Harbans Singh v. Union of India, (AFT) (Regional Bench Chandigarh At Chandimandir) *: Law Finder Doc Id # 1999617*

ARMED FORCES TRIBUNAL

(Regional Bench Chandigarh At Chandimandir)

Before:- Mr. Justice Dharam Chand Chaudhary, Member (J) and Vice Admiral Hcs Bisht, Member (A).

OA 480 of 2016. D/d. 26.04.2022.

Harbans Singh - Applicant

Versus

Union of India and Ors. - Respondents

For the Applicant:- Mr. GS Ghuinan, Advocate.

For the Respondent:- Mr. FS Virk, Sr PC.

Armed Forces Tribunal, Act, 2007, Section 14 (2) - Army Act, 1950 Section 39 (a) and 39 (b)

Cases Referred :-

Narain Singh v. Union of India 2019 (9) SCC 253 : AIR 2019 (SC) 4433

Sep.Satgur Singh v. UOI 2019 (9) SCC 205 : AIR 2019 (SC) 4047

Surinder Singh v. Union of India (2003) 1 SCT 697

Union of India v. Balwant Singh Civil Appeal No. 5616 of 2015

Union of India v. Corporal A.K. Bakshi

Union of India v. Dipak Kumar Santra

Union of India v. Rajesh Vyas

Veerendra Kumar Dubey v. Chief of Army Staff (2016) 2 SCC 627

ORDER

Mr. Justice Dharam Chand Chaudhary, Member (J). (Oral) - This order shall dispose of the present application filed under Section 14 (2) of the Armed Forces Tribunal, Act, 2007 for the grant of following reliefs:-

(a) to quash and set aside the impugned orders dated 18.01.2016 and 04.02.2016 marked as Order No.1 and Order No.2, rejecting thereby the claim of the applicant for the grant of service pension and

(b) to grant service pension and other retrial benefits to the applicant in terms of Regulation 132 of the Pension Regulations for the Army 1961 Part-1 w.e.f 11.08.1990 with all consequential benefits.

2. The facts of the case not in controversy in a nutshell are that the applicant got himself enrolled in the Indian Army on 19.06.1979. After completion of his basic military training, he was posted to 3 Sikh LI Regiment w.e.f. 10.05.1980. He remained posted at different Regiments where he allegedly accomplished the assignment entrusted to him to the entire satisfaction of his superiors. On his participation in Operation namely "Hornut" and 'Battle Axe', he was awarded 'Samanya Seva Medal'.

3. The applicant, however, allegedly maintained poor discipline while in service and he was awarded punishment on several time. The charges herein below contains the details of the offences the applicant allegedly committed and the punishment awarded to him:-

Sr.No	Date of Offence	Punishment Awarded under Army Act	Punishment Awarded	Date of Punishment Awarded
(a)	16 Dec 1984	AA Sec 39 (a)	21 days imprisonment	17 Jan 1985
(b)	24 Jul 1985	AA Sec 39(b)	28 days RI and 14 days detention	12 Aug 1985
(c)	30 Jan 1986	AA Sec 39(b)	28 days RI and 14 days detention	25 Aug 1986
(d)	25 May 1988	AA Sec 39(b)	28 days RI and 14 days detention	11 Aug 1988
(e)	13 May 1990	AA Sec 39(a)	28 days RI and 14 days detention	25 May 1990

4. While the applicant submits that he has been discharged from service on the ground "Service No Longer Required" under Army Rule 13 (3) (III)(v) on 10.08.1990 without affording him an opportunity of being heard, the respondents claims that show cause notice dated 08.07.1990 Annexure R-l was served upon him and the reply thereto he submitted is Annexure R-2. Therefore, while the applicant prays for quashing of impugned Order No. 1 and Order No.2 to the Original Application being illegal and violative of principle of natural justice, the respondents have sought the dismissal of the application on the grounds inter-alia that the applicant was a habitual offender as irrespective of having been given various opportunities to improve his act, conduct and behaviour, he failed (sic) available with them served the applicant with show cause notice Annexure R-l. Although he filed reply Annexure R-2 to the show cause notice, however, in the form of mercy petition as he did not opt for giving explanation to this charges against him. He, as such was rightly discharged from service on the ground "Service No Longer Required".

