

(1992) 03 KAR CK 0013

In the Karnataka High Court

Case No : W.A.S. No's. 78, 141 and 152 of 1992

Sgt. Jeevan Kumar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-03-1992

Acts Referred:

Air Force Act, 1950 — Section 189 (2) (a), 19, 20, 22, 24
Air Force Rules, 1969 — Rule 13, 14, 15 (2) (g) (ii)
Constitution of India, 1950 — Article 20

Citation : (1992) ILR (Kar) 1027 : (1992) 2 KarLJ 408

Hon'ble Judges : Venkatachala, J;Vasanth Kumar, J

Bench : Division Bench

Advocate : K.S. Desai, A.S. Krishna Murthy and K.N. Purushothaman, for the Appellant; Bapu Heddur Shetty, Addl. Central Govt. Stdg., for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Union of India and others Vs. Corporal A.K. Bakshi and another, (1996) 2 AD 422 : AIR 1996 SC 1368 : (1996) 3 JT 310 : (1996) 2 SCALE 394 : (1996) 3 SCC 65 : (1996) 2 SCR 986 : (1996) 1 UJ 705

Venkatachala, J.—These Writ Appeals, W.A.Nos. 78/92, 141/92 and 152/92, are preferred u/s 4 of the Karnataka High Court Act, 1961, by the petitioners respectively in Writ Petitions, W.P.Nos. 20048/89, 12320/90 and 5850/90, questioning the correctness of the common order dated 3-1-1992 of a learned single Judge of this Court dismissing their Writ Petitions.

2. As the learned single Judge, by his Common Order under Appeals, had refused to interfere with the orders of discharge of Airmen, who were subject to Air Force Act, 1950 (for short, "the Act"), we were, to begin with, rather disinclined to entertain these appeals being of the view that disciplinary action taken by Air Force Officers respecting their Airmen in the strategic and sensitive area of the Defence Air Force was not rightly interfered with in exercise of this Court's

discretionary Writ jurisdiction. However, as we later found that the orders of Airmen impugned in the Writ Petitions had not been made conforming to the requirements of the Act and the Air Force Rules, 1969 (for short, "the Rules"), we felt it necessary to hear the appeals on merits. Having thus heard learned Counsel appearing on both sides, we are disposing of the Appeals on their merits, by this Common Judgment.

The sustainability or otherwise of the discharge orders impugned in the Writ Petitions being the ultimate matter requiring our Decision in these appeals, it would be convenient to set out here itself the circumstances and the manner in which the discharge order impugned in each Writ Petition has come to be made, as disclosed from the disciplinary files relating to such discharge orders, made available for our perusal. Sergeant Jeevan Kumar - the petitioner in Writ Petition No. 20048/89 (appellant in Writ Appeal No. 78/92) having been tried by a District Court Marshal between 26-5-1988 and 24-6-1988 on a charge of disobeying a lawful command of his superior Officer given on 23-4-1988, had suffered therefore conviction and punishment of reduction in his rank. Consequently, action was taken against him for discharge from service under Rule 15(2)(g)(ii) of the Rules conforming to Airmen-Habitual Offenders Policy of 1984 requiring such a person to be treated as a habitual offender and discharged from service. However, the said conviction and punishment were set aside in the meantime, in an appeal taken up by him in the matter. On 16-3-1989, after coming to know about the success of his appeal, he went to the Mess of which he had been denied entry having lost his rank as a Sergeant, took a drink and shouted at the Waiters required to attend on him when there was delay in laying dinner for him. The Duty Officer being informed of the said shouting, the petitioner came to be charged for the offence of committing nuisance in the Mess under the influence of liquor and suffered punishment of "reprimand" for that offence. Such punishment of "reprimand" suffered by the petitioner being regarded as the punishment for his sixth offence committed as an Airman, action came to be initiated against him for discharge from service by his Group Captain acting for Air Officer Commanding-in-chief, Headquarters Training Command, Bangalore, by issuance of a show cause notice dated 13-4-1989 calling upon him to show cause as to why, under Rule 15(2)(g)(ii) of the Rules, he should not be discharged from service for the reason of six acts of his indiscipline (offences) for which he had been convicted and made to suffer punishments, obviously for the reason of his having become a habitual offender warranting his discharge from service under the Airmen-Habitual Offenders Policy of 1984. That show cause notice being received by the petitioner on 24-4-1989, a reply thereto having been given by him thereto, a note is put up in his file by the Group Captain (GPS) for the orders by the Air Officer-in-Charge Administration (AOA). In that note, which commends the work of the petitioner, it is recommended for giving the petitioner one more chance. But, the Air Officer-in-Charge Administration has ordered on the note thus:

"The last offence is least expected of a SNCO especially after being relieved of

the concern of Court Martial Proceedings. In my opinion, he is unfit to be retained in the service. Recommended for discharge."

The said recommendation having ultimately reached the Air Officer-in-Charge Personnel (AOP), he has passed orders thereon on 25-9-1989, thus:

"I have discussed with AOA. I agree with his recommendation. Discharge is approved."

