

Form No. 4
(See rule 11(1))
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH, GUWAHATI
(Sl. No. 6)

O.A. No. 09 of 2020

Ex. Rfn. Sameer Gurung Applicant
By Legal Practitioner for the Applicant : Shri A.R. Tahbildar, Advocate

Versus

Union of India & Others Respondents
By Legal Practitioner for Respondents : Shri P.J. Barman, Advocate

Notes of the Registry	Orders of the Tribunal
	<p><u>06.04.2023</u> <u>Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)</u> <u>Hon'ble Air Marshal Balakrishnan Suresh, Member (A)</u></p> <p style="text-align: center;">Heard Shri A.R. Tahbildar, Ld. Counsel for the applicant and Shri P.J. Barman, Ld. Counsel for the respondents.</p> <p style="text-align: center;">Original Application is dismissed.</p> <p style="text-align: center;">For orders, see our order passed on separate sheets.</p> <p style="text-align: center;">Misc. Application(s), pending if any, shall be treated to have been disposed of.</p> <p style="text-align: center;">(Air Marshal Balakrishnan Suresh) (Justice Umesh Chandra Srivastava) Member (A) Member (J)</p> <p>AKD/MC/-</p>

(A)

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
GUWAHATI**

Original Application No 09of 2020

Thursday, this the 6th day of April, 2023

"Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)"
"Hon'ble Air Marshal Balakrishnan Suresh, Member (A)"

No: 5457755Y Ex- Rfn Sameer Gurung Vill: S4Jhalupara Cantonment
P.O: Bara Bazar Teh: Shillong District: East Khasi Hills (Meghalaya)
PIN: 793002

-----Applicant

Ld. Counsel for the Applicant: **Shri AR Tahbildar, Advocate**

Versus

1. The Union of India, Represented by the Secretary, Ministry of Defence, Sena Bhawan, New Delhi - 11
2. General Officer Commanding - in - Chief Eastern Command Kolkata - 21.
3. Commander, 107 Mountain Brigade
4. Commanding Officer 5/5 Gorkha Rifles (FF) PIN - (Army) - 908105, C/o 99 APO
5. Records 5 & 8 Gorkha Rifles PIN - 900332, C/o 99 APO
6. Additional Directorate General, Personnel Services, PS-4 (d), Adjutant General's Branch, IHQ of MoD(Army), DHQ New Delhi

..... Respondents

Ld. Counsel for the Respondents : **ShriPJ Barman,**
Central Govt. Counsel.

ORDER

"Per Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)"

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- 1) *To quash and set aside the discharge order dated 18.08.2019 issued by the Commanding Officer, 5/5 GR (FF)*
- 2) *To quash and set aside the recommendation by the Commander 107 Mountain Brigade dated 18.08.2019 for discharge of the applicant from service as well as the findings of the preliminary enquiry dated 2.7.2019.*
- 3) *To direct the authorities to reinstate the applicant in service with all service benefits / backwages and continuity in service OR alternately, allow the applicant to go on retirement with pension and other retirement benefits as he has already completed the qualifying pensionable service.*
- 4) *To pass such other or further order (s) as your Lordships may deem fit and proper."*

2. Brief facts of the case are that the applicant was enrolled in the Indian Army in March 2003 in the boys Battalion in the age of 12 years. He was awarded 7 red ink entries for various offences and was locally discharged from service on 18.08.2019 being undesirable soldier under Army Rule 13 (3) III (v) as "Service No Longer Required". Since

the applicant had failed to show improvement in discipline and sense of devotion towards duty despite frequent counselling and punishment keeping in view the above facts, it was brought out that the applicant was not upto the acceptable limit of discipline of soldier in Indian Army where the discipline is the backbone. Therefore, applicant was issued a Show Cause Notice. The competent authority was not satisfied with the reply of the applicant and hence proposal for discharge from service under Army Rules 13 was initiated and sanctioned discharge order of the applicant. Accordingly, applicant was discharged from service w.e.f. 18.08.2019 being an undesirable soldier. The applicant being not satisfied with the procedure of discharge, has filed this Original Application to grant him pension and other retirement benefits or quash his discharge order and to reinstate him in service.

