

(2012) 07 DEL CK 0011

In the Delhi High Court

Case No : Writ Petition (C) No.5747 of 2011

Sh. Om Lat

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Army Act, 1950 — Section 23, 26, 39(a), 39(b), 69

Constitution of India, 1950 — Article 226

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 41, 42

Citation : (2012) 191 DLT 95

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : S.S.Pandey, for the Appellant; Vaibhav Agnihotri and Ms. Kanika Agnihotri, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner, a Sepoy, of the Indian Army who had been discharged pursuant to orders dated 8th December, 2010 and 26th April, 2011, has challenged the said orders and has sought the quashing of the same and has also sought directions to the respondents to reinstate him in the service with all consequential benefits including continuity of service, seniority, back wages etc. Relevant brief facts to comprehend the controversies are that the petitioner was enrolled in the Rajputana Rifles Regiment in the Indian Army as a Sepoy on 22nd December, 2003. After his training he was posted to 15 Rajputana Rifles Battalion on 4th January, 2005.

2. While posted with the 15 Raj Rif, the petitioner sought leave on account of his alleged domestic problems. Though the leave was declined to him, the petitioner thought that his domestic problems were too compelling and in utter defiance of discipline, he left the unit without leave on 28th July, 2005 and rejoined on his own on 1st August, 2005. The petitioner was tried summarily u/s 39(a) of the Army Act by his CO and awarded 14 days rigorous imprisonment on 19th August,

2005. The punishment attracted a red ink entry. The petitioner alleged that the red ink punishment was given to him because the Senior JCO and the CHM of his company had become inimical towards him on account of the petitioner leaving the unit despite of refusal of leave.

3. The petitioner, thereafter, again absented himself without leave on 18th January, 2006 and rejoined on his own accord on 17th March, 2006 after 59 days. Therefore, he was tried again under Army Act Section 39(a) and had been awarded 28 days rigorous imprisonment by Commanding Officer of 15 Raj Rif. on 18th March, 2006. Third time the petitioner again absented himself without leave on 4th July, 2006 and rejoined his unit on his own accord on 8th July, 2006 at 0945 hours after 4 days which again attracted the proceedings against him u/s 39(a) of the Army Act and consequently, he was awarded 14 days rigorous imprisonment by the CO on 8th July, 2006. Despite repeated punishments imposed upon him for various periods, the petitioner did not reform himself.

4. On another occasion the petitioner was granted leave from 9th August, 2006 to 7th September, 2006, however, he failed to rejoin the duty on expiry of his leave. He joined the duty only on 9th September, 2009 after 2 days. Immediately thereafter, on 10th September, 2006 he absented himself without leave and rejoined on his own accord on 4th October, 2006 at 1645 hours after 25 days. His act of overstaying the leave by 2 days and absenting himself without leave for 25 days entailed the proceedings under the Army Act u/s 39(b) and (a) leading to the award of the punishment of 14 days rigorous imprisonment by the Commanding Officer on 5th October, 2006.

5. The petitioner allegedly had justified his leaving without permission or leave on account of the alleged compelling reasons of illness of his parents and on account of urgent work at home. Though the petitioner alleged that the punishments on various occasions were awarded to him without following any procedure, however, he did not challenge the punishments awarded to him in the various proceedings u/s 39(a) and 39(b) of the Army Act, 1985. During the absence of the petitioner, the desertion rolls were issued, however, as the petitioner had rejoined the unit, the desertion rolls were recalled. Subsequently, on 9th November, 2006 a show cause notice was issued to the petitioner on the basis of his service record contending that he is found to be an undesirable soldier on account of frequently absenting himself without leave and as per policy laid down in Integrated HQ of MoD (Army) dated 28th December, 1988 and the retention of the petitioner was considered inadvisable. The petitioner was asked to show cause as to why he should not be discharged from the service on account of being an undesirable soldier under Items III (v) of the Army Rule 13(3). The petitioner in writing by his communication dated 15th November, 2006 stated that he does not wish to make any representations. Consequent thereto the petitioner was issued movement order dated 8th December, 2006 for his village Koka after being discharged from the Army.