Petitioner says that though he was orally informed about his discharge from service, he got served with the discharge order dated 02 November 1989 (Annexure-F), which read:

"DISCHARGE AIRMEN (WITHOUT RESERVE LIABILITY) (HABITUAL OFFENDER)

1. Air Force Record Office has accorded authority to discharge you from Air Force under the provisions of Air Force Rules, 1969, Chapter III, Rule 15, Clause 2(g) (ii) "HIS SERVICES NO LONGER REQUIRED-UNSUITABLE FOR RETENTION IN THE AIR FORCE" vide their letter No. RO/2510/ 1/INQ(Dis) dated 09 Oct. 89.

2. You have to collect the clearance certificate to-day and complete the same within 14 days. Also, please collect all your pension papers and submit the same, duly filled, before the date of discharge. You have to report to SMO for your final medical examination, immediately."

It is that discharge order which had come to be impugned by the petitioner in the Writ Petition which was dismissed necessitating the filing of the present appeal, W.A.No. 78/92.

5. Corporal A.K. Bhakshi - the petitioner in Writ Petition No. 12320/90 (appellant in Writ Appeal No. 141/92) had come to be convicted and suffer punishments under the Act and the Rules for the following offences:

"(a) Absenting himself from class, making false statement, refusing to carry out instructions given by WO i/c police and misbehaving with superior Officer.

(b) AWL for 5 days.

(c) Failure to report for duty when detailed by his superior officer.

(d) Absenting himself from guard duty.

(e) Riding motor cycle without wearing helmet, consumption of liquor in the billet and teasing a lady wife of an officer in the vicinity of Officers' mess.

(f) Breaking out of camp and quarrelling with an auto-rickshaw driver in civil area under the influence of liquor."

On account of the said six offences, for which he had been convicted and suffered punishment under the Act and the Rules, action was initiated by the Group Captain of Headquarters Training Command, IAF., Bangalore, acting for Air Officer Commanding-in-Chief, by issuance of a show cause notice dated

28-12-1987 calling upon him to show cause as to why, for the said acts of his indiscipline, he should not be discharged from service under Rule 15(2)(g)(ii) of the Rules, obviously having become a habitual offender warranting discharge from service under Airmen-Habitual Offenders Policy of 1984. On receipt of reply thereto given by the petitioner, a note has come to be put up in the petitioner's disciplinary file signed by the Wing Commander recommending for his discharge. That recommendation having been accepted by the Air Officer-in-Charge Administration, the same has come to be finally approved by the Air Officer-in-Charge personnel on 15-5-1990. This has led to the discharge of the petitioner - an Airman from service he having been treated as a habitual offender. He has been accordingly discharged as per the communication dated 21-5-1990 received by him from the Wing Commander acting for Air Officer-in-Charge Administration. It is that discharge order which had come to be impugned by the petitioner in the Writ Petition which was dismissed necessitating the filing of the present Appeal, W.A.No. 141/92.

6. Aircraftman Sobhanan - the petitioner in Writ Petition No. 5850 /90 (appellant in Writ Appeal No. 152/92) had come to be convicted and suffer punishment under the Act and the Rules for the following offenses:

"(a) Losing his temporary identity card.

(b) Failure to take hair cut when ordered to do so while on Guard of Honour duties.

(c) Being AWL.

(d) Fighting with airmen and causing injuries to airmen.

(e) Sleeping while on guard duty leaving his arms and ammunition unattended and under the influence of liquor.

(f) Picking up quarrel with DSC on duty, using threatening language to IAF/P on duty and consumption of liquor."

- The said six acts of indiscipline (offences) for which the petitioner was convicted and suffered punishments, made the Group Captain, Headquarters Training Command, IIF., Bangalore, acting for Air Officer Commanding-in-Chief, initiate action against the petitioner for discharge under Rule 15(2)(g)(ii) of the Rules, obviously for having become a habitual offender liable for discharge from service under the Airmen-Habitual Offenders Policy of 1984, by issuance of a show " cause notice dated 14-9-1989. A reply thereto having been given by the petitioner, the Wing Commander has put up a note in the petitioner's disciplinary file recommending for his discharge under Rule 15(2)(g)(ii) of the Rules. The DPS as also the Air Officer-in-Charge Administration have recommended to the Air Officer-in-Charge Personnel for the discharge of the petitioner. The Air Officer-in-Charge Personnel has ultimately approved such discharge of the petitioner from service on 21-2-1990, A discharge order dated 28-2-1990 is issued to the petitioner discharging him as an Airman, he having become a habitual offender.

It is the said discharge order which had come to be impugned by the petitioner in the Writ Petition which was dismissed necessitating the filing of the present appeal, W.A.No. 152/92.

