AMARENDRA KUMAR PANDEY

v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 11473-11474 of 2018)

JULY 14, 2022

[SURYA KANT AND J. B. PARDIWALA, JJ.]

Service Law: Armed forces – Discharge from service – Appellant was discharged from service on the basis of four Red-Ink entries received by him during his period of service – Writ petition filed by him challenging order of discharge – Single judge relied upon the judgment in Balwant Singh *wherein similar issue was involved regarding discharge from Assam Rifles on securing four Red-Ink entries – In that case, it was held that the authority vested with the power to discharge must examine the response of the concerned person and weigh the same vis-a-vis the severity of the misconduct which led to incurring of the Red-Ink entries in the service rolls; and that the order of discharge and the procedure preceding such discharge being of summary nature, it is necessary that the order of discharge is a speaking order – Relying on the said judgment, Single Judge set aside the order of discharge and remitted matter to competent authority for fresh decision – However, Division Bench set aside the order passed by Single Judge on the ground that neither the Assam Rifles Act, 1941 nor the Assam Rifles Act, 2006 requires the authority to record any reasons or satisfaction in the order of discharge itself – On appeal, held: Where there are no reasonable grounds for formation of the authority's opinion, judicial review in such a case is permissible – There is nothing on record to indicate that the nature of the misconduct leading to the award of four Red Ink entries was so unacceptable that the competent authority had no option but to direct his discharge to prevent indiscipline in the force – Therefore, to do substantial justice, order of discharge is set aside and appellant is treated to have been in service till the time, he could be said to have completed the qualifying service for grant of pension – Assam Rifles Act, 1941 – Assam Rifles Act, 2006 – Assam Rifles Regulation, 2016 – Regns.107 and 108.*

A **Allowing the appeal, the Court**

HELD: 1. Where an Act or the statutory rules framed thereunder left an action dependent upon the opinion of the authority concerned, by some such expression as 'is satisfied' or 'is of the opinion' or 'if it has reason to believe' or 'if it considered
B **necessary', the opinion of the authority is conclusive, (a) if the procedure prescribed by the Act or rules for formation of the opinion was duly followed, (b) if the authority acted *bona fide*, (c) if the authority itself formed the opinion and did not borrow the opinion of somebody else and (d) if the authority did not proceed**
C **on a fundamental misconception of the law and the matter in regard to which the opinion had to be formed. The action based on the subjective opinion or satisfaction, can judicially be reviewed first to find out the existence of the facts or circumstances on the basis of which the authority is alleged to have formed the opinion. It is true that ordinarily the court should not inquire into the**
D **correctness or otherwise of the facts found except in a case where it is alleged that the facts which have been found existing were not supported by any evidence at all or that the finding in regard to circumstances or material is so perverse that no reasonable man would say that the facts and circumstances exist. The courts**
E **will not readily defer to the conclusiveness of the authority's opinion as to the existence of matter of law or fact upon which the validity of the exercise of the power is predicated. The doctrine of reasonableness thus may be invoked. Where there are no reasonable grounds for the formation of the authority's opinion, judicial review in such a case is permissible. [Para 28-30][239-E-**
F **H; 240-A-C]**

2. When this Court say that where the circumstances or material or state of affairs does not at all exist to form an opinion and the action based on such opinion can be quashed by the courts, this Court means that in effect there is no evidence whatsoever
G **to form or support the opinion. The distinction between insufficiency or inadequacy of evidence and no evidence must of course be borne in mind. A finding based on no evidence as opposed to a finding which is merely against the weight of the evidence is an abuse of the power which courts naturally are loath to tolerate. Whether or not there is evidence to support a**
H

particular decision has always been considered as a question of law. Secondly, the court can inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In other words, if an inference from facts does not logically accord with and flow from them, the Courts can interfere treating them as an error of law. Thus, this Court can see whether on the basis of the facts and circumstances found, any reasonable man can say that an opinion as is formed can be formed by a reasonable man. That would be a question of law to be determined by the Court. Thirdly, this Court can interfere if the constitutional or statutory term essential for the exercise of the power has either been misapplied or misinterpreted. The Courts have always equated the jurisdictional review with the review for error of law and have shown their readiness to quash an order if the meaning of the constitutional or statutory term has been misconstrued or misapplied. Fourthly, it is permissible to interfere in a case where the power is exercised for improper purpose. If a power granted for one purpose is exercised for a different purpose, then it will be deemed that the power has not been validly exercised. If the power in this case is found to have not been exercised genuinely for the purpose of taking immediate action but has been used only to avoid embarrassment or wreck personal vengeance, then the power will be deemed to have been exercised improperly. Fifthly, the grounds which are relevant for the purpose for which the power can be exercised have not been considered or grounds which are not relevant and yet are considered and an order is based on such grounds, then the order can be attacked as invalid and illegal. [Para 31, 34-37][240-D-E, H; 241-A-B, D-G]

