IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

**O R D E R**

**CPL DEBASISH SEN. V. UNION OF INDIA AND OTHERS**.

**S.B.CIVIL WRIT PETITION NO.3987/2005,**
under Article 226 of the Constitution of India.

DATE OF ORDER: SEPTEMBER 28, 2005.

**PRESENT.**

**HON'BLE MR. JUSTICE R.P. VYAS**

Mr.K.K.Shah, for Petitioner.
Mr.Kuldeep Mathur ) for Respondents.

**BY THE COURT:**

**REPORTABLE**

By this writ petition, petitioner has prayed that by issuance of an appropriate writ, order or direction, the respondents may be directed to initiate the action for discharge of the petitioner from the service, being habitual offender.

Petitioner – Debasish Sen was enrolled in the Indian Air Force (IAF) on February 16, 1993 and since the year, 2003, he is working in 33 Signal Unit, Air Force Unit, Jodhpur. It is averred in the instant petitioner that from August, 2002, the petitioner

has serious problems from his home front and he was required to proceed on leave very often from his unit to his home. The petitioner overstayed, beyond the period of leave, at his home. Then, on reporting back on duty, he was charge-sheeted and and punished with a few red ink entries in his service record. By 2.5.2003, the petitioner had already incurred 3 red ink entries .A warning vide letter dated 5.5.2003 (Annexure 1) was issued to the petitioner by the Station Commander, 33 Signal Unit of Air Force (Respondent No.4) to the effect that his service document has revealed that there are a total of three entries of punishments (Red Ink) in his conduct sheet as on May 2, 2003. It was stated by Respondent No.4 in Annexure 1 that in accordance with the policy, airman who falls in any of the following categories shall be treated as Habitual Offender and is to be considered for discharge from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969 (hereinafter as 'the Rules, 1969'). It was also stated in Annexure 1 that the petitioner is on the threshold of falling in the category of Habitual Offender as per para 2 (b) – Four Red Ink Punishment entries or © - Four Punishment entries (Red or Black ink entries included) for repeated omission of any one specific type of offence. The petitioner was, therefore, cautioned and counselled by Respondent No.4 to mend himself and desist from act of indiscipline and he was also warned that addition of another punishment entry as required by the category of Habitual

Offender referred in aforesaid Para 2 will render him liable for discharge from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969.

It is averred in the instant petition that despite that the petitioner remained absent from duty without leave. When his service record was perused, it was found by Respondent No.4 that the petitioner had already incurred 4 Red Ink entries of punishment as on July 1, 2003. Then, again, a warning letter dated 23.7.2003 (Annexure 2) was issued to the petitioner, by which the petitioner was again cautioned and counselled to mend himself and desist from the acts of indiscipline and addition of entry of punishment will render him liable for discharge from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969. Thereafter, again, on two more occasions, the petitioner overstayed his leave and he was awarded a Red Ink entry. Thus, by August, 2003, the petitioner had incurred 5 Red Ink entries.

On December 31, 12, 2003, Respondent No.2 issued a show cause notice (Annexure 3) along with the extract of Section IV of conduct sheet of sheet roll from 16.8.2002 to 15.8.2003. The petitioner gave reply dated 14.1.2004 (Annexure 4) to the show-cause notice stating therein that he may be discharged from the service as he is unable to meet the personnel

requirements being in service and is also unable to cope up with the service rules and regulations. Thereafter, the petitioner absented himself again on two more occasions without leave. Then, he was awarded one more Red Ink entry. Thus, by the end of the year, 2003, he had incurred 6 Red Ink entries. The petitioner has averred in the instant petition that the authorities had decided to threaten the petitioner with the act of discharge, but, in fact, no action is taken by them. By July, 2004, the petitioner had incurred 7 Red Ink entries. On September 1, 2004, one more show-cause notice along with extract of Section IV conduct sheet of sheet roll from 16.8.2002 to 19.7.2004 was issued to the petitioner to the effect that as to why he should not be discharged from service under Rule 15 (2) g (ii) read read in conjunction with Rule 15 (2) of the Air Force Rules, 1969. The petitioner gave reply dated September 13, 2004 (Annexure 7) to the show cause notice that he is aware of the service rules and regulations, but committed the offences to fulfill his personnel requirements. The petitioner also requested the Authorities to take appropriate action against him as per Law. Thereafter, Respondent No.4, on November 1, 2004 again issued a second warning (Annexure 8) to the petitioner and he was given one more chance to improve himself. He was also cautioned to be more careful in future and desist from act of indiscipline. Then, the petitioner again committed two offences of absence without leave, for which one more punishment was awarded. Thus, in all,

he has incurred 8 Red Ink entries for 12 offences. Ultimately, the petitioner gave a legal notice dated January 28, 2005 (Annexure 9) to the Authorities, but no action has been taken by the Authorities.

Being aggrieved of the non-action of the respondents, the petitioner has preferred the instant petition.

It is submitted by Mr.K.K.Shah, learned counsel for the petitioner, that the Air Force Authorities have been following the policy on habitual offender, but the petitioner is being discriminated, in spite of the fact that he had incurred 7 Red Ink entries, whereas, according to the learned counsel, after 4 Red Ink entries, the personnel are declared unfit in the service. According to the Policy of habitual offender, a person having four Red Ink entries in his service records is a poor airman material and he is not required by the IAF. He submits that the petitioner is required to be discharged from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969.