7. Thus, what becomes clear and what was not disputed, is that show cause notices were issued to the appellants-petitioners by the Group Captain, Headquarters Training Command, IIF., Bangalore, acting for the Air Officer Commanding-in-Chief, to show cause why their services should not be terminated for six acts of indiscipline, which were the offences for which each of them had been convicted and suffered punishments; by discharging them under Rule 15(2)(g)(ii) of the Rules, in that, they had become habitual offenders liable for discharge under the Airmen-Habitual Offenders Policy of 1984. Initiation for termination of their services by way of discharge under Rule 15(2)(g)(ii) of the Rules was not, however, made by the Air Officer-in-Charge Personnel, the competent Authority who is authorised to discharge the services of Airmen under the Rules, but by an Officer subordinate to him, the Wing Commander who acted for the Air Officer Commanding-in-chief. Termination of the services of the petitioners by way of discharge is not done as a discharge (termination) simpliciter, but is done as a discharge (termination) by way of punishment for the "six offences committed by each of them. Air Officer in-charge Personnel, authorised under Rule 15(2)(g)(ii) of the Rules to discharge Airmen from services, has merely accorded his approval for discharge initiated and recommended by his subordinates.

8. Elaborate arguments were addressed to us in these Appeals by learned Counsel appearing on either side. The points, which require to be answered by us for the disposal of these Appeals in the light of such arguments, admit of the following formulations;

(i) Whether the Act specifies the modes of termination (determination) of the services of persons subject to the Act.

(ii) Whether the modes of such termination (determination) of services of persons subject to the Act could be classified into two groups

(a) those meant to terminate the services of persons by way of punishment for causes involving misconduct, and

(b) those meant to terminate the services of persons not by way of punishment, but by way of termination simpliciter for causes not involving their misconduct.

(iii) Whether the Airmen-Habitual Offenders Policy envisaged by Air Headquarters, New Delhi, in their letter AIR.HQ/23406/ 685/PS dated 14th August 1984 is liable to be struck down for the reason that it permits the counting of offences for which Airmen were convicted and punished earlier to 14th August 1984, to regard them as habitual offenders requiring their discharge from service under that Policy.

(iv) Whether the termination of the services of an Airman subject to the Act

under the Airmen-Habitual Offenders Policy for six offences of misconduct, of which he is found guilty and punished under the Act and the Rules, could become a discharge for the cause "unsuitable for retention in the Air Force" envisaged under Rule 15(2)(g)(ii) of the Rules.

(v) Whether the procedural safeguards required to be followed by the Headquarters Commands concerned as per the letter of Air Headquarters, New Delhi, dated 14th August 1984 for discharge of their Airmen under Rule 15(2)(g)(ii) of the Rules in implementing the Airmen - Habitual Offenders Policy contained therein, were sufficient to meet the requirements of law, if such discharge (termination) from service was not a discharge (termination) simpliciter of the Airman, but a discharge (termination) from service by way of punishment for the cause of misconduct of the Airman amounting to his dismissal or removal from service.

(vi) If the termination from service of an Airman in the implementation of the Airmen-Habitual Offenders Policy by way of punishment for the reason (cause) of his misconduct amounts to such Airman's dismissal or removal from service though called an order of discharge under Rule 15(2)(g)(ii) of the Rules, can such order of discharge, when impugned by the Airman, be regarded by the Court, to be in reality, as an order of dismissal or removal from his service.

(vii) If the orders of discharge of the Airmen (Appellants in the Writ Appeals and the petitioners in the Writ Petitions) impugned in the Writ Petitions are found to be, in reality, orders of dismissal or removal of Airmen from service made without observing the safeguards provided in the Act and the Rules, for such dismissal or removal from service, were they liable to be sustained by the learned single Judge's common order appealed against. If not, are they liable to be invalidated and quashed in these appeals.

9. We shall now deal with and answer the said points seriatim. Re. Point (i):

Whether the Act itself specifies the modes of termination of the services of persons, who are subject to the Act, is the point under consideration.

10. When the provisions of the Act are seen, some of the provisions specify the modes by which the services of a person subject to the Act, could be terminated. Provision in Section 19 of the Act vests in the Central Government the power of termination of the services of any person subject to the Act by his dismissal or removal. So also, the provision in Section 20 of the Act empowers the services of persons subject to the Act other than the Officers by dismissal or removal. But, when the provision in Section 22 is seen, the services of a person subject to the Act could be terminated by retirement, release or discharge by such Authority and in such manner as may be prescribed, that is, by Rules made under the Act. The provision in Section 24 of the Act refers to the termination of the services of a person subject to the Act when he is out of India, by means of discharge or dismissal. That provision itself clarifies that discharge referred to therein includes release, while dismissal referred to therein includes removal. Clause(f) of Section

73 refers to the termination of the services of a person subject to the Act by award of dismissal as a punishment by a Courts-Martial. The provision in Clause (a) of Sub-section (2) of Section 189, which empowers the Central Government to make Rules for the purpose of carrying into effect the provisions of the Act, specifies the subject of such Rules as removal, retirement, release or discharge of persons subject to the Act.

11. From the foregoing provisions of the Act, it becomes obvious that the Act itself specifies the modes of termination of the services of persons subject to the Act as dismissal, removal, retirement, release or discharge.

Re. Point (ii):

The point, which requires our consideration here, is whether the modes of termination of the services of persons subject to the Act, which are dismissal, removal, retirement, release or discharge, as seen from the answer to Point (i), could be classified into two groups-(a) those meant to terminate the services of the persons by way of punishments for causes involving their misconduct; and (b) those meant to terminate the services of the persons not by way of punishments, but by way of termination simpliciter for causes not involving their misconduct.