6. Consequent to the discharge of the petitioner from the Army by order dated

8th December, 2006 he made a representation on 27th January, 2007 contending that his economic condition is very pitiable and that even his father is old and sisters are also to be married, therefore, he ought to be reinstated. The letter dated 27th January, 2007 sent by the petitioner is as under:-

Dated: 27/01/07

To

Mr.Carnal Ojhala Sahab

15, Raj Rif, Mahu, MP.

Respected Sir,

I Omlat Ex Rifleman, 15 Raj Rif was in your unit in Mahu. Suddenly I was given home movement order (Dismiss). Sir my economic condition is very pitty, father is old and sisters are also to be marry. Kindly re-instate me I will be very much grateful to you.

Omlat

S/o.Balbir Singh

Post-Ahri

Distt-Jhajjar

Haryana

SD/-

7. The petitioner made another representation to the Brigadier, Commandant Rajputana Riffles on 12th February, 2007 contending that he has been suddenly given the discharge order on 5th December, 2006 and he was sent home. He alleged that his family condition is not good and that he wants to serve the nation by working in the Army, therefore, he may be reinstated. Thereafter, the petitioner made another representation to the Major General, ADG (Military Intelligence Bureau) that he was posted at 15, Rajputana Riffle Centre Mhow and that on 8th December, 2006 by the excuse of posting him in the center he was dismissed. He stated that he is very much interested in serving the Army and, therefore, he sought his reinstatement. His communication dated 24th May, 2007 is as under:-

Dated: 24.05.2007

To

Mj.Gen.K.T.Parnayak Sahab

Con. Of the Regiment (Rajrif) ADG

(Military Intelligence Bureau)

Respected Sir,

It is humbly prayed that I Omlat S/o Balbir Singh was posted at 15 Rajputana Riffle Centre Mhow. On 8th Dec, 2006 by the excuse of posting me in the center, I was dismissed. I am very much interested to do job in army. Kindly reinstate me. I will be very much grateful to you for my whole life.

Thank you

Sd/- Omlat S/o.Balbir Singh

Vill-Koka,

Distt-Jhajjar

Pin-124108 Haryana

8. The petitioner again sent a representation dated 20th June, 2008 to the Joint Secretary, Chief Administrative Officer & Training alleging that he was suddenly discharged from the unit and that he was discharged in the garb of his posting in the Centre at Delhi. He stated that he has made appeals to all places but no one has considered his appeals and he again sought his reinstatement. Thereafter, the petitioner sent a communication dated 11th November, 2008 to the Defence Minister contending that he was told that he is being posted at Delhi because of some reason, but he was locally discharged and thus he sought his reinstatement. The petitioner thereafter, challenged his order of discharge dated 8th December, 2006 before the Armed Forces Tribunal, Principal Bench by filing an original application, being O.A No.32/2009, inter-alia, on the grounds that he had submitted his representation verbally to the concerned officers on account of the exigencies of the circumstances which had not been taken into consideration; the certificate of his termination of service was not issued in compliance of the provisions u/s 23 of Army Act as only a movement order was issued by the Lieutenant Colonel on 8th December, 2006 which was neither a discharge nor removal from the service; though the leave was not granted to the petitioner he had submitted leave applications which had not been taken into consideration; the respondents were biased and prejudiced and without conducting an enquiry on account of his absence from duty he could not be discharged; no charge sheet was ever issued to the petitioner, nor was any opportunity accorded or personal hearing given to the petitioner in violation of the principles of natural justice; the punishment given by the respondents without serving any discharge order is vague and is not supported by any reason; the discharge of the petitioner is illegal and contrary to the provisions of Rule 13 sub Rule 3 of Army Rules, 1954 and is also violative of Rule 22 of the Army Rules, 1954.