5. It is in this back drop and in the light of the legal principles well settled at this stage, we have hoard Mr.G.S.Ghuman, learned counsel representing the applicant and Mr.F.S.Virk, learned Senior Penal Counsel for the respondents and have also gone through the record .

6. The only question which has engaged our attention in this matter is as to whether in the given facts and circumstances of the case and also the applicable rules/ law, the respondents were justified in discharging the applicant from service on the ground "Service No Longer Required" under Section 13 (III) of the Army Rules. Before this poser is answered, we would like to mention the offence the applicant allegedly committed under: section 39 (a) and 39 (b) of the Army Act and the punishment prescribed therefor. Section 39 (a) and 39 (b) reads as under:-

"39. (a) absents himself without leave; or

39 (b) without sufficient cause overstays leave granted to him".

He on completion of Court Martial is liable to suffer imprisonment for a term which may extend to three years or such lesser punishment as is mentioned in this Act. The charge reproduced in earlier part of this judgment shows that he absented himself without leave and as such, awarded the punishment firstly for 21 days imprisonment on 17.01.1985: secondly 28 days Rigorous Imprisonment and 14 days detention on 12.08.1985; thirdly 28 days Rigorous Imprisonment and 14 days detention on 25.08.1986; fourthly 28 days Rigorous Imprisonment and 14 days detention on 04.08.1988 and fifthly 28 days Rigorous Imprisonment and 14 days detention on 20.06.1990.

7. The punishment as awarded against the applicant, however, is qua the offence of absence from duty/ over stayal of leave duly sanctioned and not for the commission of any cognizable offence. He has been duly awarded the punishment for the commission of such offence as discussed here in above.

8. Now if coming to the second limb of arguments, that the applicant has been discharged from service without affording him an opportunity to show cause notice, the same in view of the show cause notice Annexure R-l and the reply thereto Annexure R-2 he submitted has no legs to stand. The respondents are also justified in submitting that the applicant has not given any reasonable ana plausible explanation to the allegations against him in the show cause notice because the reply Annexure R-2 he submitted reveals that the same is in the nature of mercy petition.

9. As a matter of fact, he sought the mistake he committed to be pardoned and requested the respondents to give him one opportunity to improve himself and also to serve the Army. He has tendered apology and also submitted that, his family comprises four daughters and son are solely dependent upon him.

10. It is, however, to be seen that in the given facts and circumstances, the order of discharge of the applicant was the only alternative available with the respondent authorities and the order of the discharge is legally sustainable.. This determination of this point takes us to the law cited on both sides at bar.

11. On behalf of the applicant, reliance has been placed on a Three Judge Bench judgment of the Hon'ble Apex Court in ***Veerendra Kumar Dubey vs. Chief of Army Staff, 2016 (2) SCC 627*** and also again a Three Judge Bench judgment in ***Narain Singh vs. Union of India and others 2019 (9) SCC 253 : AIR 2019 (SC) 4433***. On the strength of the ratio thereof, it has been urged that due to non compliance of the procedure and affording an opportunity of being heard to the applicant, the order of discharge is illegal, arbitrary and against all canons of principles of natural justice.