3. Having regard to the nature of the misconduct alleged against the appellant in the ends of justice, the order of discharge is set aside and the appellant is treated to have been in service till the time, he could be said to have completed the qualifying service for grant of pension. Such an order is passed with a view to do substantial justice as there is nothing on record to indicate that the nature of the misconduct leading to the award of four Red Ink entries was so unacceptable that the competent authority had no option but to direct his discharge to prevent indiscipline in the force. [Para 39][244-F]

A *Ram Manohar v. State of Bihar* **AIR 1966 SC 740 : [1966] 1 SCR 709;** *Dwarka Das v. State of J. and K.* **AIR 1957 SC 164;** *Motilall v. State of Bihar* **AIR 1968 SC 1509 : [1968] 3 SCR 587;** *Virendra Kumar Dubey v. Chief of Army Staff & Ors.* **(2016) 2 SCC 627 : [2015] 10 SCR 1013;** *Vijay Shankar Mishra v. Union of India and Ors.* **(2017) 1 SCC 795 : [2016] 12 SCR 200;** *Rasbihari v. State of Orissa* **AIR 1969 SC 1081 : [1969] 3 SCR 374;** *Rohtas Industries Ltd. v. S.D. Agarwal and Another* **AIR 1969 SC 707 : [1969] 3 SCR 108;** *Barium Chemicals Ltd. and Another v. Company Law Board and Others* **AIR 1967 SC 295 : [1966] Suppl. SCR 311 – relied on.**

Union of India v. Balwant Singh **(2015) 14 SCC 389 – referred to.**

Satgur Singh v. UOI & Ors. **(2019) 9 SCC 205 : [2019] 11 SCR 1023 - held inapplicable.**

Director of Public Prosecutions v. Head **(1959) AC 83;** *Reg. v. Governor of Brixton Prison, Armah, Ex Parte* **(1966) 3 WLR 828;** *Bean v. Doncaster Amalgamated Collieries* **(1944) 2 All ER 279;** *Farmer v. Cotton's Trustees,* **1915 AC 922;** *Iveagh (Earl of) v. Minister of Housing and Local Govt.* **(1962) 2 QB 147;** *Iveagh (Earl of) v. Minister of Housing and Local Govt.* **(1964) 1 AB 395 - referred to.**

Muthu Gounder v. Government of Madras **(1969) 82 Mad LW 1;** *Natesa Asari v. State of Madras* **AIR 1954 Mad 481 – referred to.**

Case Law Reference

[2015] 10 SCR 1013	**relied on**	**Para 13**
[2016] 12 SCR 200	**relied on**	**Para 13**
(2015) 14 SCC 389	**referred to**	**Para 18**
[2019] 11 SCR 1023	**held inapplicable**	**Para 19**
[1969] 3 SCR 374	**relied on**	**Para 32**

H

[1969] 3 SCR 108	**relied on**	**Para 33**
[1966] Suppl. SCR 311	**relied on**	**Para 33**
[1966] 1 SCR 709	**relied on**	**Para 37**
[1968] 3 SCR 587	**relied on**	**Para 37**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 11473-11474 of 2018.

From the Judgment and Order dated 21.12.2017 and 22.08.2017 of the High Court of Gauhati at Guwahati in W.A. No. 354 of 2017 and W.A. No. 399 of 2016.

Mehul M. Gupta, R. P. Gupta, Advs. for the Appellant.

Ms. Manjula Gupta, Sharath Narayan Nambiar, V. Balaji, Shailesh Madiyal, Arvind Kumar Sharma, B. V. Balaram Das, Advs. for the Respondents.

The Judgment of the Court was delivered by

J. B. PARDIWALA, J.

1. These appeals, by special leave, are directed against the judgment and order passed by a Division Bench of the Guwahati High Court dated 21.12.2017 in the Writ Appeal No. 354 of 2017 by which the High Court allowed the appeal filed by the Union of India & Ors. thereby setting aside the judgment and order passed by a learned Single Judge of the High Court dated 19.01.2015 in the Writ Petition (C) 2783 of 2004 filed by the appellant herein.

2. The facts giving rise to this appeal may be summarized as under:

(i) The appellant herein (original writ petitioner) had joined the Assam Rifles as a Rifleman in the year 1993. While he was in service, he came to be discharged vide order dated 31.01.2004 passed by Lt. Col Offg Comdt.

(ii) The order of discharge referred to above reads thus:

OFFICE OF THE COMMANDANT 24 ASSAM RIFLES,
C/O 99 APO

ORDER

2401637/AKP/2004 DATED 31.01.2004

A 1. WHEREAS it is considered that the conduct of No 2401637W Rfn/GD Amrandra Kumar Pandey of which has led him getting four Red Ink entries is such as to render his further retention in the public Service undesirable being a incorrigible offender and having shown no improvement during his service.