9. Before the Tribunal, the petition was contested by the respondents detailing the various incidents of the petitioner absenting himself without permission or leave and on one occasion overstaying the leave and immediately one day after again absenting himself for 25 days leading to as many as 4 times awarding rigorous imprisonment to the petitioner by the Commanding Officer on various

dates. The respondents contended that the petitioner is a perpetual offender and that he had not improved his habits, conduct and military discipline as expected from a soldier. The petitioner was, therefore, given a show cause notice and the allegations against the petitioner were admitted by him and, therefore, the competent authority had decided to discharge the petitioner from the service under Item III(v) Rule 13(3) of Army Rules, 1954. At the time of the petitioner's discharge, he had earned only 2 years 11 months and 18 days of service and, therefore, it was held that the petitioner is not entitled for grant of service pension, as well as service gratuity under the provisions of para 132 and 147 of Pension Regulations for the Army, 1961 (Part I). The respondents disclosed that 15 years of qualifying service is required for service pension and 5 years service for service gratuity. The respondents also disclosed that on discharge of the petitioner from service his case was submitted to the Pay Account Office (Other Ranks), Rajputana Rifles for final settlement of account on 27th December, 2006 and his individual running ledger account was finalized accordingly and he was remitted a sum of Rs.32,376/- on account of closing balance of final settlement of account which had been paid by SBI, Delhi Cantt-10 vide demand draft bearing machine number 272570 dated 21st March, 2007. The respondents also detailed a sum of Rs.6811/- paid on account of contribution of AFPP Fund; the respondents also disclosed that the payment of a sum of Rs.24,500/- on account of contribution of Army Group Insurance Fund is still under progress and another amount of Rs.15,876/- on account of 6th Pay Commission arrears has been worked out and the tender memo has been issued accordingly. The said amount according to the directions of the Government was payable in two installments of 40% and 60%.

10. The respondents also asserted that an application filed by the petitioner on 4th March, 2009 regarding the amounts payable to him was duly replied to by the letter dated 21st March, 2009 and no amounts are due and payable to the petitioner other than what have been indicated above. The respondents also disclosed that the original application of the petitioner is barred in view of the alternative remedy available to the petitioner to seek redressal from the department under the provision, Section 26 of the Army Act read with para 364 of the Regulation for the Army, 1987.

11. The respondents also challenged the claim of the petitioner on the ground that the various punishments awarded to him from time to time had been accepted by the petitioner and were not challenged and, therefore, the order of discharge cannot be challenged on the ground that the punishments could not be awarded to the petitioner. The show cause notice dated 9th November, 2006 was given to the petitioner on the basis of his service record which service record could not be challenged by the petitioner as he had not challenged the red ink entries awarded to him and the punishments awarded to him which he had already undergone. The respondents also contended that in the initial representation the petitioner admitted that he had been dismissed, however, later on he started alleging that he was issued a movement order under the false

pretext that he is being sent to another place. According to the respondents perusal of all the representations/communications sent by the petitioner will reveal that the petitioner has progressively changed his stand and has tried to improve on his allegations and justify the lapses on his part. The respondents also contended that no justification was given by the petitioner for challenging the order of discharge after almost three years by filing O.A No.32/2009 before the Tribunal.

12. The Tribunal after considering the pleas and contentions of the petitioner and the respondents, dismissed the original application challenging the order of discharge by respondents" order dated 8th December, 2010. While dismissing the original application, the Tribunal held that the petitioner had been successively absenting and not adhering to the Army discipline and it would not be in the public interest to retain such an un-disciplined soldier. The Tribunal further held that there were no grounds to interfere in the matter as it involved Army discipline. Regarding the plea of the petitioner that retiral benefits have not been given, the Tribunal directed in view of the reply filed by the respondents to clear the outstanding dues of the petitioner immediately and all other benefits due to the petitioner in accordance with the rules. The order of the Tribunal dated 8th December, 2010 was challenged by the petitioner by filing a review petition being R.A. No. 08/2011. The review petition filed by the petitioner was also dismissed by the Principal Bench, Armed Forces Tribunal by order dated 26th April, 2011.