12. When the termination of the service of a person subject to the Act is the dismissal by way of punishment awardable by the Courts-Martial under Clause (f) of Section 73 of the Act, it becomes obvious that the termination of the service of a person subject to the Act, is by way of punishment for cause/s involving his misconduct. Whether termination of the service of a person subject to the Act by his dismissal or removal u/s 19 or Section 20 of the Act, could be by way of punishment for cause/s involving misconduct of the person, is a matter which requires our examination now.

13. Exercise of the power of termination of the service of a person subject to the Act by way of dismissal or removal u/s 19 or Section 20 of the Act, is by the very provisions contained therein, made subject to the other provisions of the Act and the Rules and Regulations made thereunder.

Rule 16 of the Rules, which provides for dismissal or removal of Officers for misconduct, reads:

"16. Dismissal or removal of officers for misconduct: - (1) An officer may be dismissed or removed from service for misconduct by the Central Government, but before doing so and subject to the provisions of Sub-rule (2) he shall be given an opportunity to show cause against such action.

(2) Where the dismissal or removal of an officer is proposed on ground of misconduct which has led to his conviction by a Criminal Court, or where the Central Government is satisfied that for reasons to be recorded in writing, it is not expedient or reasonably practicable to do so, it shall not be necessary to give an opportunity to the officer of showing cause against his dismissal or removal.

(3) Where an officer has been convicted by a criminal court and the Central Government, after examining the judgment of the Criminal Court in his case and considering the recommendation about him of the Chief of Air Staff, is of opinion that further retention of such officer in the service is undesirable, that Government may dismiss or remove such officer from the service.

(4) In any case not falling under Sub-rule (3), when the Chief of Air Staff, after considering the reports on an officer's misconduct, is of opinion that the trial of the officer by a Court-Martial is inexpedient or impracticable but the further retention of the officer in the service is undesirable, he shall so inform the officer and subject to the provision of Sub-rule (5) furnish to the officer all reports adverse to him calling upon him to submit in writing within a reasonable period to be specified his explanation in defence and any reasons which he may wish to put forward against his dismissal or removal.

(5) The Chief of the Air Staff may withhold from disclosure any report adverse to an officer or any portion thereof, if in his opinion its disclosure is not in the interests of the security of the State.

(6) If no explanation is received from the officer within the specified period or if the explanation received is considered to be not satisfactory or, when so directed by the Central Government, the reports against the officer as well as his explanation, if any, shall be submitted to the Central Government by the Chief of the Air Staff together with his recommendation as to the dismissal or removal of the officer from service.

(7) The Central Government may, after considering the reports against the officer and his defence, if any, and the recommendations of the Chief of the Air Staff, dismiss or remove the officer from service.

(8) In this Rule and in Rule 17 the Chief of the Air Staff while submitting a case to the Central Government may recommend that instead of removing an officer from service, he may be compulsorily retired or that he should be called upon to resign his commission, and the Central Government in passing orders may instead of removing an officer from service, compulsorily retire him or give the officer an option to submit his resignation and if he refuses to do so, remove him from the service."

Rule 17 of the Rules, which provides for removal from service of the officers on the grounds other than misconduct, reads:

"17. Removal from service of the officers on the grounds other than misconduct:-

(1) When the Chief of the Air Staff is satisfied that an officer is unfit to be retained in service due to inefficiency, physical disability or other ground other than misconduct of the officer

(a) shall be so informed;

(b) shall be furnished with the particulars of all matters adverse to him; and

(c) shall be called upon to submit in writing, within a reasonable period any reasons he may wish to urge for not being removed from the service;

Provided that all or any of the Clauses (a), (b) and (c) shall not apply if the Central Government is satisfied that for reasons to be recorded by it in writing, it is not expedient or reasonably practicable to comply with the provisions thereof;

Provided further that the Chief of the Air Staff may withhold from disclosure the particulars of any matter adverse to the officer, or any portion thereof, if in his opinion, its disclosure is not in the interest of the security of the State.

(2) If no reply is received from the officer within the specified period, or the reasons submitted by him are considered not satisfactory by the Chief of the Air Staff, the matter shall be submitted to the Central Government for orders, together with the explanation of the officer, if any, and the recommendation of the Chief of Air Staff for the removal of the officer from the service.

(3) The Central Government may, after considering the explanation, if any, of the officer and the recommendations of the Chief of the Air Staff, and after satisfying itself that the failure, where applicable, to disclose matters adverse to the officer was in the interest of the security of the State, may remove or compulsorily retire the officer from the service."

Rule 18 relating to dismissal or removal of a person subject to the Act, other than an officer, reads:

"18. Dismissal or removal of a person subject to the Act other than an officer:-

(1) Save in a case where a person subject to the Act other than an officer is dismissed or removed from the service on the ground of conduct which had led to his conviction by a criminal Court or a court-martial, no such 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.

(2) Notwithstanding anything contained in Sub-rule (1), if in the opinion of the officer competent to order the dismissal or removal of such person, it is not expedient or reasonably practicable to comply with the provisions of Sub-rule (1), he may after, certifying to that effect order the dismissal or removal.