12. The respondents in order to rebut the contentions so raised have placed reliance on a Division Bench judgment of the Hon'ble Apex Court in ***Sep.Satgur Singh Vs. UOI and others 2019 (9) SCC 205 : AIR 2019 (SC) 4047*** and has claimed that the only requirement was to serve the applicant with a show cause notice which in this case has been done and as the applicant has failed to give plausible and reasonable explanation and rather conceded to the allegations against him in reply Annexure R-2, therefore, he was rightly discharged from service in view of his "services Were No Longer Required"

13. Now coming to the ratio of Three Judge Bench judgment in Veerendra Kumar Dubey 's case (supra), the same reads as follows:-

"10. A careful reading of the above would show that the competent authority has made it

abundantly clear to officers competent to direct discharge that before discharging an individual, not only should there be a show cause notice but an enquiry into the allegations made against the individual concerned in which he ought to be given an opportunity of putting up his defence and that the allegations must stand substantiated for a discharge to follow.

11. Para 5(f)(2) (supra) underscores the importance of the truism that termination of the individual's service is an extreme step which ought to be taken only if the facts of the case so demand 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 factor 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.

12. The argument that the procedure prescribed by the competent authority de hors the provisions of Ride 13 and the breach of that procedure should not nullify the order of discharge otherwise validly made has not impressed us. It is true that Rule 13 does not in specific terms envisage an enquiry nor does it provide for consideration of factors to which we have referred above. But it equally true that Rule 13 does not in terms make it mandatory for the competent, authority to discharge an individual just because he has been awarded four red ink entries. The threshold of four red ink entries as a ground for discharge has no statutory sanction. Its genesis lies in administrative instructions issued on the subject. That being so, administrative instructions could, while prescribing any such threshold as well, regulate the exercise of the power by the competent authority qua an individual who qualifies for consideration on any such administratively prescribed norm. Inasmuch as the competent authority has insisted upon an enquiry to be conducted in which an opportunity is given to the individual concerned before he is discharged from service, the instructions cannot be faulted on the ground that the instructions concede to the individual more than what is provided for by the rule. The instructions are aimed at ensuring statutory rule. It may have been possible to assail the circular instructions if the same had taken away something that was granted to the individual by the rule. That is because administrative instructions cannot make inroads into statutory rights of an individual. But if an administrative authority prescribes a certain procedural safeguard to those affected against arbitrary exercise of powers, such safeguards or procedural equity and fairness will not fall foul of the rule or be dubbed ultra vires of the statute. The procedure prescribed by circular dated 28th December, 1988 far from violating Ride 13 provides safeguards against an unfair and improper use of the power vested in the authority, especially when even independent of the procedure stipulated by the competent authority in the circular aforementioned, the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and

that he may be completing pensionable service are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge. Inasmuch as the procedure stipulated specifically made them relevant for the exercise of the power by the competent authority there was neither any breach nor any encroachment by executive instructions into the territory covered by the statute. The procedure presented simply regulates the exercise of power which would, but for such regulation and safeguards against arbitrariness, be perilously close to being ultra vires in that the authority competent to discharge shall, but for the safeguards, be vested with uncanalised and absolute power of discharge without any guidelines as to the manner in which such, power may be exercised. Any such unregulated and uncanalised power would in turn offend Article 14 of the Constitution.

13. Coming then to the case at hand, we find that no enquiry whatsoever was conducted by the Commanding Officer at any stage against the appellant as required under para 5(a) of the procedure extracted above. More importantly, there is nothing on record to suggest that the authority competent had taken into consideration the long service rendered by the appellant, the difficult living conditions and the hard stations at which he had served. There is 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. We must, fairness, mention that Mr. Maninder Singh, ASG, did not dispute the fact that any number of other personnel are still in service no matter they have earned four red ink entries safeguard against arbitrary exercise of power by the authority would be to ensure that there is an enquiry howsoever summary and a finding about the defence set-up by the individual besides consideration of the factors made relevant under the note to para 5(f) of the procedure, it is common ground that a red ink entry may be earned by an individual for overstaying leave for one week or for six months.In either case the entry is a reel ink entry and would qualify for consideration in the matter of discharge. If two persons who suffer such entries are treated similarly notwithstanding the gravity of the offence being different, it would be unfair and unjust for unequals cannot be treated as equals. More importantly, a person who has suffered four such entries on a graver misconduct may escape discharge which another individual who has earned such entries for relatively lesser offences may be asked to go home prematurely. The unfairness in any such situation makes it necessary to bring in safeguards to prevent miscarriage of justice. That is precisely what the procedural safeguards purport to do in the present case.