B 2. AND WHEREAS No. 2401637W Rfn/GD Amrandra Kumar Pandey was afforded opportunity to show cause against the proposed action vide 24 AR letter No. 11014/A36-2003/635 dt. 02 Sep., 2003.

3. AND WHEREAS No 2401637W Rfn/GD Amrandra Kumar
C Pandey submitted his replies vide letter No. Nil dated 01. Oct.2003. the same was considered in terms of ROI 4/99 and was found unsatisfactory by the competent authority.

4. NOW WHEREFORE, In exercise of the powers conferred on me under AR Act 1941 Sec 4(a) read with Para 24, Chapter VIII
D of AR Manual and Para 6 of ROI 4/99, the undersigned hereby discharge the said No.2401637W Rfn/GD Amrandra Kumar Pandey from the Assam Rifles being incorrigible offender soldier with effect from 31 Jan., 2004 (Afternoon) No.2401637W Rfn/GD Amrandra Kumar Pandey is entitled to get pension and gratuity as admissible under rule.

E

s/d
(Santosh Joseph)
Lt. Col Offg Comdt

3. Thus, the aforesaid order of discharge was passed on the basis
F of the four Red-Ink entries received by him during his period of service. The four Red-Ink entries were on the following grounds:

Entry 1 (1996)	For staying back to take care of his ailing mother – *'without sufficient cause over staying leave granted'*. Sentenced to 14 days of rigorous imprisonment with deduction in salary.
Entry 2 (1998)	For being on the way out to make a phone call, but stopped before he could leave the compound –

G

H

	"visited out of bound areas as specified in unit BRO Part I Ser No 202 dated 30 Aug 96 without permission from his superior officers". Sentenced to 28 days of rigorous custody and 14 days of Military Custody.
Entry 3 (1999)	For losing his luggage while coming back from home – *"lost his identity card bearing machine No. 078550 by neglect the property of the Government issued to him for his use".* Sentenced to 28 days of rigorous imprisonment and 14 days of detention in AR custody.
Entry 4 (2004)	For playing cards all alone by himself – *'to obey unit standing orders and was found Gambling in unit line'.* Sentenced to 28 days of rigorous imprisonment and 14 days of fine.

4. The appellant herein challenged the order of discharge before the Guwahati High Court by filing the Writ Petition (C) No. 2738 of 2002. It appears from the materials on record that a learned Single Judge of the Guwahati High Court decided the Writ Petition filed by the appellant herein along with two other identical petitions of two similarly situated riflemen and by a common judgment and order dated 19.01.2015 allowed the same. The impugned order of discharge came to be set aside. The learned Single Judge remitted the matter to the authorities concerned for a fresh decision in the light of a Division Bench decision of the Guwahati High Court.

5. The learned Single Judge while allowing the Writ Petition filed by the appellant herein held as under:

> *"The issue regarding discharge from Assam Rifles on securing four Red Ink entries was gone into by a Division Bench of this Court in Balwant Singh Vs. Union of India & Ors.,*

reported in 2011 (5) GLT 640. That was a case where a Rifleman was discharged from the Assam Rifles on getting four Red Ink entries. Out of the four Red Ink entries, three related to intoxication and one related to overstay of leave period. The Division Bench examined the provisions of Clause-5 of the Record Branch Instruction (ROI) No.1/2004. Clause-5 of ROI provides that under Chapter-VIII, Rule 24 of the Assam Rifles Manual power is conferred on the Commandant of an Assam Rifles battalion to discharge any member of the Assam Rifles below the rank of Naib Subedar in case he receives four or more Red Ink entries. The Division Bench held that the use of the expression "four or more Red Ink entries" and also the use of the word "may" in Clause-5 indicates that discretion is vested in the disciplinary authority to decide as to whether the person who is found to have received the Red Ink entries ought to be discharged from service or not. It was held that merely because a man receives four Red Ink entries, discharge is not automatic. Discretion is given to the Commanding Officer to consider discharge. The severity and the nature of the misconduct will have to be weighed before recourse is taken to exercise power conferred by Clause-5 of the ROI.