13. The order of discharge dated 8th December, 2006 and the order of the Armed Forces Tribunal, Principal Bench dismissing the original application of the petitioner on December, 2010 and the order dated 26th April, 2011 dismissing the review petition of the petitioner are challenged by the petitioner in the present writ petition contending, inter-alia, that the respondents were bound to follow the procedure as laid down in the policy instructions dated 28th December, 1988 and the dismissal of the petitioner on the basis of his reply only could not be held to be valid. The petitioner also relied upon the judgment dated 2nd May, 2008 in W.P(C) No.3874/1995 and 1930/2003 titled as "Satbir Singh v. The Chief of the Army Staff". The petitioner has also relied on Surinder Singh Sihag Vs. Union of India (UOI) and Others, holding that the order of discharge is required to be passed in the prescribed manner. The petitioner reiterated the pleas and contentions raised before the Tribunal and also relied on Union of India & Anr. v. Dipak Kumar Santra, 2009(8) SCR 281; Mazharul Islam Hashmi Vs. State of U.P. and Another, and Union of India (UOI) and Others Vs. L.D. Balam Singh,

14. The learned counsel for the respondents has also reiterated the pleas and contentions raised before the Tribunal and relied on a decision of a Coordinate bench in Pratap Singh v. Chief of Army Staff & Ors, LPA No.136/2003 decided on 3rd June, 2011. Reliance was also placed on Surinder Singh Sihag Vs. Union of India (UOI) and Others, ; Union of India (UOI) and Others Vs. Dipak Kumar Santra, Ex. Nk. Birendra Kumar Singh vs. Union of India and Sepoy Islam Khan

Vs. Union of India (UOI) and Others in support of the pleas and contentions of the respondents.

15. The learned counsel for the respondents also relied on Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, ; Aligarh Muslim University and Others Vs. Mansoor Ali Khan, Indian Council of Agricultural Research Vs. Central Administrative Tribunal, Allahabad Bench and Pankaj Kodesia, The Secretary, A.P. Social Welfare-Residential Educational Institutions Vs. Sri Pindiga Sridhar and Others, ; Krishna Bahadur Vs. Purna Theatre and Others, to contend that there can be certain circumstances in which an order passed in violation of the natural justice need not be set aside under Article 226 of the Constitution of India where no prejudice is caused to the person concerned and in such circumstances interference under Article 226 is not necessary. The learned counsel contended that if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudicial, would not apply. The learned counsel had contended that the principles of natural justice are not required to be complied with when it will only lead to an empty formality. It was asserted that to sustain the complaint of the violation of principles of natural justice, one must establish that he was prejudiced for non observance of the same.

16. The learned counsel for the respondents also emphasized that the present case is almost covered by the principles laid down by another bench of this Court in the case of Pratap Singh (supra) in which case also five red ink entries had been awarded to the delinquent and after issuing a notice to show cause and enabling the delinquent to submit his response to the proposed action of his being discharged from the service, the competent authority had passed an order that the retention of the delinquent in service was not warranted. In Pratap Singh (supra) also the order of discharge was challenged by merely raising four points, that the commandant of the Central Ordinance Depot who passed the order was not competent to do so; no reasons were given while passing the impugned order; by dropping proposed action pursuant to the show cause notice, the respondent had waived, for all times, a right to predicate further action on the four red ink entries which had been awarded to the delinquent and lastly that in view of the law laid down by another bench in the case of Surinder Singh Sihag, without conducting an enquiry, the services of the delinquent could not be discharged.