14. Reliance upon the decisions of this Court in the cases referred to earlier is, in our opinion, of no help to the respondent for the same have not adverted to the procedure prescribed for the exercise of the power of discharge. In ***Union of India v. Corporal A.K. Bakshi & Anr.*** (supra) the question pursuance of the Policy for Discharge of Habitual Offenders could be considered a discharge simplicitor as envisaged 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. This was clearly not a case where the procedure for discharge, was not followed. The Court had, in that case, unequivocally held that there was no dispute between the parties that the procedure had been duly followed. Similarly, the decision of this Court in ***Union of India v. Rajesh Vyas*** (supra) is also distinguishable. In that case, the discharge order was challenged on the ground that it was passed without regard to the response to the show cause notice filed by the discharge order. Upon a perusal of the material, this Court held that the case was not one

wherein the discharge order was passed without application of mind and ' that there was evidence to snow that power was exercised upon consideration of all relevant records. The decision of this Court in ***Union of India and Ors. v. Dipak Kumar Santra*** (supra) is also of no relevance to the case at hand as that case dealt with a recruit who had. failed twice in clerks' proficiency and. aptitude test and was discharged under Rule 13(3) of the Army Rules. Without adverting to the procedure prescribed for such that the discharging authority was empowered to do so under Rule 13(3) of the Army Rules. Reliance upon the recent judgment of this Court in ***Union of India & Ors. v. Balwant Singh [Civil Appeal No. 5616 of 2015***] is also misplaced. The grievance of the respondent in that case, primarily, rested upon the alleged excessive punishment meted out for the red ink entries suffered by him. The respondent also claimed to have been discriminated due to discharge from the Armed Forces. That was also not a case where discharge order was challenged as bad in law on the basis of irregularities nor was it a case where the authority was said to have failed to follow the necessary procedure. The decision, of the High Court of Delhi in ***Surinder Singh v. Union "of India (2003) 1 SCT 697***, to the extent the same toes a line of reasoning different from the one adopted by us does not lay down the correct proposition and must, therefore, be confined to the facts of that case only.

14. The Hon'ble Apex Court in Narain Singh's case cited supra while placing reliance on the judgment of Veerendra Kumar.Dubey 's case has held as unden:-

6.1 At the outset, it is required to be noted that at the time when the appellant was discharged, from service in exercise of under Rules 13(3)(III)(v) of the Army Rules, he had served for 13 years 7 months and 6 days. That, at the time of discharge from service, the appellant could not complete the pensionable service and he was discharged from service 1 year 5 months and 24 days before he could, complete pensionable service. It is From Service Under Rule 13(3)(III)(v) of the Army Rules, solely on the basis of four red ink entries awarded to him. It is required to be noted that from 1980 to 7.6.1993 there was nothing adverse found against the appellant. All these four red ink entries relate to the period between 7.6.1993 and 3.5.1994.

6.2 We have gone through the four red ink entries and the nature of allegations and the charge on the basis of which four read entries were awarded to the appellant. It appears that, out of, four red ink entries, two entries pertain to 3.3.1994 and. one entry $pertains to 3.5.1994. Out of the aforesaid, with respect to one of the red ink entries, the allegation was that the appellant refused to take food when he was ordered. Considering the nature of offences for which the red ink entries were made, we are of the opinion that on the basis of such red ink entries, the appellant could not have been discharged from service and that too after rendering 13 years of service and when he was about to complete the pensionable service. From the impugned judgment and order, it appears that the appellant has been discharged from service mechanically and solely on the basis of award of four red ink entries. As observed by this Court in the case of Veerendra Kumar Dubey (supra), mere award of four red ink entries does not make the discharge mandatory. It is further observed that four red ink entries is not some kind of laxman Rekha, which if crossed would by itself render the individual concerned undesirable or unworthy of retention in the force. Award of four red ink entries 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 is further observed that it is one thing to qualify for consideration and an entirely different to be found fit for discharge. It is further observed that

four red ink entries in that sense takes the of such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects. It is further observed that the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and that he may be completing pensionable serve, are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge.