It is a settled position in law that when a discretion is vested in an authority to exercise a particular power, the same is required to be exercised with due diligence, and in reasonable and rational manner. Since order of discharge and the procedure preceding such discharge is of a summary nature, it is necessary that the order of discharge is a speaking order and must indicate how and in what manner the authority exercised the discretionary power. The Hon'ble Supreme Court in a catena of decisions has reiterated time and again the necessity and importance of giving reasons by the authority in support of its decision. It has been held that the face of an order passed by a quasi-judicial authority or even by an administrative authority affecting the rights of parties must speak. The affected party must know how his case or defence was considered before passing the prejudicial order. Coming back to the three impugned orders, it is evident that none of the orders disclose how the responses of the petitioners were

considered and why discharge was necessary. As held by the Division Bench just because the petitioners incurred four Red Ink entries, it does not ipso facto mean that they are to be discharged from the Assam Rifles. As pointed out by the Division Bench, the authority vested with the power to discharge must examine the response of the concerned person and weigh the same vis-à-vis the severity of the misconduct which led to incurring of the Red Ink entries in the service rolls. Such examination is not discernible from the impugned orders.

Having regard to the above, this Court is of the view that the impugned orders of discharge cannot be sustained. Accordingly, the orders of discharge of the petitioners are set aside and quashed. Matter is remanded back to the respondents for a fresh decision in the light of the Division Bench judgment in Balwant Singh (Supra) and the discussions made above. Respondents may consider imposition of any lesser punishment on the petitioners balancing the interest of the organization and also that of the petitioners subject to assessment of physical fitness of the petitioners.

Writ petitions are allowed to the above extent. No costs."

6. The Union of India being dissatisfied with the judgment and order passed by the learned Single Judge referred to above challenged the same by filing the writ appeal before the Division Bench of the Guwahati High Court. The Division Bench allowed the writ appeal filed by the Union of India and thereby set aside the order passed by the learned Single Judge referred to above. The Appeal Court while allowing the writ appeal filed by the Union of India essentially took the view that neither the Assam Rifles Act, 1941 under which the decision to discharge was taken nor the Assam Rifles Act, 2006 requires the authority to record any reasons or the satisfaction in the order of discharge itself. The Appeal Court took the view having regard to the provision of Clause 5 of the ROI 1/2004 that the Commandant has the discretion to discharge a person who has four or more Red Ink entries. All that is required is to serve a notice on the individual affording an opportunity to explain. The provision of Clause 5 does not require the Commandant to record the reasons of satisfaction in the order of discharge.

7. Being dissatisfied with the impugned order passed by the Appeal Court of the High Court, the appellant herein (original writ petitioner) is here before this Court with the present appeal.

SUBMISSIONS :

8. The learned Counsel appearing for the appellant vehemently submitted that the High Court committed a serious error in passing the impugned order. He would submit that there was no good reason for the Appeal Court to disturb the order passed by the learned Single Judge of the High Court.

9. The learned Counsel has broadly classified his submissions as under:

(a) Discharge is not mandatory even after four Red entries.

(b) There is a difference between cases of major misconducts and minor misconducts.

(c) In the order of discharge no reasons have been assigned.

(d) The plea of malafide raised against the authority has not been considered.

10. The learned Counsel appearing for the appellant invited the attention of this Court to the Record Office Instruction No. 4 of 1999 which provides for the procedure for discharge/retirement from service of Assam Rifles personnel. The same reads thus:

RECORD OFFICE INSTRUCTION NO.4/99

PROCEDURE FOR DISCHARGE/RETIREMENT FROM SERVICE ASSAM RIFLES PERSONNEL

1. A comprehensive instruction, containing all existing orders on the subject has been compiled in the form of this ROI for guidance and strict compliance by all concerned.

***** ***** *****

***** ***** *****

***** ***** *****

6. Discharge/Disposal of Undesirable/Inefficient Personnel

Chapter VIII, Rules 24 of the Assam Rifles Manual invests

powers to the Commandant of Assam Rifles Battalions to 'dismiss' or 'remove' any member of the Assam Rifles below the rank of Nb/Sub. This power may be invoked by a Commandant in case where a person has got four red ink entries. As far as practicable, however, discharge under this provision should be avoided as personnel sent on discharge on this account are not eligible for pension. In case it is necessary to send an individual on discharge under this provision, a notice will be served on the individual to give opportunity to explain his case. Complete case will be forwarded to Range HQ alongwith the notice and reply received from the individual, for the approval of the DIGAR. The documents will be sent to this Directorate Records (Doc)/ UPAO (And the individual to Depot Coy (No.1 Constr Coy))……

11. The learned Counsel also invited the attention of this Court to the Assam Rifles Manual. The relevant clause of the Assam Rifles Manual reads thus:

ASSAM RIFLES MANUAL

"24. A Commandant may dismiss any member of the Assam Rifles below the rank of Jemadar.

The word "dismissal" should be restricted to the case of an officer removed with disgrace. In other cases

"removal" is the proper word to be used. A "dimissed" officer may not be re-employed.