(3) All cases of dismissal or removal without complying with the procedure prescribed in Sub-rule (1) shall, without delay, be reported to the Central Government."

Rule 13 of the Rules, which provides for termination of a person subject to the Act, by way of release, reads:

"13. Release - A person subject to the Act may be released from the Air Force in accordance with these Rules, or in accordance with any orders or instructions made in that behalf by or under the authority of the Central Government."

Rule 14, which provides for termination of the services of a person subject to the Act, by way of retirement, reads:

"14. Retirement:- Subject to the other provisions of these Rules, a person subject to the Act may be retired in accordance with the terms and conditions of his service by or under the authority of the Central Government."

Rule 15 of the Rules, which provides for termination of the services of a person subject to the Act, but who is not an officer, reads:

"15. Authorities empowered to authorise discharge: (1) Each of the authorities specified in column 3 of the Table below shall be the authority competent in respect of persons subject to the Act specified in column 1 thereof for the causes specified in column 2 and in the manner specified in column 4, to discharge such persons from the service.

(2) Any power conferred by this rule on any of the aforesaid authorities may also be exercised by any other authority superior to it."

14. A perusal of the above Rules makes it clear that termination of the services of persons subject to the Act could be by way of punishment for causes involving their misconduct or could be for causes not involving their misconduct, i.e., not by way of punishment.

15. Though Rule 17 above envisages termination of the service of an officer by way of removal, it is not removal for misconduct, as it is clearly stated therein that it is removal of the officer due to his inefficiency, physical disability or any other ground other than his misconduct. When the above Rule 13 relating to release, Rule 14 relating to retirement and Rule 15 relating to discharge are read, they clearly indicate that there could be the termination of the services of the persons subject to the Act on grounds other than their misconduct and as such, not by way of punishment.

16. The said analysis of the provisions of the Act and the Rules makes us conclude that terminations of the services of persons subject to the Act under Sections 19 and 20 thereof read with Rules 16 and 18 made thereunder, which relate to terminations of their services by way of punishment for causes involving their misconduct while could be classified as falling in one group, terminations of the services of persons subject to the Act u/s 22 thereof read with Rules, 13, 14, 15 and 17 made thereunder, which relate to terminations of their services not by way of punishment for causes other than those involving misconduct, could be classified as falling in a different group.

Re. Point (iii):

We are concerned here with the Airmen - Habitual Offenders Policy envisaged by Air Headquarters, New Delhi, in their letter No. Air HO/C 23406/685/PS dated 14th August 1984.

17. For a proper appreciation of the attack directed against the said Policy by

learned Counsel appearing on behalf of the appellants before us, it would be advantageous to re-produce the same in extenso.

"DISCIPLINE: AIRMEN HABITUAL OFFENDERS DISCHARGE UNDER RULE 15(2) (g) (ii) OF AIR FORCE RULES 1969."

1. The aim of this letter is to appraise your HQ about the existence of habitual offenders among the airmen, the adverse effects of their repetitive indiscipline on the general discipline and administration in the Air Force and the guidelines which have been decided at this HQ to deal firmly with such habitual offenders.

Habitual Offenders 2. A project study on AWL of airmen by the Institute of Defence Management concerning the period 1978 to 1983 had inter-alia brought about the following salient features regarding the existence of habitual offenders among Airmen:-

(a) That there is a specific hard core group of Airmen in the Air Force (about 1288 in number from all trades) who have been contributing regularly and predominantly to the annual offence statistics in the Air Force year after year. Further breakdown of the group based on the number of punishments and the corresponding number of Airmen in each of these sub-groups is as under:-

Group based on punishments on record

Number of Airmen

Progressive total

11 and above

17

17

10

7

24

9

11

35

8

22

57

7

56

113

6

80

193

5

140

338

4

339

677

3

611

1288

(b) That this group of airmen have not only been repeating AWL offenders, but also other offences and

(c) That this group of airmen have been a strong source of adverse influence on the general discipline of other airmen in the service.

Adverse Effects

3. The following are the main adverse effects flowing out of the repetitive indiscipline perpetrated by this group of habitual offenders:-

(a) Serious adverse effect on the general morale and discipline, especially on the young airmen joining various Units from the training centres.

(b) Unit level administration is kept pre-occupied with these chronic indiscipline cases impinging on time which is otherwise required for constructive activity.

(c) Very often, at some stage or the other, airmen from this group are found to commit serious offences not only within, but also outside the Air Force, thereby tarnishing the image of the service.

(d) Invariably many of these airmen are not performing well in their trades also. Hence their overall contribution to the service is negligible.

(e) Some of the airmen of this group have been promoted and have attained the ranks of SNCOs (Sgts and above). Such SNCOs are a very poor example to others particularly the younger airmen.

4. From para 3 above, it will be evident that the existence of habitual offenders

in their Air Force is a malady which needs to be contained with some firm measures on a time bound programme. Keeping the foregoing in view, airmen who meet any one of the following individual criteria are to be treated as habitual offenders and considered for discharge under Rule 15(2)(g)(ii) of Air Force Rules, 1969.