6.3 Coming then to the case a: hand, we find that there is nothing on record to suggest that the authority concerned has taken into consideration the long service rendered by the appellant. There is 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. Even considering the offences for which the red ink entries were awarded, it cannot be said that the misconduct and/or offences are such which would justify the discharge of the appellant. The offences for which the red ink entries are awarded, cannot be said to be such gross misconduct which would make the appellant indiscipline and liable to be discharged from service and that too, after a period of long service rendered by him.

6.4 Under the circumstances and in the facts and circumstances of the case, the order of discharge is wholly unjustified and not sustainable at law. While discharging the appellant from service, the Commanding Officer has failed to take into consideration the relevant assects noted here in above and the

7. In the result, present appals succeed and are hereby allowed. The order of discharge past ed against the appellant is hereby set aside. The appellant shall be entitled to all consequential benefits as if the order of discharge was not passed. Benefit of continuous service for all other purpose shall be granted to the appellant including pension. The monetary benefits payable to the appellant shall be released expeditiously, but not later than four months from the date of this order.

15. The Hon'ble Apex Court in Sep. Satgur Singh Singh's case cited supra has held as under:-

5) Learned counsel for the appellant relied upon judgment of this Court in ***Veerendra Kumar Dubey v. Chief of Army Staff & Ors. (2016) 2 SCC 627*** wherein, it has been held that the red ink entries by itself would not be sufficient to discharge any person, but the Commanding Officer is required to conduct an enquiry as required under para 5(a) of the Army Instructions dated December 28, 1988. The relevant part is reproduced below:

'Addl. Director General Personal Services (PS-2) Army Headquarters, Room No. Sena Bhawan 's Wing, DHQ PO New Delhi - 110011 A/21210/159/ps-4(C) 28 Dec. 1988 Headquarters, Southern Command, Pune Eastern Command, Calcutta Western Command, Chandimandir Centra I Command, Luckhnow .Northern command, C/o 56 APO Procedure for dismissal/discharge of undesirable JCOs/WOs/OR:

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5. xx xx xx

(a) Preliminary Enquiry.-Before recommending discharge or dismissal of an individual the authority concerned will ensure-

(i) that an impartial enquiry (not necessarily a court of enquiry) has been made into the allegations against him and that he has had adequate opportunity of putting up his defence or explanation and of adducing evidence in his defence.

(ii) that the allegations have been substantiated and that the

6) We do not find any merit in the argument that since no regular enquiry Was conducted by the Commanding Officer as held by this Court in Veerendra Kumar Dubey, therefore, the punishment is not sustainable. This Court in the aforesaid judgment held as under:

"10. The Government has, as rightly mentioned by the learned counsel for the appellant, stipulated not only a show-cause notice which is an indispensable part of the requirement of the Rule but also an impartial enquiry into the allegations against him in which he 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 four red ink entries have also been prescribed. @@The first and foremost is an unequivocal declaration that mere award of four red ink entries to an individual does not make his discharge mandatory. This implies that four red ink entries is not some kind of Laxman rekha, which if crossed would by itself render the individual concerned under desirable or unworthy of retention in the force. Award of four red ink entries 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 is one thing to qualify for consideration and an entirely different thing to be found fit for discharge. Four red ink entries in that sense take the individual closer to discharge but does not push him over. It is axiomatic that the Commanding Officer is, even after the offence for which such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects made relevant by the Government in the procedure it has prescribed.