Dismissal is the last resource, and should not ordinarily be ordered until all other means of punishment have been tried and failed. For incorrigible offenders; confirmed bad characters, confirmed drunkards, for offences involving moral disgrace, fraud and dishonesty, continued and willful disobedience or neglect, it is generally the only appropriate punishment"

12. The principal argument of the learned Counsel appearing for the appellant is that the discharge from service is not automatic or mandatory after four Red entries. Four Red entries are only a minimum requirement and cannot be the sole ground to order discharge. It is argued that the Rule itself states that the power "may be invoked" and that "as

A far as practicable, however, discharge under this provision should be avoided as the Personnel sent on discharge on this account are not eligible for pension". The submission is that the provision can be pressed into service only when "continued and willful disobedience or neglect" comes on record.

B 13. The learned Counsel with a view to fortify his aforesaid submission placed strong reliance on the decisions of this Court in the case of ***Virendra Kumar Dubey v. Chief of Army Staff & Ors.***, (2016) 2 SCC 627, and ***Vijay Shankar Mishra v. Union of India and Ors.***, (2017) 1 SCC 795, respectively.

C 14. In such circumstances referred to above, the learned Counsel prays that there being merit in his appeal the same be allowed and the impugned judgment and order passed by the High Court may be set aside including the order of discharge and the appellant may be ordered to be reinstated in service with all Full Back Wages and all other statutory benefits.

D 15. On the other hand, this appeal has been vehemently opposed by the learned Counsel appearing for the respondents. The learned Counsel would submit that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order. She would submit that the High Court E was absolutely justified in taking the view that it was not necessary for the authority concerned to assign any reasons for the purpose of passing an order of discharge. The four Red Ink entries were sufficient for the authority to arrive at the subjective satisfaction that the appellant herein was not fit to be retained in service and more particularly being a Rifleman F with the Assam Rifle.

16. It is argued that before passing the order of discharge, notice to show cause was issued to the appellant herein and an opportunity of hearing was given to him.

17. The learned Counsel submitted that all that the appellant did G was to tender an apology for his mistakes. No other ground was raised in his reply to the show cause notice except that he hails from a poor family and his parents and children are dependent on him. Having regard to the reply the authority concerned rightly formed an opinion that the appellant was a habitual offender. She invited the attention of this Court to Para 6 of the impugned judgment of the High Court wherein the High H

Court has noted that the appellant failed to offer any explanation in the reply to the show cause notice except the family circumstances.

18. The learned Counsel further submitted that the decision of this Court in the case of ***Union of India v. Balwant Singh***, (2015) 14 SCC 389, has not been referred to in the case of ***Virendra Kumar Dubey*** (supra).

19. In the last the learned Counsel placed reliance on the decision of this Court in the case of ***Satgur Singh v. UOI & Ors.*** reported in (2019)9 SCC 205, more particularly, the observations made in Para 6 and 7 respectively. Para 6 & 7 respectively are as under:

> *"6. We do not find any merit in the present appeal. Para 5(a) of the circular dated 28-12-1988 deals with an enquiry which is not a court of inquiry into the allegations against an army personnel. Such enquiry is not like departmental enquiry but semblance of the fair decision-making process keeping in view the reply filed. The court of inquiry stands specifically excluded. What kind of enquiry is required to be conducted would depend upon facts of each case. The enquiry is not a regular enquiry as Para 5(a) of the Army Instructions suggests that it is a preliminary enquiry. The test of preliminary enquiry will be satisfied if an explanation of a personnel is submitted and upon consideration, and order is passed thereon. In the present case, the appellant has not offered any explanation in the reply filed except giving vague family circumstance. Thus, he has been given adequate opportunity to put his defence. Therefore, the parameters laid down in Para 5(a) of the Army Instructions dated 28-12-1988 stand satisfied….*
>
> *7. In reply to the show-cause notice, the appellant has not given any explanation of his absence from duty on seven occasions. He has been punished on each occasion for rigorous imprisonment ranging from 2 days to 28 days. A member of the Armed Forces cannot take his duty lightly and abstain from duty at his will. Since the absence of duty was on several different occasions for which he was imposed punishment of imprisonment, therefore, the order of discharge cannot be said to be unjustified. The Commanding Officer has recorded that the appellant is a habitual offender. Such*

fact is supported by absence of the appellant from duty on seven occasions."

20. In such circumstances referred to above the learned Counsel appearing for the respondents pray that there being no merit in this appeal, the same may be dismissed.

ANALYSIS

21. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the Division Bench of the High Court committed any error in passing the impugned order?