(a) Total number of punishment entries six and above (including Red and Black ink entries);

or

(b) Four Red ink punishment entries;

or

(c) Four punishment entries (Red and Black ink entries included) for repeated commission of any one specific type of offences such as disobedience, insubordination, AWL, breaking out of camp, offences involving alcohol, mess indiscipline, use of abusive/threatening language etc.

Implementation:

5. The detailed actions and procedures which are required to be followed to implement the policy are given in Appendix to this letter, Necessary actions are to be initiated immediately to implement the policy in your command."

18. As laid down in Paragraph-4 of the above Airmen-Habitual Offenders Policy, an airman, who has been punished for the number of offences referred to therein, having regard to the category in which he falls, has to be treated as a habitual offender. The argument advanced on behalf of the appellants against the Airmen - Habitual Offenders Policy relates to the provision thereunder which requires the punishments suffered by an Airman for offences he was found guilty before the coming into force of the Policy for treating him as a habitual offender for initiating action of removal from service against him under that Policy. According to the argument, the Policy since permits the taking of action of removal of an airman from service by way of punishment for his past offences, for which he has already suffered punishments, has to be regarded as that which violates Article 20(2) of the Constitution prohibiting prosecution and punishment for an offences more than once and hence struck down.

19. The mere fact that punishments awarded in the past to an Airman for an offence involving his misconduct forms the basis under the Habitual Offenders Policy for treating him as habitual offender for taking administrative action for his removal from service, does not vitiate the Policy as being violative of Article 20(2) of the Constitution. Administrative action envisaged under the said Policy against an Airman for his removal from service for his misconduct which has led to his conviction by a criminal Court or Court-martial is not a new one. Taking of such administrative action against an Airman even in the event of his suffering one conviction for an offence involving his misconduct is what is permitted under

Rule 18 of the Rules. If anything, Airmen - Habitual Offenders Policy saves the Airman from administrative action being taken against him for his removal from service till he is punished for the minimum number of offences envisaged therein. The argument of learned Counsel for the appellants that the Policy is violative of Article 20(2) of the Constitution overlooks the well settled law that the administrative action against the Airman for his removal from service for his past misconduct which has led to his punishment, is not a criminal prosecution or award of such punishment as would violate Article 20(2) of the Constitution (See: THOMAS DANA v. STATE OF PUNJAB AIR 1957 SC 375 Besides, the Policy, by declaring that an Airman's case, on his becoming a habitual offender, shall be considered for his discharge, does not envisage the Airman's automatic or mechanical removal from service with the number of punishments suffered by him for the offences committed by him, but envisages the removal of Airman from service by administrative action for an undesirable tendency exhibited by repetitive acts of misconduct which had led to award of punishments to him. Regard if is had to the above nature and content of Airmen - Habitual Offenders Policy and the approval accorded to it by the Supreme Court in Sergeant V.K. Mehta Vs. Union of India (UOI) and Others, the argument of learned Counsel for the appellants that Policy has to be struck down as violative of Article. 20(2) of the Constitution, has to fail.

20. Hence, the said Airman - Habitual Offenders policy cannot be regarded as a policy made in contravention of any provision of law or the Constitution as requiring its striking down.

Re. Point (iv):

While considering Point (ii), by analysing the provisions of the Act and the Rules, we have pointed out that those provisions relate to termination of the services of the persons subject to the Act, by two modes, namely, (a) termination by way of punishment for misconduct and (b) termination simpliciter involving no misconduct. In this context, we have further pointed out that termination of the service of a person subject to the Act, by release, retirement or discharge u/s 22 of the Act read with the Rules -- Rule 13 envisaging release, Rule 14 envisaging retirement and Rule 15 envisaging discharge, is termination simpliciter of the service of the person subject to the Act and the same does not involve punishment for misconduct. If that be so, service of an Airman subject to the Act, if has to be terminated under Rule 15(2)(g)(ii) of the Rules by way of discharge, that is "unsuitable for retention in the air force", it must be a termination simpliciter not involving any misconduct. Hence, the method available for discharge of an Airman under Rule 15(2)(g)(ii) of the Rules, it has to be said, was unavailable for giving effect to the Airmen-Habitual Offenders Policy which involved the termination of the services of an Airman for his misconduct which had led to his conviction and award of punishments under the Act and the Rules. However, recourse to Rule 15(2)(g)(ii) of the Rules for discharge of Airmen for their misconduct, which had led to their convictions and

award of punishments therefore, under the Airmen-Habitual Offenders Policy, we cannot help holding, was unwarranted when Rule 18 of the Rules itself specifically provided for termination of the services of an Airman (a person subject to the Act other than an Officer) for his misconduct leading to his conviction and punishment therefor, as already adverted to thus:

"18. Dismissal or removal of a person subject to the Act other than an officer - (1) Save in a case where a person subject to the Act other than an officer is dismissed or removed from the services on the ground of conduct which had led to his conviction by a criminal court or a court-martial, no such person shall be dismissed or removed under Sub-section (1) of 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.