11. xxx xxx xxx A careful reading of the above would show that the competent authority has made it abundantly clear to officers competent to direct discharge that before discharging an individual, not only should there be a show-cause notice but an enquiry into the allegations made against the individual concerned in which he ought to be given an opportunity of or putting up his defence and that the allegations must stand f substantiated for a discharge to follow.

12. Para 5(f)(2) underscores the importance of the truism that termination of the individual's service is an extreme step which ought to be taken only if the facts of the case so demand. What is evident from the procedural mandate given to the authorities the process leading to the discharge of an individual is humanised 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 Ride 5 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.

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18. Coming then to the case at hand, we find that no enquiry whatsoever was conducted by the Commanding Officer at any stage against the appellant as required under Para 5(a) of the procedure extracted above. More importantly, there is nothing on record to suggest that the authority competent had taken into consideration the long service rendered by the appellant, the difficult living conditions and the hard stations at which he had served. There is 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... "

(emphasis supplied)

7) We are not find any merit in the present appeal. Para 5(a) of the Circular dated December 28, 1988 deals with an enquiry which is not a court of enquiry into the allegations against an army personnel. Such enquiry is not like departmental enquiry but semblance of the fair decision-making process keeping in view the reply filed. The court of enquiry stands specifically excluded. What kind of enquiry is required to be conducted would depend upon facts of each case. The enquiry is not a regular enquiry as para 5(a) of the Army Instructions suggests that it is a preliminary enquiry. The test of preliminary enquiry will be satisfied if an explanation of a personnel is submitted and upon consideration, an order is passed thereon. In the present case. the appellant has not offered any explanation in the reply filed except para 5(a) of the Army Instructions dated December 28, 1988 stand satisfied.

8) In reply to the show-cause notice, the appellant has not given any explanation of his absence from duty on seven occasions. He has been punished on each occasion for rigorous imprisonment ranging from 2 days to 28 days. A Member of the Armed Forces cannot take his duty lightly and abstain from duty at his will. Since the absence of duty was on several different occasions for which he was imposed punishment of imprisonment, therefore, the order of discharge cannot be said to be unjustified. The Commanding Officer has recorded that the appellant is a habitual offer. Such fact is supported by absence of the appellant from duty on seven occasions.

9) In view thereof, we do not find any error in the order of discharge of the appellant. Appeal is dismissed".

16. The crux of the law laid down, in the judgment cited supra is that mere issuing show cause notice is not sufficient to discharge a soldier from service on the ground "Service No Longer Required"under Section 13 of the Army Rules and enquiry envisaged in para 5-A of the Circular dated 28.12.1988 into the allegations is also to be conducted. Besides, the total service render by the Army personal should also be given due weight age. As a matter of fact, in Narain Singh's case, the soldier had rendered 13 years, 07 months and 06 days service and as such was nearer to qualify for 15 years service required for grant of service pension. The competent authority while discharging said Narain Singh from service had not taken into consideration the same.

17. Not only this, but only for instance of red ink entries i.e. two entries ,'of the same date i.e.

03.03.1994 and one dated 03.05.1994 being close in proximity should not have been made the basis to discharge him from service that too after he having rendered 13 years of service and as such the basis of four red ink entries in his credit. It is further held that mere award of four red ink entries does not make the discharge mandatory. The Hon'ble Apex Court in Veerendra Kumar Dubey's case cited supra has observed that "four red ink entries is not some kind of 'Laxman Rekha' which if cross would by itself render the individual concerned undesirable or unworthy of retention in the force". Therefore, the order of discharge passed against the appellant was set aside with all consequential benefits.

Now coming to the case in hand.

18. The applicant has admittedly rendered 11 years and 53 days of service at the time of his discharge. He as such was about to complete pensionable service in a period less than four years. This has not been at all taken into consideration by the competent authority which had passed the order of his discharge from service.