22. We must first look into the decision of this Court rendered in the case of ***Virendra Kumar Dubey*** (supra). In the said case, the appellant Virendra Kumar Dubey was enrolled as an operator in the corps of Artillery of Indian Army on 27.09.1980. Having served in that capacity for nearly twelve years, he received a show cause notice pointing out that he had been awarded four Red Ink entries for various offences set out in the notice and that Virendra Kumar Dubey had become a habitual offender, thereby setting a bad example of indiscipline in the army. Virendra Kumar Dubey ultimately came to be discharged from service by an order dated 14.12.1992. He preferred a departmental appeal, which failed. He, thereafter, went to the High Court of Madhya Pradesh at Jabalpur, however, the High Court declined to entertain the petition on the ground of lack of territorial jurisdiction. He, thereafter, preferred an appeal before the Appeal Court and the writ appeal was ultimately ordered to be transferred to the Armed Forces Tribunal Regional Bench, Lucknow. The Tribunal ultimately dismissed the transferred petition which gave rise to the appeal before this Court.

23. This Court in ***Virendra Kumar Dubey*** (supra) held as under:

"*19. It is common ground that a red ink entry may be earned by an individual for overstaying leave for one week or for six months. In either case the entry is a red ink entry and would qualify for consideration in the matter of discharge. If two persons who suffer such entries are treated similarly notwithstanding the gravity of the offence being different, it would be unfair and unjust for unequals cannot be treated as equals. More importantly, a person who has suffered four such entries on a graver misconduct may escape discharge*

which another individual who has earned such entries for relatively lesser offences may be asked to go home prematurely. The unfairness in any such situation makes it necessary to bring in safeguards to prevent miscarriage of justice. That is precisely what the procedural safeguards purport to do in the present case."

Taking the aforesaid view, this Court ultimately passed the following order:

"21. In the result this appeal succeeds and is hereby allowed. The order of discharge passed against the appellant is hereby set aside. Since the appellant has already crossed the age of superannuation, interest of justice will be sufficiently served if we direct that the appellant shall be 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. Benefit of continuity of service for all other purpose shall be granted to the appellant including pension. Monetary benefits payable to the appellant shall be released expeditiously but not later than four months from the date of this order. No Costs."

24. In ***Vijay Shankar Mishra*** (supra), the appellant therein was enrolled in the Army Medical Corps on 23.06.1984. On 03.10.1997, a notice to show cause was issued to him to explain why he should not be discharged from service under Rule 13(3) Table (III)(v) of the Army Rules, 1954 on the ground that his conduct and service had not been found satisfactory. He ultimately came to be discharged from service. By that time, he had rendered service of thirteen years and eight months. The minimum qualifying service for earning pension under Rule 132 of the Pension Regulations for the Army ,1961 is fifteen years. He filed a writ petition before the Madhya Pradesh High Court which was dismissed on 21.11.2006. In appeal, a Division Bench directed reconsideration of the case of the appellant. Pursuant to the order of the High Court, an order was issued rejecting his claim for pension on the ground that he had not put in fifteen years of service and had been discharged for the reason that he was unlikely to become an efficient soldier. He again filed a writ petition before the Madhya Pradesh High Court which was transferred to the Armed Forces Tribunal. The Tribunal dismissed the matter. Thereafter, Mishra came before this Court. The very same

A argument was canvassed before this Court on behalf of Vijay Shankar Mishra that 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 the relevant rule for the purpose of discharge. The Court relied upon ***Vijay Shankar Mishra*** (supra) and ultimately held as under:

B

"9. 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 26-2-2007 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 28-12-1988 and the Circular dated 10-01-1989.

C

D

E

10. 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 23-9- 2010 Vijay Shankar Mishra V. Union of India, 2010 SCC OnLine AFT 1127 and 15-9-2011 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."

F

G

H

25. In both the aforesaid decisions, this Court took into consideration the fact that there was no application of mind by the authority to the relevant aspects which were taken into consideration while exercising the power under Rule 13 of the Rules. In both the aforesaid cases, this Court took the view that the mere fact that the Personnel had crossed the threshold of few Red Ink entries could not have been made a ground to discharge them without considering other relevant circumstances, more particularly, the nature of the violation which led to the award of the Red Ink entries. The crux of the ratio of the decision of this Court in the case on ***Veerendra Kumar Dubey*** (supra) is that the only safeguard against arbitrary exercise of power by the authority would be to ensure that there is an enquiry, howsoever, summary and a finding about the defence set up by the individual besides consideration of the factors made relevant under the procedure.

26. The reliance placed by the learned Counsel appearing for the respondents on the decision of this Court in the case ***Satgur Singh*** (supra) is of no avail. It was a case in which the appellant failed to furnish any explanation of his absence from duty on seven occasions. On facts, this Court took the view that as the absence from duty was on several different occasions for which he was imposed punishment of imprisonment, the order of discharge could not be said to unjustified.

27. We may elaborate the aforesaid a little further.

28. Where an Act or the statutory rules framed thereunder left an action dependent upon the opinion of the authority concerned, by some such expression as 'is satisfied' or 'is of the opinion' or 'if it has reason to believe' or 'if it considered necessary', the opinion of the authority is conclusive, (a) if the procedure prescribed by the Act or rules for formation of the opinion was duly followed, (b) if the authority acted *bona fide*, (c) if the authority itself formed the opinion and did not borrow the opinion of somebody else and (d) if the authority did not proceed on a fundamental misconception of the law and the matter in regard to which the opinion had to be formed.