17. This Court has heard the submissions on behalf of the petitioner and the respondents and has also perused the writ petition, reply to the writ petition filed on behalf of the respondents, rejoinder and the documents and the various precedents relied on by the parties. The emphasis of the learned counsel for the respondents is that the case of the petitioner is almost covered with the propositions laid down by another Division Bench in LPA No.136/2003 tilted as Pratap Singh v. Chief of Army Staff and Anr. While repelling the first plea in the said case that the order was not passed by the competent person it was held

that that SRO No.161 dated 11th June, 1979 prescribes the officers listed in SRO with the powers under the Army Act with respect to persons under their command. Since the order of discharge of the delinquent in that case was passed by the Commandant of the Central Ordinance Depot, Delhi it was held that the order was passed by a competent person. Regarding the order of discharge not disclosing the reasons, it was held that the Commandant had accorded approval to a note which was sent by another officer giving reasons as to why the delinquent should be discharged and since the proposal contained the reasons which were approved by the competent authority, therefore, the reason in the proposal have to be treated as a reason of the authority concerned and, therefore, it could not be held that the Commandant did not have adequate reasons in support of his decision. Regarding waiver of the earlier red ink entries, the Division Bench had held that when a wrong or wrongs are overlooked at a given point of time, their negative effect revives when a further wrong is committed. Regarding the administrative instructions contained in letter circular dated 28th December, 1988, the Division Bench relying on Union of India (UOI) and Others Vs. Dipak Kumar Santra, held that the Supreme Court had taken a contrary view to the one taken by the Division Bench in Surender Singh Sihag's case. The Division Bench had held that so long as statutory rules are valid, there is no place for a policy guideline and as long as the procedure prescribed by the statutory rule is followed, it hardly matters whether a policy guideline is valid or not. In paras 13 to 22 the Division Bench distinguished Surender Singh Sihag's case, which relevant paras are as under:-

13. The last plea urged is premised on the law laid down by a Division Bench of this Court in Surender Singh Sihag's case.

14. The decision deals with the right of the competent authority to discharge a force personnel who has earned 5 red ink entries, a power under Rule 13 of the Army Rules. The Division Bench noted that the army authorities had issued an administrative instruction by way of a letter circular dated 28.12.1988 which contemplated an inquiry before discharging or dismissing a person concerned.

15. The Division Bench took the view that no action could be taken under Rule 13 without an inquiry and since no inquiry was held against Surender Singh Sihag when his services were dispensed with by way of discharge pursuant to a show cause notice alleging against him that he had earned 5 red ink entries, the order was quashed.

16. But we find that the Supreme Court, in the decision reported as Union of India (UOI) and Others Vs. Dipak Kumar Santra, has taken a view contrary to the one taken by the Division Bench of this Court.

17. Pertaining to a discharge of an Army Officer exercising power under Rule 13 of the Army Rules, the Supreme Court held that once statutory Rules occupy the field, there is no place for a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters whether a policy

guideline is not followed.

18. Relevant would it be to state that where a Rule deals with subject matter and the procedure to be followed with respect to the subject matter is also prescribed by the Rule, there is no scope to issue a policy guideline with respect to the procedure to be followed.

19. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule.

20. That apart, it escaped the notice of the Division Bench of this Court as to what was the scope of the inquiry to be conducted if the power to discharge a force personnel was being exercised with respect to the service profile which shows that the person concerned had earned 5 red ink entries and the requirement of the rule was to consider whether such a person is required to be discharged from service.

21. Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.

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

18. This is not disputed that the red ink entries were given to the petitioner for absenting himself without leave and leaving the Army unit though he applied for leave which was not sanctioned and thereafter deciding on his own that his need to go on leave was more paramount than the requirements of the service to which the petitioner belonged. Pursuant to the movement order dated 8th December, 2006 and the representations made by the petitioner on various dates to the different authorities, it is apparent that the petitioner seems to be a man who has taken convenient stands from time to time as were found suitable by him. He had consistently modified his version in the letters written by him to the commanding officers and thereafter, to the other higher authorities, since at first he admitted that he had been given a movement order (dismissal), however, later on, he changed his version and tried to contend that he was issued a movement order under a false pretext that he was being sent to another unit. Even before this Court when the petitioner could not convince his counsel about the production of some documents, the letters which could not be produced by the petitioner as the said letters were not produced by him before the Tribunal, the petitioner sent a direct letter to this court dated 27th April, 2010 along with the copy of his application dated 27th January, 2006 and the copy of the report of absence of the petitioner without leave on desertion of a soldier.

