded by them on the question of limitation is vitiated and thus the same cannot be allowed to be sustained. It is held that the suit is within time. We may also place on record that the Army HQ letter referred herein above is not on the file of the case presumably it being not in issue between the parties. It can be held that the cause of action for declaration etc. accrue, when the other relief was denied by the defendant on 13.6.1996.

Now we take up the second point i.e. Whether the discharge of plaintiff from service vide order dated 13.8.1994 is justified or not ? The submission of the learned counsel for the petitioner is that the said order has been passed by the authority who was not competent to pass it and secondly that the petitioner was not given any opportunity of hearing before passing of the said order. He further submits that there is some manipulation in the record as the petitioner availed balance leave and as such the order of discharge is illegal. In contra, the learned counsel for the respondents submits that the appellant was discharged as his services were no longer required. During the service, the petitioner received as many as four red ink entries (adverse remarks) awarding punishments to the petitioner. The leave record of the petitioner was produced before the courts below to show that the leave period which was due to the petitioner was corrected. Further, show cause notice dated 18.6.1994 was duly issued to the petitioner before passing of the impugned order. But no cause was shown.

Considered the submissions made by the learned counsel for the parties and perused the record. It was urged that the discharge order has not been passed by competent officer/authority. Firstly, it appears that no such plea has been set out either in the plaint or raised before the courts below. We repeatedly asked the petitioner's counsel to show as to how the authority who passed the discharge order is not the competent authority. But he failed to do so. He could not place any material to show that the Commander 121(I) Inf Bde Gp was not competent to pass the discharge order.

The relevant statutory provisions are contained in Section 20 of the Army Act and Rule 17 of the Army Rules. They are reproduced below:-

> Army Act:
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> "20. Dismissal, removal or reduction by the Chief of Army Staff and by other Officers –
> (1) & (2) xxx xxx xxx
> (3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioner officer.
> (4) to (6) xxx xxx xxx
> (7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder."
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> Army Rules:-
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> "17. Dismissal or removal by Chief of Army Staff and by other officers – Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section(3) of section 20, unless he has been informed of the particulars of the cause of action against him and allowed reasonable

> time to state in writing any reasons he may have to urge against his dismissal or removal from the service.
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> Provided that if in the opinion of the officer competent to order, the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may, after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the General Government."

A perusal of the Discharge Certificate on record would show that the petitioner was discharged from the service by the order of Commander 121 (I) Infantry Brigade Group under Army Rule 13(3) Item(III) (v) and Army Headquarters letter No. A/00660/GS/Rtg (I of R) dated 21st July, 1973 being services no longer required. His discharge takes effect from 13.8.1994 (AN). The discharge order was passed by the competent authority.

In view of the above, we find no substance in the aforesaid submissions of the petitioner's counsel and the same is hereby rejected.

Before passing of the discharge order dated 13.8.1994, a show cause notice dated 11.7.94 was served on the petitioner. The said show cause notice is reproduced below :-

> "You were enrolled in the Army on 04 Jan 80 and posted to 7 SIKH LI on completion of basic trg. Since your enrolment in the army, you have been awarded the following punishments, resulting in four red ink entries, on the charges mentioned against each :-

(a) AA Sec 39(a) "Absenting himself without leave"
28 days RI

(b) AA Sec 39(d) "Without sufficient cause fails to appear at the time fixed for PT parade"
07 days detention

(c) AA Sec 40(c) "Using insubordinate language to his Superior officer"
Severe Reprimand and 14 days pay fine

(d) AA Sec 63 "Violation of good order and MIL Discp."
Severe Reprimand"

Admittedly no cause was shown by the petitioner. We have perused the plaint in this regard very minutely. Except making a bald statement that the discharge order passed on 13.8.1994 is illegal, null and void, unlawful and against the principle of natural justice vide Para 15 of the plaint, there is no averment that no show cause notice before passing of the discharge order was served on the petitioner. A bald allegation has been made that the said order has been passed against the principle of natural justice. How and in what manner, the principle of natural justice has been violated, has not been pleaded anywhere in the plaint. A perusal of the show cause notice would show that as many as on four occasions, the petitioner was punished under Sections 39(a), 39(d), 40(c) and 63 of the Army Act.