29. The action based on the subjective opinion or satisfaction, in our opinion, can judicially be reviewed first to find out the existence of the facts or circumstances on the basis of which the authority is alleged to have formed the opinion. It is true that ordinarily the court should not inquire into the correctness or otherwise of the facts found except in a

A case where it is alleged that the facts which have been found existing were not supported by any evidence at all or that the finding in regard to circumstances or material is so perverse that no reasonable man would say that the facts and circumstances exist. The courts will not readily defer to the conclusiveness of the authority's opinion as to the existence of matter of law or fact upon which the validity of the exercise of the power is predicated.

30. The doctrine of reasonableness thus may be invoked. Where there are no reasonable grounds for the formation of the authority's opinion, judicial review in such a case is permissible. [See ***Director of Public Prosecutions v. Head,*** (1959) AC 83 (Lord Denning).

31. When we say that where the circumstances or material or state of affairs does not at all exist to form an opinion and the action based on such opinion can be quashed by the courts, we mean that in effect there is no evidence whatsoever to form or support the opinion. The distinction between insufficiency or inadequacy of evidence and no evidence must of course be borne in mind. A finding based on no evidence as opposed to a finding which is merely against the weight of the evidence is an abuse of the power which courts naturally are loath to tolerate. Whether or not there is evidence to support a particular decision has always been considered as a question of law. [See ***Reg. v. Governor of Brixton Prison, Armah, Ex Parte,*** (1966) 3 WLR 828 at *p. 841*].

32. It is in such a case that it is said that the authority would be deemed to have not applied its mind or it did not honestly form its opinion. The same conclusion is drawn when opinion is based on irrelevant matter. [See ***Rasbihari v. State of Orissa,*** AIR 1969 SC 1081].

33. In the case of ***Rohtas Industries Ltd. v. S.D. Agarwal and another,*** AIR 1969 SC 707, it was held that the existence of circumstances is a condition precedent to form an opinion by the Government. The same view was earlier expressed in the case of ***Barium Chemicals Ltd. and another v. Company Law Board and others,*** AIR 1967 SC 295.

34. Secondly, the court can inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In other words, if an inference from facts does not logically accord with and flow from them, the Courts can interfere treating them as an error of law. [See ***Bean v. Doncaster***

Amalgamated Collieries, (1944) 2 All ER 279 at *p. 284*]. Thus, this Court can see whether on the basis of the facts and circumstances found, any reasonable man can say that an opinion as is formed can be formed by a reasonable man. That would be a question of law to be determined by the Court. [See ***Farmer v. Cotton's Trustees,*** 1915 AC 922]. Their Lordships observed:

> *"…… in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."*
>
> [See also ***Muthu Gounder v. Government of Madras,*** (1969) 82 Mad LW 1].

35. Thirdly, this Court can interfere if the constitutional or statutory term essential for the exercise of the power has either been misapplied or misinterpreted. The Courts have always equated the jurisdictional review with the review for error of law and have shown their readiness to quash an order if the meaning of the constitutional or statutory term has been misconstrued or misapplied. [See ***Iveagh (Earl of) v. Minister of Housing and Local Govt.,*** (1962) 2 QB 147; ***Iveagh (Earl of) v. Minister of Housing and Local Govt.*** (1964) 1 AB 395].

36. Fourthly, it is permissible to interfere in a case where the power is exercised for improper purpose. If a power granted for one purpose is exercised for a different purpose, then it will be deemed that the power has not been validly exercised. If the power in this case is found to have not been exercised genuinely for the purpose of taking immediate action but has been used only to avoid embarrassment or wreck personal vengeance, then the power will be deemed to have been exercised improperly. [See ***Natesa Asari v. State of Madras,*** AIR 1954 Mad 481].

37. Fifthly, the grounds which are relevant for the purpose for which the power can be exercised have not been considered or grounds which are not relevant and yet are considered and an order is based on such grounds, then the order can be attacked as invalid and illegal. In this connection, reference may be made to ***Ram Manohar v. State of Bihar,*** AIR 1966 SC 740; ***Dwarka Das v. State of J. and K.,*** AIR 1957 SC 164 at *p. 168* and ***Motilall v. State of Bihar,*** AIR 1968 SC

1509. On the same principle, the administrative action will be invalidated if it can be established that the authority was satisfied on the wrong question: [See (1967) 1 AC 13].