3. Learned counsel for the applicant submitted that applicant has been discharged from service in an illegal and arbitrary manner without giving any consideration over reply to the Show Cause Notice and violating the provisions of Army HQ letter dated 28.12.1988. The red ink entries have been forcibly awarded without any fault on the part of the applicant. The applicant was enrolled in the Boys Battalion of 58 Gorkha Training Centre (GTC) Shillong on March, 2003 at the age of 12 years. The objective of such enrolment was to train him as a boxer soldier in the Regiment. The applicant played boxing in India and abroad and brought laurels to the Regiment and to the nation. He won Bronze Medal, Silver Medals and eight Gold Medals during his service.

The applicant was in Boys Battalion till he attained the age of 18 years and thereafter, he was enrolled in the Army on 02.08.2009. Consequent on issue of Min of Def letter dated 27.03.2002, the benefits of counting of service rendered before attaining the age of 17 years for the purpose of pension and gratuity was made admissible to Army personnel. It was held that the Boys service rendered before attaining the age of 17 years would be counted as qualifying service for the purpose of pension and gratuity. The applicant rendered more than 16 years of service including Boys service. He was awarded seven 'Red Ink Entry' and one 'Black Ink Entry' in last four years of service from 2016 to 2019. Court of Inquiry was conducted on 02.07.2019. After examining the witnesses, the Board recorded its findings that the applicant has been perpetual defaulter in Unit and failed to improve in spite of repeated warning sessions. As per Army HQ letter dated 28.12.1988, a preliminary enquiry and not necessarily a Court of Inquiry is to be held in impartial manner before recommending discharge which renders it null and void. The order of discharge has been passed in a clear violation of Army Rules 13 & 22 and Article 20 of the Constitution of India, whereas the applicant had rendered more than 16 years of service and he should have been discharged from service with pension and all consequential benefits.

4. He also placed reliance on the judgment of the Hon'ble Apex Court in ***Vijay Shankar Mishra vs. Union of India & Ors***, Civil appeal Nos. 12179-12180 of 2016 (Arising out of Civil appeal (D) No. 34132 of

2013), decided on 15.12.2016, **Veerendra Kumar Dubey vs. Chief of Army Staff and Ors**, Civil appeal D No. 32135 of 2015, decided on 16.10.2015 and AFT (RB) Lucknow judgment in OA No. 183 of 2018, **Arun Kumar Pandey vs. Union of India and Ors**, decided on 23.07.2021 and OA No. 222 of 2011, **Rajesh Kumar vs. Union of India and Ors**, decided on 01.12.2015 and pleaded that applicant's case is similar to aforesaid judgments and therefore, his discharge order to be quashed and applicant should be reinstated in service.

5. On the other hand, Ld. Counsel for the respondents submitted that on earning 7 Red Ink Entries, a Board of Preliminary Enquiry dated 04.07.2019 was held and it was established that the applicant was a habitual defaulter who could not improve his conduct in spite of giving adequate opportunities. The Board opined that retention of applicant in service will have a detrimental effect on the discipline and further functioning of the unit. Since the applicant had failed to show improvement in discipline and sense of devotion towards duty despite frequent counselling and punishment keeping in view the above facts, it was brought out that the applicant was not upto the acceptable limit of discipline of soldier in Indian Army where the discipline is the backbone. Therefore, applicant was issued a Show Cause Notice dated 27.07.2019 to explain reasons as to why he should not be discharged from service under the provisions of Army Act Section 20 (3) as his services are no longer required. The competent authority was not satisfied with the reply of the applicant and hence proposal for

discharge from service under Army Rules 13 was initiated. The applicant had become a bad example in the unit due to his irresponsible attitude towards his duties and discipline and thereby failed to render an unblemished service which resulted his discharge from service as undesirable soldier. The Commanding Officer 5/5 GR constituted a Board of Preliminary Enquiry to investigate into the circumstances under which the applicant has earned seven red ink entries. Further if the applicant was having any objection on his trial by Commanding Officer of 33 Rashtriya Rifles for the offence he had committed, he should not have pleaded guilty and accordingly, applicant was locally discharged from service being an undesirable soldier.