The order of discharge has not been passed arbitrarily or on the subjective satisfaction but is based on the material on record. The

petitioner was given imprisonment of 28 days for the offence under Section 39(a), detained for 07 days for the offence under Section 39(d), severe reprimand and 14 days pay fine under Section 40(c) and severe reprimand under Section 63 of the Army Act.

It appears that after the close of the arguments, learned counsel for the petitioner filed Photostat copies of certain rulings to the effect that before passing of discharge order, an enquiry should be conducted in accordance with policy letter dated 28.12.1988. They are as follows:-

(i) "CWP No. 662 of 2012 – Ex. Driver M.T. Parshotam Dass Vs Union of India and others decided on 30.01.2013 by the Punjab and Haryana High Court, wherein the discharge order has been quashed by following the two judgments of Delhi High Court in the cases of Surinder Singh Sihag Vs Union of India, 2003(1) S.C.T. 697 and Ex. Nk Shri Bagwan Vs Union of India and others, 2009(2) S.C.T. 343. The Punjab and Haryana High Court on the basis of the decision of the Delhi High Court has held that an order of discharge of service, without following the procedure prescribed therefore, cannot be sustained.

(ii) Ex-Constable Rajinder Kumar Vs State of Haryana and others, 2002(2) RSJ 59 in LPA No. 1252 of 1992 decided on 20th September, 2001 by the Punjab and Haryana High Court. It was a case under Punjab Police Rules and has nothing to do with the controversy on hand. There the petitioner challenged the termination order. It was decided on different factual matrix and under different statutes.

(iii) CWP No. 2629 of 1991 – Roop Singh Vs General Officer Commanding and others, 2004(3) RSJ 223. It was a case of Ex-Havildar who was dismissed from service but without issuing any show cause notice. The controversy was as to whether the giving of show cause notice could be dispensed with or not. There the petitioner was not intimated anything about the outcome of the proceedings taken by the Court of Inquiry nor its findings or opinion were ever conveyed to him. Therefore, this case is also distinguishable and there different controversy was involved.

(iv) Civil Writ No. 384 of 1981 – D.P. Mahajan Vs Punjab National Bank and others decided on 10th February, 2004 by the Delhi High Court, 2004(3) RSJ 366. A case with respect of bank employee, where the relevant documents according to the employee were not supplied. Therefore, this case also is not applicable to the appellant.

(v) Writ Petition No. 836 of 2003 – Prem Kumar Upadhyay Vs Air India Ltd. and another, 2005(3) RSJ 785 decided on 17th December, 2004 by Bombay High Court, where an employee of Air India was served with charge-sheet. It has been held that person claiming document has the duty to point out how each and every document was relevant to the charges or to the enquiry being held against him and whether and how their non supply has prejudiced his case. Obviously, this case also does not give any help to the petitioner as it is distinguishable on facts and was rendered under a different statutory setup.

(vi) For the same reasons, judgment passed in R.S.A. No. 3203 of 2005 – Rajan, Ex-Constable Vs State of Punjab

and others decided on 27th May, 2009 by Punjab and Haryana High Court, 2009(4) RSJ 546, is not applicable.

We find that discharge from service under Army Rule 13, the person concerned received punishments termed as 'RED INK ENTRIES' has been considered and discussed in detail in OA No. 362 of 2011- Shingara Singh Vs Union of India and others by this Tribunal decided on 07.01.2013. After a great deal of discussion and taking into consideration the judgment given by the Delhi High Court in case of Surinder Singh Sihag (Supra) and other judgments, the view taken in the case of Surinder Singh Sihag for the reasons reproduced below, has not been followed :-