19. When the learned counsel for the petitioner was confronted with the situation, the counsel readily accepted that he cannot give any justifiable reason on behalf of the petitioner for his conduct. In the circumstances, the plea of the petitioner that he was not aware that he has been discharged and the Movement Order was issued to him on the false pretext that he is being transferred to

another unit cannot be accepted.

20. This Court also concurs with the reasoning of the co-ordinate Bench in the case of Pratap Singh (*supra*) that where a rule deals with the subject matter and procedure to be followed with respect to the subject matter is also prescribed by the said rules, then there is no scope to rely on the policy guidelines with respect to the procedure to be followed. In any case, the inquiry had to be held if the facts were in dispute or blameworthiness of the petitioner was to be ascertained. As far as the red ink entries given to the petitioner is concerned, they were not challenged by the petitioner and if that be so, then the petitioner could not challenge the earlier punishments awarded to him on account of the red ink entries given to him for taking the action under Rule 13 of the Army Rules. There would not be any scope for any inquiry to be conducted, if the petitioner was to be discharged from service with reference to his past service record. In any case, show cause notice was given to him and the petitioner in reply had rather contended that he has gone through the show cause notice and he does not wish to make any representation. The show cause notice was based on his past service record, and the petitioner was well aware with the earlier punishments imposed on him and the red ink entries given to him and consequently, the petitioner could not have made any representation against the earlier punishments and red ink entries which were in his service record and at the time of awarding the earlier punishments and when the red ink entries were given to the petitioner, he had not challenged the same.

21. In Ashok Kumar (*supra*), relied on by the learned counsel for the respondents, the Supreme Court had held that the principles of natural justice may not be applicable in a given case unless a prejudice is shown, as application of principles of natural justice is not necessary where it would be a futile exercise. In the cited case, the selection of the employee was *per se* illegal as he was ineligible to be considered for the appointment and in the circumstances, cancellation of his appointment without affording any opportunity of hearing to him by the visitor of the University concerned was held to be proper as it was held that in such cases it would have been a futile exercise to give the employee an opportunity of being heard. The Supreme Court had held that principles of natural justice cannot be put in any straitjacket formula and that the principles may not be applied in a given case unless a prejudice is shown if the same is not complied to. The Court further held that the Court of law does not insist on compliance with useless formalities and it will not issue any such direction where the result would remain the same, in view of the factual situation prevailing in a matter or in terms of the legal consequences. In paras 26, 27 and 28, at page 66 the Supreme Court had held as under:-

26. This brings us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the *audi alteram partem* is one of the basic pillars of natural justice which means no one should be condemned unheard. However, whenever possible the principle

of natural justice should be followed. Ordinarily in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be effected by the ultimate order that may be passed. He may not be given an oral hearing, but may be allowed to make a representation in writing.

27. It is also, however, well settled that it cannot put any straitjacket formula. It may not be applied in a given case unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut-off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard.

22. The "useless formality" theory was applied by the Supreme Court in the case of Aligarh Muslim University & Ors. (supra). It was held by the Supreme Court that apart from the class of cases of "admitted or indisputable facts leading only to one conclusion", "useless formality" theory is also an exception to the principles for the application of natural justice. In para 25 at page 539 of the said judgment, the Supreme Court had held as under:-

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Staughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

23. In the Indian Council of Agricultural Research (supra), it was observed that principles of natural justice is not an unruly horse. It was further held that Courts cannot look at law in abstract or natural justice as a mere artifact. If, in the totality of the circumstances, it is clear to the Courts that the party affected by the adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical. In the said judgment relying on various other judgments, the Supreme Court had held as under:-

22. In *The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee*, the Court: has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cureall. If fairness is shown by the decision-maker to the man proceeded against the form, features and the fundamentals of such essential procedural propriety being conditioned by the facts and circumstances of each Situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference of the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfy the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

23. In *Union of India and Another Vs. Tulsiram Patel and Others*, the Hon''ble Supreme Court held:

Though the two rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible.