6. Ld. Counsel for the respondents also submitted that As per Regulation 47 of Pension Regulations for the Army 2008 (Revised), minimum physical service required to earn service pension for Junior Commissioned Officers/ Other Ranks is 15 years. Since the applicant has rendered only 09 years, 11 months and 28 days service in the Army at the time of his discharge from service, he was not entitled for service pension. However, the applicant was granted his Credit Balance, AFPP Fund Balance and AGI Fund Balance. The averment of the applicant that "Within a short span of one year, Commanding Officer Sajal Shukla awarded 4 Red Ink Entries which proves the arbitrary and whimsical exercise of power by the Commanding Officer that does not stand judicial scrutiny" is not agreed. The applicant has signed Appendix 'A' to AO 6/2009, Record of Proceedings before

Commanding Officer under Army Rule 22 as an accused before the prosecution witnesses and independent witnesses. Army Rule 180 was followed and applicant was given full opportunity to be present throughout the enquiry and of making any statement and giving evidence and to cross examining witnesses. Furthermore, the statement had been read over to the applicant in the language he understands and he signed it as correct. As such, the applicant cannot claim that he could not even go through the statement. The applicant was counselled on numerous occasions and provided with more than fair chance to improve his discipline and personal conduct. However, all efforts by the officers, Junior Commissioned Officers and his colleagues have been in vain and he was approved to be a habitual defaulter, showing no desire to reform himself or display any remorse for his misdeeds. All the procedures as laid down vide Integrated headquarters of Min of Def (Army) letter dated 28.12.1988 and Additional Directorate General, Discipline and Vigilance (DV-5) Adjutant General's branch, letter dated 01.1.22015 have been followed in letter and spirit while discharging the applicant on earning more than four red ink entries. Hence the discharge order of the applicant is legal.

7. Ld. Counsel for the respondents also relied on the judgment of the Hon^{ble} Apex Court in Civil Appeal No. 1857 of 2018, **Sep Satgur Singh vs. Union of India &Ors**, decided on 02.09.2019. Para 7 of the judgement being relevant is quoted below :-

"7) We do 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 inquiry into the allegations against any 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 inquiry 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 suggest 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 giving vague family circumstance. Thus, he has been given adequate opportunity to put his defence. Therefore, the parameters laid down in para 5(a) of the Army Instructions dated December 28, 1988 stand satisfied."

8. Learned counsel for the respondents pleaded that applicant is not entitled any relief. Instant O.A. has no substance and is liable to be dismissed.
9. We have heard learned counsel for both sides and perused the material placed on record.
10. Before adverting to rival submissions of learned counsel of both sides, it is pertinent to mention that judgments relied upon by the applicant in Para 4 referred above are not relevant in the present case being based on different facts and circumstances.
11. We find that applicant was negligent towards his duties and disciplined. During his service, the applicant was awarded seven punishments for his irresponsible attitude and undisciplined nature towards his duty. Even after giving repeated warnings/counselling, the applicant did not show any improvement in his personal/military

discipline and conduct. There being no other option, being an undesirable soldier, the applicant was discharged from service after holding a Court of Inquiry and due procedure as per Army Rule 13 (3) III (v) and Army Headquarters policy letter dated 28.12.1988 on the subject. Hence, the applicant is not entitled the relief prayed in Original Application to quash his discharge order and to reinstate him in service.

12. The applicant kept committing offence repeatedly showing utter disregard to the law of land as well as to the organization. Army is known for its discipline and any indiscipline activity by any member of Armed Forces personnel tantamount to breach of security/discipline. Applicant is not entitled to pensionary benefits as per para 43 of Pension Regulations for the Army, 2008 (Part-I) as it provides that an individual who is dismissed from service under the provisions of Army Act, is ineligible for pension or gratuity in respect of all previous service. For convenience sake the aforesaid para is quoted below:-

"113(a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service."

13. In view of the above, we are of the view that a dismissed Armed Forces personnel is not entitled for any pensionary benefits as per the Pension Regulations for the Army.

14. In view of the above, we do not find any irregularity or illegality in discharging the applicant from service being an undesirable soldier and

hence, there is no violation of Army Rules 13 & 22 and Article 20 of the Constitution of India as alleged by the applicant. The O.A. is devoid of merit and deserves to be dismissed. It is accordingly **dismissed**.

15. No order as to costs.

(Air Marshal Balakrishnan Suresh) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 06 April, 2023

Ukt/-