(2) Notwithstanding anything contained in Sub-rule (1), if in the opinion of the officer competent to order the dismissal or removal of such person, it is not expedient or reasonably impracticable to comply with the provisions of Sub-rule (1), he may after, certifying to that effect order the dismissal or removal.

(3) All cases of dismissal or removal without complying with the procedure prescribed in Sub-rule (1) shall, without delay, be reported to the Central Government."

(Underlining is ours)

21. As we have already pointed out, it is the conduct of the Airman, which will have led to his conviction and award of punishments, which becomes the cause for termination of his services and not the number of punishment awarded to him. If the number of punishments for which the Airman had been awarded punishments had to be the criteria and his discharge, therefore, automatic, there would not have been any need for the Air Force Authorities to have envisaged the issuing of show cause notice to the Airman and obtaining his reply thereto before proceeding to discharge him or terminate his services. In this situation, we are unable to think how it was open to the Air Force Authorities to ignore Rule 18 and have recourse to Rule 15(2)(g)(ii) of the Rules for termination of the services of the Airman in implementation of the Airmen - Habitual Offenders Policy, Consequently, Rule 15(2)(g)(ii) which envisaged discharge of Airman for the cause of "unsuitable for retention in the Air Force", was unavailable for termination of the services of the Airman subject to the Act, under the Airmen--Habitual Offenders Policy for six offences of misconduct, of which he is found guilty and punished under the Act and the Rules.

Re. Point (v):

The point here concerns the procedural safe-guards to be followed by the Headquarters Command for discharging of their Airmen under Rule 15(2)(g)(ii) of the Rules while implementing the Airmen- Habitual Offenders Policy. Such

procedural safeguards are contained in the Appendix to the Letter No. Air/HQ/C 23406/685/PS dated 14th August 1984, in Paragraphs 13 to 16 thereof, and they read:

"Actions at Command HQs:

13. All cases of the two categories, i.e., those who have already crossed the criteria laid down for qualifying as habitual offenders and those on the threshold of doing the same, reported to Command HQs either by the initial Board of Officers or individually, are to be monitored by the Command HQs. On receipt of intimation regarding the award of another punishment in such cases the Command HQs are to issue Show Cause Notice to the individual in terms of this HQ letter No. Air HQ/G 23406/685/PS dated 28 Oct. 66.

14. All cases of airmen who have been served with Show Cause Notices are to be individually forwarded with all the relevant replies / details / documents / recommendations to Directorates of PS and PA at Air HQ at the earliest.

Action at Dtes of PS and PA at Air HQs:

15. Dte of PS will scrutinise these cases and forward the same to Dte of PA with their recommendations,

16. Dte of PA will submit the cases to AOP for his approval and then to initiate follow-up action with AFRO."

As seen from Paragraph-14 of the Appendix, Show Cause Notice to the Airman is issued by the Command headquarters and not by the officers envisaged under Rule 18 of the Rules, who are empowered to dismiss or remove an Airman on grounds of conduct, which led to his conviction. If Sub-rules (1) and (2) of Rule 18 of the Rules are read together, they make it clear that the Show Cause Notice required to be issued under Sub-rule (1) would be on the satisfaction of the Officer competent to order dismissal or removal of such person.

22. In Capt. Virendra Kumar Vs. Union of India (UOI), the Supreme Court had an occasion to consider Rule 15 of the Army Rules, 1964, which empowered termination of services of an Officer by the Chief of the Army Staff after satisfying himself that the Officer was unfit to be retained in the service due to physical disability, after issuing Show Cause Notice to such Officer in the matter. Adverting to the satisfaction to be obtained by the Chief of the Army Staff and the Show Cause Notice to be served on such Officer in the matter, this is what the Supreme Court has said in paragraph-10 thereof:

"The Chief of the Army Staff must be satisfied that the Officer is unfit to be retained in the service due to physical disability This satisfaction is not purely subjective and only on its formation, the Chief of the Army Staff shall proceed further. He may thereafter, inform the Officer concerned about the ground for release from service,...."

As the said procedure was found to have not been adopted, this is what the

Supreme Court has later said in the same paragraph:

"The mere injury in action does not automatically end the officer's service. The consequence is that the Order of termination of service is invalid for failure to adhere to basic procedure, Even the top brass must act according to law as lawlessness in the Defence Force is a grave risk, four Star General or foot infantry Jawan."

When the procedural safeguards contained in the Appendix to the letter dated 14th August 1984 do not envisage issuance of Show Cause Notice as to why the Airman should not be removed for his misconduct leading to conviction by the officer envisaged in Rule 18, the same cannot be regarded as a sufficient safeguard and any action taken against the Airman without compliance with that safeguard will vitiate the action itself.

23. Hence, when action is taken for removal of an Airman by terminating his services for his misconduct leading to his conviction and award of punishment, the procedural safeguards provided in Paragraphs 13 to 16 of the Appendix, cannot meet the requirements of law.