24. Principles of natural justice must not be stretched too far as held by the Supreme Court in *Sohan Lal Gupta (Dead) thr. L.Rs. and Others Vs. Smt. Asha Devi Gupta and Others*, ; *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and *Canara Bank and Others Vs. Shri Debasis Das and Others*,

25. In *Hira Nath Mishra and Others Vs. The Principal, Rajendra Medical College, Ranchi and Another*, the Supreme Court held that principles of natural justice are not inflexible and may differ in different circumstances. Rules of natural justice cannot remain the same applying to all conditions.

24. These principles were reiterated by the Supreme Court in the case of *Secretary, Andhra Pradesh Social Welfare Residential Educational Institutions (supra)*. It was observed that to sustain the complaint of the violation of principles of natural justice, one must establish that he was prejudiced for non-observance of the principles of natural justice. In the said case, the service of the employee was terminated, who was appointed on compassionate ground. When the employee was appointed on compassionate ground, his mother was in service and even his wife was in service. In the circumstances, it was inferred that the facts apparently show that the appointment on compassionate ground was secured by playing fraud. The Court held that the fraud cloaks everything and in view of such admitted fact that the mother and the wife of the employee

who had sought compassionate appointment were already in service, the termination of the service of the employee does not suffer on account of non-observance of the principles of natural justice. The Court further held that in the circumstances, it cannot be held that the employee had suffered prejudiced as the employee could not have improved his case since even a show cause notice was not issued to him and in the circumstances, the necessity of issuing the show cause notice was held to be not required before the termination of the services of the said employee.

25. In another precedent relied on by the learned counsel for the respondents, Krishna Bahadur (*supra*), it was held that waiver of statutory rights is permissible subject to the condition that no public interest is involved therein. It was further held that the party pleading waiver, has to show that some agreement waiving the right in consideration of some compromise came into being, though a statutory right may also be waived by conduct. It was held that a right can be waived by the party for whose benefit certain requirements or conditions had been provided by a statute, subject to the conditions that no public interest is involved therein. Applying these principles, it is apparent that in view of the earlier punishment awarded to the petitioner and the red ink entries made in his service record, giving of a show cause notice would have been a useless formality and thus non-compliance of the same would not prejudice the petitioner. So long as the red ink entries existed in the service record of the petitioner, the show cause notice would have been only a useless formality. In any case, a show cause notice was given to the petitioner and since the petitioner was aware of the red ink entries in his service record which had not been challenged by him and which could not be challenged by him when the show cause notice was given to him, he had opted not to file any representation and the right, if any, was waived by him.

26. In the circumstances, the plea by learned counsel for the petitioner that the petitioner had not replied to the show cause notice but on his behalf a reply was prepared, which was got signed from him without the petitioner understanding the ramification of same, cannot be accepted in the facts and circumstances. Because even if the petitioner had given a representation to the show cause notice, he could not challenge the red ink entries given to him on account of previous punishments which had not been challenged by him at the appropriate time and also which could not be challenged by the petitioner at the time of the show cause notice given to him under Rule 13 of the Army Rules.

27. Learned counsel for the respondents has also relied on Sepoy Islam Khan (*supra*), where the order of discharge from service was challenged. In the said case, the concerned officer had earned four red ink entries leading to the prima facie opinion that officer was not fit to be retained in service. A co-ordinate Bench of this Court had considered the decisions of the different Division Bench in the matter of Surender Singh Sihag (*supra*); Pratap Singh (*supra*) and Deepak Kumar Santra of the Supreme Court and had held that pertaining to discharge of