38. At this stage, it may be apposite to refer to the Assam Rifles Regulation, 2016. We are conscious of the fact that these regulations do not apply to the case on hand as the order of discharge is of 2004. However, we deem fit to reproduce the relevant regulations, more particularly, 107(c) and 108 respectively, as these regulations seem to have been enacted and brought into force having regard to the ratio of the decision of this Court in the case of ***Veerendra Kumar Dubey*** (supra). Regulation 107(c) reads thus:

> ***"107. Removal of undesirable, incorrigible and inefficient Subordinate Officers, Under Officers and other enrolled persons.***
>
> (a) ……
>
> (b) ……
>
> (c) The procedure for dismissal/discharge of unsuitable subordinate officer/under officer/enrolled person will be as under:-
>
> (i) As provided under Rules 24 and 25 of Assam Rifles Rules, the person concerned, subject to the exception mentioned therein, shall be served with a Show Cause Notice against the contemplated action.
>
> **(ii) Preliminary enquiry**. Before recommending discharge or dismissal of an individual the authority concerned will ensure that an impartial enquiry (not necessarily a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity of hearing.
>
> (iii) Rule 24 of the Assam Rifles confers powers on the Commandants of the Assam Rifles Units/ establishment to discharge any subordinate officer/under officer/enrolled persons of Assam Rifles. However, the power of discharge by the Commandant shall be exercised with prior approval of immediate superior officer not below Sector Commander in case of Under Officers and other enrolled person and that of Inspector General Assam Rifles in case of Subordinate Officers.

(iv) After compliance of the provisions enumerated above, a show cause notice will be served on the individual affording him an opportunity to explain his case. Thereafter, the complete case file will be forwarded to next superior authority/Sector Headquarters for approval of the superior authority/Sector Commander.

(v) The authority competent to sanction the dismissal/discharge of the individual will before passing orders re-consider the case in the light of the individual reply to the show cause notice. A person who has been served a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the end of justice. If the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactorily, he will pass orders accordingly.

108. **Discharge on ground of red ink entries.** A Subordinate Officer, Under Officer or other enrolled person who has incurred four or more red ink entries may be recommended for discharge from the service on the ground of unsuitability, subject to the following conditions:-

(a) After an individual has earned three red ink entries, he shall be warned in writing that his service will be liable to be terminated by the competent authority if he earns one more red ink entry. Such a warning letter shall be issued to him by the concerned Sector Commander through Commandant of the individual.

(b) Each case of individuals having earned four or more red ink entries shall be examined on its own merit depending upon the nature and gravity of the offences and the aggravating circumstances under which these were committed. The authority competent to sanction discharge under this para shall record reasons for ordering the discharge, or otherwise.

(c) A person who has put in eighteen years of qualifying service for pension may be allowed to complete the required qualifying service for grant of pension before he is recommended for discharge on ground of four or more red ink entries, unless there are compelling reasons to sanction his discharge before

A completion of the qualifying service for pension, which must be specified in the discharge order.

(d) Before taking the final decision to order the discharge, the person concerned shall be informed through a show cause notice that his retention in the service is considered undesirable for having incurred four or more red ink entries, thereby also calling upon him to show cause as to why he should not be discharged from the service for being considered unsuitable for the service in the Assam Rifles. The individual shall be given minimum fifteen days, after receipt of Show Cause Notice, to submit his reply.

(e) After receipt of the individual's reply, if any, the case shall be put up to the authority competent to sanction the discharge alongwith recommendations of the Commandant of the unit concerned. Before passing the discharge order, the authority competent to sanction the discharge under this para may seek the advise of the Law Officer concerned.

(f) An order of discharge under this para shall be passed by an officer not less than a Sector Commander in the case of Under Officer or other enrolled persons and an officer not less than Inspector General Assam Rifles/Additional Director General Assam Rifles in case of Subordinate Officers."

39. Having regard to the nature of the misconduct alleged against the appellant we are of the view that the ends of justice would be met if we set aside the order of discharge and treat the appellant herein to have been in service till the time, he could be said to have completed the qualifying service for grant of pension. We are inclined to pass such an order with a view to do substantial justice as there is nothing on record to indicate that the nature of the misconduct leading to the award of four Red Ink entries was so unacceptable that the competent authority had no option but to direct his discharge to prevent indiscipline in the force.

40. The order of discharge passed against the appellant herein is hereby set aside. The appellant shall be treated to have been in service till the time he would have completed the qualifying service for grant of pension. We are informed that only six months were left for the qualifying service to be completed before the appellant came to be discharged. No back wages shall, however, be admissible. The benefit of continuity of

service for all other purpose shall be granted to the appellant including pension. The monetary benefits payable to the appellant shall be released expeditiously but not later than four months from the date of this order. A

41. The appeals are allowed in the aforesaid terms. No order as to costs.

42. Pending application, if any, stands disposed of. B

Devika Gujral
(Assisted by : Rahul Rathi, LCRA)

Appeals allowed.