Re. Point (vi):

The point for consideration here relates to the nature of termination of the services of an Airman in the implementation of the Airmen-Habitual Offenders Policy, Dealing with the Airmen-- Habiutal Offenders Policy, we have pointed out that the cause for termination of the services of an Airman under that Policy is the Airman's conduct leading to the award of punishment on that account. If that be so, the termination from service of an Airman in implementation of such Policy would be by way of punishment for the reason or cause of his misconduct When once misconduct of the Airman is the cause for his dismissal or removal, the mere fact that it is sought to be regarded as a discharge under Rule 15(2)(g) (ii) of the Rules cannot make it a discharge simpliciter envisaged therein.

24. The question is whether it is open to the Court to regard the termination of the services of an Airman as the Airman's dismissal or removal u/s 20 of the Act though such termination of service is purported to have been done as a discharge under Rule 15(2)(g)(ii) of the Rules. Whenever a question arises whether a particular termination of service of an individual is dismissal, removal or discharge, the Court is empowered to decide what, in reality, is such termination, cannot be disputed.

25. In Jagdish Mitter Vs. The Union of India (UOI), the Supreme Court, when had to find what a purported discharge of an individual in reality was, said thus:

"No doubt, the order purports to be one of discharge and as such, can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But, it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts, a stigma on the appellant and in that sense, must be

held to be an order of dismissal and not a mere order of discharge."

Proceeding further, the Supreme Court lays the test for finding whether a particular order is either a discharge or dismissal, thus:

"When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be highly to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal."

26. Hence, when termination of the services of an Airman is done in the implementation of the Airmen-Habitual Offenders Policy for the reason of his misconduct leading to his conviction and award of punishment against him, notwithstanding the fact that such termination is called a discharge under Rule 15(2)(g)(ii) of the Rules, it has to be regarded, in reality, as an order of dismissal or removal from his service by way of punishment for misconduct.

Re. Point (vii):

The point here is whether the orders of discharge of the Airmen (appellants in the Writ Appeals and petitioners in the Writ Petitions) impugned in the Writ Petitions though are purported to be orders of discharge under Rule 15(2)(g)(ii) of the Rules, are, in reality, the orders of dismissal or removal from service made without observing the safeguards provided under the Act and the Rules for such removal or dismissal from service.

27. We have adverted to the nature of orders of discharge made respecting the Airmen-appellants. As they are made in implementation of the Airmen-Habitual Offenders Policy for removal from service of Airmen subject to the Act as a measure of administrative action, for their misconduct leading to their conviction for offences and award of punishments against them, they are to be necessarily regarded as orders for removal of the Airmen from service u/s 20 of the Act read with Rule 18 of the Rules and not mere discharge simpliciter envisaged under Rule 15(2)(g)(ii) of the Rules. Thus, the removal of the Airman by the said orders of discharge, when is made without observing the requirement of Rule 18 of the Rules, which was required to be followed for such removal as we have pointed out earlier, it is difficult to think that the procedural safeguards required for Airmen's removal provided under the Act and the Rules have not been violated. In this view of the matter, the orders of discharge of the appellants-petitioners could not have been sustained as those validly made. We have pointed out earlier, how the said orders purported to be discharge orders, have come to be made. They appear to be automatic orders made because of the number of punishments envisaged in the Airmen-Habitual Offenders Policy,

having been suffered by them but not for any undesirable misconduct of the Airmen emanating from their conduct which led to their convictions and award of punishments as assessed by the Officer empowered to remove them from service, as envisaged in that Policy. Hence, it cannot be said that the said orders of discharge impugned before the learned single Judge were liable to be sustained by him by his common order appealed against. We are, therefore, left with no option but to invalidate the orders of discharge relating to the appellants, which were impugned in the Writ Petitions, and quash them.

29. Before parting with this order, having regard to an argument addressed to us by the learned Additional Central Government Counsel that termination of appellants' (Airmen's) services by discharge, instead of removal, should be taken by them as an advantage, for, they would be saved of some of the monetary benefits of service which would not have been otherwise available and make them happy, we cannot help observing that discharge of Airmen from service when is made by stating that it is made for their misconduct, no amount of monetary benefits conferred upon them could assuage them particularly men, who have served in a Defence Force of the Country, from the feeling of stigma of misconduct ingrained in such discharge. However, if it is the intention of the Air Force Authorities to give discharge for Airmen excusing them for their misconduct, nothing could prevent them from resorting to a course similar to that adopted respecting termination of services of Officers in similar circumstances as provided for in Rule 16(8) of the Rules, in as much as such cases would become cases of seeking voluntary discharge by Airmen.

30. In the result, we allow these Appeals, reverse the order of the learned single Judge, allow the Writ Petitions and quash the orders of discharge of the petitioners-appellants impugned therein and also direct the respondents to reinstate the petitioners-appellants in their posts, within four weeks from to-day, if they are already relieved of their duties pursuant to the discharge orders now quashed.

31. However, we make it clear that the quashing of the orders impugned in the Writ Petitions on the ground that they have been made without observance of the mandatory rules of procedure in the matter of removal of the Airmen subject to the Act from their services, cannot come in the way of the Air Force Authorities making fresh orders for the removal of the Airmen concerned, if so warranted, by observing the mandatory procedural requirements of the Act and the Rules, to which we have adverted in the course of this Judgment.