an Army Officer exercising power under Rule 13 of the Army Rules, when statutory rules are there, there is no place for policy guidelines as long as procedure prescribed by the statutory rules is followed and it would not strictly matter, if the guideline is not followed. The procedure under Rule 13 of the Army Rules simply contemplates a prior notice to the person concerned before exercising power under the rule. It was also noted that the inquiry, if had held in case the facts are disputed, then the blame worthiness of the delinquent is to be ascertained. In the circumstances, it was held that there was no scope for any inquiry to be conducted where an officer is being discharged from service with reference to his past service record. It was further held that discharge from service consequent to four red ink entries is not mandatory or a legal requirement and in such cases the commanding officer must consider the nature of offences for which each red ink entry has been awarded, but he can hear the individual especially when he is about to complete his pensionable service.

28. The precedents relied on by learned counsel for the petitioner, are apparently distinguishable. In *Satbir Singh (supra)*, an Army Officer was found guilty of charges of intoxication on four occasions and he was issued a show cause notice under Army Rule 13 (3)(III) (V). Employee had submitted a reply that he desires to be relieved as he had family problem, however, the Army Authorities terminated the service of the Army Officer. The issues which were raised in the matter were whether discharge on the basis of red ink entries was legal or whether the petitioner was never served with the discharged order and thus was discriminated by the Army Authority. The Court had taken the cognizance of the fact that despite the reply given by the Army Officer to the show cause notice, it was not considered favorably, as the reply of the Army Officer should have been treated as his resignation. In the other matter which was decided along with *Ex. Havildar Satbir Singh i.e. Ex.NK Shri Bhagwan*, the Army Employee was found guilty of charges of intoxication on four occasions and pursuant to the show cause notice given to him for discharge, he had submitted a reply that he be given an opportunity to improve his habit and character, however, the Army Authorities had terminated his service. The Court, however, considering the facts of the cases and had directed reinstatement of the Army Employee but had not granted any salary/benefit for the intervening period.

29. In *L.D.Balam Singh (supra)* relied on by the petitioner, it was held that a person serving in the Indian Army who was tried by the General Court Martial u/s 69 on the charge of illegal possession of opium punishable u/s 18 of the NDPS Act would be entitled to procedural safeguards provided under Sections 41 and 42 of the NDPS Act. It was further held that when a statute provides for trial there under by taking recourse to another statute for imposing punishment for the offences provided under that statute, safeguards provided under that statute have to be followed in the trial, otherwise the entire trial would be vitiated. However, in the case of the petitioner, he was not tried under another statute so as to attract the procedural safeguards provided under another statute. For discharge of the petitioner, the procedure prescribed under the rule had been

followed and in the circumstances, even if something had not been strictly followed under the guidelines, order of the discharge of the petitioner will not be vitiated and in the circumstances, the order of the Armed Forces Tribunal cannot be vitiated on any of the grounds raised on behalf of the petitioner.

30. Learned counsel for the petitioner has also relied on Mazharul Islam Hashmi (supra) to contend that as per principles of natural justice before giving hearing to a person, he must know what he is to meet and he must also have an opportunity of meeting that case. However, the said principles will not be applicable in the case of the petitioner for the reasons stated hereinabove. The petitioner was given a show cause notice on the basis of his record. The petitioner had the knowledge about the earlier punishments given to him and the red ink entries made against him. This Court has also held that though a show cause notice was given to the petitioner, but even if the show cause notice had not been given it would have been only a useless formality giving him show cause notice and considering his representation as the order of the discharge was passed on the basis of the previous conviction of the petitioner which were not challenged by him. In any case, a show cause notice was given to the petitioner, however, in view of the fact that the petitioner had not challenged his earlier convictions and he knew that at that juncture he could not have challenged the same, he had given a reply that he does not want to file a representation. The petitioner now cannot be allowed to contend to the contrary. In totality of the facts and circumstances, therefore, there are no grounds to interfere with the decision of the Armed Forces Tribunal as the learned counsel for the petitioner has failed to make out any such illegality, irregularity or perversity which will require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition, in the facts and circumstances, is without any merit and it is therefore, dismissed.