19. On the other hand, in;reply to Annexure R-2, he has not only tendered the apology but also requested to afford him an opportunity to improve himself and serve the Army far the sake of the welfare of his family comprising four daughters and a son. No doubt, he has not denied the so called offence of absence from duty and over stayal of leave sanctioned to him he allegedly committed, however, the same was not of such a serious nature that his discharge from service was the only option available with the respondents. The over stayal of leave and absence from duty some time happens due to the compelling family circumstances and hazard of Army service. Above all, for the so called offence he committed he was duly punished including awarding jail sentence against him.

20. It is worth mentioning that the punishment for the offence under Section 39 (a) and 39 (b) can be awarded by the competent authority on the basis of report on enquiry conducted by the Court Martial. The record is silent as to whether the Court Martial was convened and the enquiry conducted while awarding the punishment to the applicant. Even the enquiry contemplated under Para 5 of circular dated 28.12.1988 discussed in the judgment of Veerendra Kumar Dubey and Narain Dass Cases cited supra has not been considered. Therefore, the points in issue in this case are squarely covered in favour of the applicant by the ratio of the judgments of the Hon'ble Apex Court in Veerendra Kumar Dubey and Narain Singh's cases cited supra,

21. Now coming to the law down by a Division Bench of the Hon'ble Apex Court in Satgur Singh's case cited supra.

22. No doubt,as per the judgment bid, the only requirement for discharge of a soldier on the basis of red ink entries is to serve upon him a show cause notice and to take into consideration the reply if any thereto filed by him. Though in this jugment, there is reference of the law laid down by Three Judge Bench of the Hon'ble Apex Court in Veerendra Kumar Dubey's case, cited supra, however, neither disagreed nor dissented therewith and rather referred only for the limited purpose i.e. differing with the facts of that case viz-a viz the facts in Veerendra Kumar Dubey's case. Otherwise also, the judgment in Veerendra Kumar Dubey's case cited supra has been rendered by a Three Judge Bench, whereas in Satgur Singh's case, by a Division Bench, hence with all regard and humility in our command the same cannot be relied upon to take a contrary view of the

23. Above all, in the subsequent judgment in Narain Singh's case, again by Three Judge Bench of the Hon'ble Apex Court, while placing reliance upon the judgment in Veerendra Kumar Dubey's

case has held that red ink entries alone cannot be made basis to discharge a soldier from service and the over all scenario i.e. the total period of service, the applicant has rendered on the day of his discharge and he was about to acquire the qualifying service for the grant of pension should also have been taken into consideration. Therefore, with all humility in our command, we feel that the ratio of the judgment of the Hon'ble Apex Court in Satgur Singh's case cited on behalf of the respondents is not applicable in the given facts and circumstances of this case.

24. In view of what has been said here in above, the order of discharge of the applicant is wholly unjustified and not sustainable in the eyes of law. The order of discharge against the applicant has been passed without taking into consideration the law laid down by the Hon'ble Apex Court in Veerendra Kumar Dubey's case and Narain Dass's Case cited supra. The total service i.e. 11 years and 53 days including 94 days non qualifying service, the applicant rendered in the Army has not been given any weight age. As a matter of fact, a later a period over three years, the applicant had to complete qualifying service for the grant of pension. The present in the given facts and circumstances and the reasons recorded here in above is not a case where it can be said that no other option except to discharge the applicant from service was available with the respondents. In view of the fact

25. In the result, this application succeeds and the same is accordingly allowed. The order of discharge passed against the applicant is hereby quashed and set aside. The applicant shall be entitled to all consequential benefits as if the order of discharge was not passed against him. The period after discharge till he otherwise was entitled to remain in service shall be counted towards seniority and continuity with all monetary benefits. The arrears shall be released to the applicant expeditiously but not later than four months from the date of receipt of certified copy of this order by learned Senior Panel Counsel/ OIC, Legal Cell, failing which together with interest @ 8% per annum from the date of this order till the entire amount is realized.

26. This application is, accordingly, disposed of, so also the pending Misc. Application (s) if any.

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