> "In the case of Surinder Singh Sihag, The Division Bench of the Delhi High Court took the view that no action could be taken under Rule 13 without an inquiry and since no inquiry was held against Surender Singh Sihag when his services were dispensed with by way of discharge pursuant to a show cause notice alleging against him that he had earned five red ink entries, the order was quashed. But we find that the Supreme Court, in the decision reported as 2009(7) SCC 370 UOI & Ors. Vs. Deepak Kumar Santra, had taken a view contrary to the one taken by the Division Bench of the Delhi High Court. **In so far as discharge by an authority exercising power under Rule 13 of the Army Rules was concerned, the Supreme Court had held that once statutory Rules occupy the field, there is no place for a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters whether a policy guideline is not followed.**
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> **It would be relevant to state that where a Rule deals with a 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. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule. Introducing the requirement of holding an inquiry under the policy guideline of 28.12.1988 is redundant."**

With great respect to the Hon'ble Judges of High Courts, in view of the subsequent judgment of the Apex Court in the case of Deepak Kumar Santra(Supra), we are bound to follow the pronouncement of the Hon'ble Apex Court and thus do not find any substance in the petitioner's case. It appears that the attention of the High Court was not invited to Union of India and others Vs Corporal A.K. Bakshi, (1996) 3 SCC 65 and Union of India and others Vs Deepak Kumar Santra, (2009) 7 SCC 370. Even otherwise also, it is a case where the petitioner did not file any reply to the show cause notice and as such there being no denial of the contents of show cause notice, no inquiry was needed. Even otherwise also, this plea cannot be pressed for the first time before this Tribunal as it was not raised in the suit. Whether inquiry was conducted or not, necessarily requires investigation of this fact. Had there been any such plea, the defendants could have produced the record to show that as a matter of fact, some inquiry was held. In any view of the matter, the petitioner has failed to show the prejudice if any for not holding the inquiry, if it is so. The factum of red ink entries is no longer in dispute and has been rightly not questioned in the suit nor could be challenged in view of the judgment of the Principal Bench of this Tribunal passed in Ex. Nk Birender Kumar Singh Vs Union of India, T.A. No. 563 of 2009 decided on 27.2.2012.

We therefore, do not find any substance in the aforesaid arguments of the learned counsel for the appellant.

The learned counsel for the respondents pointed out that 15 years of service is the qualifying service for pension and by the respondent authority has accepted the appeal of the petitioner to this limited extent and the petitioner has been granted pension. Learned counsel for the petitioner's plea is that the petitioner should be treated in service upto the date of decision of the departmental appeal. As a matter of fact, one of the reliefs claimed by him in the suit is that a declaration be granted declaring that the petitioner is entitled for pensionary benefits by counting the period from 13.8.1994 to 26.6.1996, as continuous service and the order passed by the defendants on revision petition dated 17.2.1997 received by the petitioner on 21.12.1997 is not binding on the petitioner and the same be declared null and void. It is difficult to treat the petitioner in service upto the date of decision of the appeal or revision. Undoubtedly, the discharge order is of dated 13.8.1994 which has been confirmed with small variation by the higher authority in appeal or revision. The order dated 13.8.1994 came into operation ipso facto and the said order did not require any approval by any higher authority. Challenge to the said order by way of appeal or revision will not make the order non est. The effective date would remain 13.8.1994. The learned counsel for the petitioner could not place any statutory provision or principle of law in support of his above plea. In these state of affairs, in the absence of any such principle of law, the arguments of the learned counsel for the petitioner cannot be accepted.

Lastly, it was urged that the petitioner rightly availed the leave due to him and he could not report on duty as he fell ill. In support thereof, certain documents showing that he was treated in the Military Hospital were filed, which according to him, have been wrongly rejected by the courts below. Be that as it may, since this is not one of the grounds for discharge, we do not think it necessary to examine the said plea.

Alternatively, it will not be out of place to mention here that the aforesaid plea has been examined in the light of the evidence produced by the parties and the two courts below came to the conclusion that the petitioner unauthorizedly availed the leave in the month of November, 1991 when it was not due to him. The leave was due to him in the month of September, 1991. The petitioner could not produce any document in support of his contention that Railway warrants etc. were issued to him to avail the leave for the month of November, 1991. He could not testify his case in the cross-examination.

In view of our above discussions, we do not find any merit in this transferred case which has been treated as petition and the same is hereby dismissed but no order as to costs.

(Justice Prakash Krishna)

(Lt Gen (Retd) NS Brar)

25.11.2013
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Whether the judgment for reference to be put up on website – Yes/No