REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.12179-12180 of 2016
(Arising out of CIVIL APPEAL (D)No. 34132 OF 2013)

VIJAY SHANKAR MISHRA **.....APPELLANT**

Versus

UNION OF INDIA & ORS **.....RESPONDENTS**

J U D G M E N T

Dr D Y CHANDRACHUD, J

Leave granted

Delay condoned.

1 These appeals arise from judgment of the Armed Forces Tribunal dated 23 September 2010 and 15 September, 2016.

2 The appellant was enrolled in the Army Medical Corps on 23 June 1984. On 3 October 1997, a notice to show cause was issued to him to explain why he should not be discharged from service under Rule 13(3)III(v) of the Army Rules on the ground that his conduct which in service had not been found satisfactory. On 15 October 1997 the appellant was placed in a low medical category BEE (Permanent). On 4 December 1998, he was discharged from service under Rule 13(3) Table (III)(v). By that time he had rendered

service of 13 years 8 months and 19 days (excluding 188 days non qualifying service). The minimum qualifying service for earning pension under Rule 132 of the Pension Regulations for the Army 1961 (Part-I) is fifteen years. By an order of 22 May 1999 the appellant was also denied disability pension.

3 The petitioner filed a writ petition before the Madhya Pradesh High Court which was dismissed on 21 November 2006. In appeal a Division Bench by its judgment dated 3 January 2007 directed reconsideration of the case of the appellant in terms of a circular bearing No.0201/A/164/Admn-1 dated 10 January 1989. Pursuant to the order of the High Court an order was issued on 26 February 2007 rejecting his claim for pension on the ground that he did not have fifteen years' service and had been discharged for the reason that he was unlikely to become an efficient soldier. Moreover, it was stated that disability pension was denied to the appellant (despite being placed in a low medical category on account of primary hypertension) on the ground that he had earned six red ink entries which were a part of an award of punishment on nine occasions.

4 The appellant filed a writ petition before the Madhya Pradesh High Court in 2007 which was eventually transferred to the Armed Forces Tribunal registered as TA 320 of 2010. The Tribunal dismissed the application by its order dated 23 September 2010. The appellant then filed a review application in 2011 which was rejected by the Tribunal on 15 September 2011. A writ petition was filed before the Madhya Pradesh High Court which was dismissed on 4 July 2012 since the remedy of the appellant would lie before this Court.

The application filed by the appellant before the Tribunal for leave to appeal to this Court was rejected on the ground of delay on 4 April 2013.

5 The contention of the appellant is that his discharge shortly before he would complete qualifying service for the grant of pension was grossly disproportionate. Moreover, reliance was placed on behalf of the appellant on circular No.0201/A/164/Admn-1 dated 10 January 1989 which provides as follows:

> "Discharge from service consequent to four red entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service and the discharge should be ordered only when it is absolutely necessary in the interest of service".

6 In the submission of the appellant the mere fact that he had been punished while in service on nine occasions inclusive of six red entries was no ground to exercise the power under Rule 13(3) Table III(v). It was urged that the mere award of four red entries does not render a discharge mandatory and that the individual facts including the nature of the offence for which the entries were awarded and long service in hard stations where a member of the force was posted have to be duly borne in mind.

7 The issue which arises in the present case is not *res integra*. A Bench of three learned Judges of this Court including one of us (the learned Chief Justice) in **Veerendra Kumar Dubey** v. **Chief of Army Staff**[1] held as follows :

> "10. The Government has, as rightly mentioned by the learned counsel for the appellant, stipulated not only a show-cause notice which is an indispensable part of the requirement of the Rule but also an impartial enquiry into the allegations against him in which he is entitled to an adequate opportunity of putting up his defence and adducing evidence in support thereof. More importantly, certain inbuilt safeguards against discharge from service based on four red ink entries have also been prescribed. The first and foremost is an unequivocal declaration that mere award of four red ink entries to an individual does not make his discharge mandatory. This implies that four red ink entries is not some kind of *Laxman rekha*, which if crossed would by itself render the individual concerned undesirable or unworthy of retention in the force. Award of four red ink entries simply pushes the individual concerned into a grey area where he can be considered for discharge. But just because he qualifies for such discharge, does not mean that he must necessarily suffer that fate. It is one thing to qualify for consideration and an entirely different thing to be found fit for discharge. Four red ink entries in that sense take the individual closer to discharge but does not push him over. It is axiomatic that the Commanding Officer is, even after the award of such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects made relevant by the Government in the procedure it has prescribed."

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1 (2016) 2 SCC 627

This Court has in the above judgment construed the provisions of Rule 13 of the Army Rules, 1954 together with a letter of the Army Headquarters dated 28 December 1988 (bearing No. A/15010/150/AG/PS-2(c). Emphasising the factors which have to be borne in mind, this Court held thus :

> "16. The procedure prescribed by the Circular dated 28-12-1988 far from violating Rule 13 provides safeguards against an unfair and improper use of the power vested in the authority, especially when even independent of the procedure stipulated by the competent authority in the Circular aforementioned, the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and that he may be completing pensionable service, are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge. Inasmuch as the procedure stipulated specifically made them relevant for the exercise of the power by the competent authority there was neither any breach nor any encroachment by executive instructions into the territory covered by the statute."

8 In the present case, it is evident that there was no application of mind by the authorities to the circumstances which have to be taken into

consideration while exercising the power under Rule 13. The mere fact that the appellant had crossed the threshold of four red entries could not be a ground to discharge him without considering other relevant circumstances including (i) the nature of the violation which led to the award of the red ink entries; (ii) whether the appellant had been exposed to duty in hard stations and to difficult living conditions; (iii) long years of service, just short of completing the qualifying period for pension. Even after the Madhya Pradesh High Court specifically directed consideration of his case bearing in mind the provisions of the circular, the relevant factors were not borne in mind. The order that was passed on 26 February 2007 failed to consider relevant and germane circumstances and does not indicate a due application of mind to the requirements of the letter of Army Headquarters dated 28 December 1988 and the circular dated 10 January 1989.

9 For these reasons, we are of the view that the Armed Forces Tribunal was in error in rejecting the application. The orders of the Tribunal dated 23 September 2010 and 15 September 2011 are set aside. Since the appellant would have attained the age of superannuation, the ends of justice would be met if he is treated to have been in service till the time he would have completed the qualifying service for grant of pension. No back-wages shall however be admissible. The benefit of continuity of service for all other purposes shall be granted to the appellant including pension. The monetary benefits payable to the appellant shall be released within a period of four months from the date of this order.

10 The appeals are allowed in these terms. There shall be no order as to costs.

.....CJI
[T S THAKUR]

.....J
[Dr D Y CHANDRACHUD]

New Delhi
December 15, 2016.