It is further submitted by the learned counsel for the petitioner that after incurring six Red Ink entries, the petitioner was only warned that any addition of another Red Ink punishment entry, will render him liable for discharge, whereas, as per Policy, he should have been discharged after incurring

four Red Ink entries.

It is also submitted by the learned counsel for the petitioner that after six Red Ink entries, the respondents have again issued a show-cause notice by deciding him to give him one more chance, but he has not been discharges from service. The petitioner remained absent without, but, despite that, the Authorities have not initiated any action against the petitioner.

In reply, it is submitted by the learned counsel for the respondents that the tenure of engagement of the petitioner was 20 years, which will expire on February 15, 2003. It is submitted that the petitioner has intentionally resorted of habitual offender policy for claiming discharge from service under Rule 15 (2) (g) (ii) of the Air Force Rules.

It is further submitted by the learned counsel for the petitioners that the first warning was issued to the petitioner on May 5, 2003 when he became potential habitual offender and the second warning was issued to him on July 23, 2003, by which he was intimated that he had fallen in the category of habitual offender.

It is also submitted by the learned counsel for the petitioner that this case was taken up for discharge from service

under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969, which is under consideration of the Competent Authorities.

It is contended by the learned counsel for the respondents that it is no doubt true that the Habitual Offender Policy has been framed to deal which such type of acts of the Air Force Personnel, but the same is directory in nature and an air force personnel under the said policy cannot claim to be discharged as a matter of right. The overstay of leave without any sufficient reason is an offence and the offender has to be dealt with as per provisions of the Air Force Law. The overstay of leave beyond 48 hours automatically attracts Red Ins Entry, irrespective of quantum and type of punishment awarded.

It is further contended by the learned counsel for the respondents that the petitioner was issued with a warning letter on May 5, 2003 to caution him from being habitual offender. The subsequent warning letter was given on July 23, 2003, wherein it was stated that he has fallen in the category of habitual offender. The petitioner's reply to the show cause notice dated October 31, 2003 has been considered at the appropriate level and the same has been forwarded to the Competent Authority for their decision. Apart from that, the petitioner's case is being monitored closely and appropriate decision will be taken by the Competent Authority as the Administrative procedures being

followed are in order.

It is also contended by the learned counsel for the respondents that the case of the petitioner for discharge from service is under progress. He submitted that the country has spent money on the training of the petitioner. The petitioner has deliberately committed these offences repeatedly. There is no chance of hostile discrimination as respondents have been acting without any prejudice and within the framework of Air Force Rules and Regulations. The Competent Authority on the basis of the facts of the case decides to discharge the habitual offender and the same is being followed.

It is argued by the learned counsel for the respondents that the petitioner is claiming the policy of habitual offender as a right for discharge. In fact, the Policy has been formulated to discourage personnel of Indian Air Force from committing offences and complying with the Rules and Regulations of Air Force and not use it as recourse to go out of Air Force, as the petitioner is using. The discharge option is the last one under this Policy. If the petitioner is really having genuine problems at his home, then he could have applied for discharge from service on compassionate grounds, but the petitioner has chosen the different way for going out of service and intentionally absented himself without leave every now and then.

Lastly, it is strenuously argued by the learned counsel for the respondents that a huge amount is spend on the training of the defence forces personnel to defend the national security. If like the petitioner the personnel of defence forces become the habitual offender intentionally for leaving the service, it will cause a heavy loss to the state.

Heard learned counsel for the parties.

Admittedly, the Policy of habitual offender has been formulated to put restrictions on the personnel so that they will not commit offences and also to maintain the discipline of the Air Force, which is a prima requirement of defence forces. The Policy was not formulated to take undue advantage by the defence personnel for going out of service by remaining absent without any leave. Apart from that, the Policy is directory in nature. No Air Force personnel can claim as a matter of right for discharge from service by remaining absent from duty frequently, without leave. If any Air Force personnel, like the petitioner, adopts such tactics, then it will not be in the interest of the Air Force as well as Nation also. Such practice/tactics should be curbed. The rights of the Forces are limited and that too, for the purpose of maintaining discipline in them.

So far as the contention of the petitioner that there is

violation of Articles 14 and 21 of the Constitution of India, is concerned, it may be mentioned that concept of equality and equal protection of laws guaranteed by Article 14 in its proper spectrum encompasses social and economic justice in a political democracy. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment. It would be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages.

With regard to Article 21 - protection of life and personal liberty, it may be mentioned that before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed. Right to life, enshrined in Article 21 means something more than survival. It would include all those aspects of life which go to make a man's life meaningful, complete and worth living.

So far as the principles of Article 33 are concerned, it may be mentioned that under Article 33 (a) and (b), the Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to (a) the members of the Armed Forces; or (b) the members of the Forces

charged with the maintenance of public order. In **Union of India and Others v. L.D.Balam Singh [ (2002) 9 SCC 73 ]**, it was held by their Lordships of the Supreme Court that an Army personnel is as much a citizen as any other individual citizen of this country. Incidentally, the provision as contained in Article 33 does not by itself abrogate any rights and its applicability is dependent on parliamentary legislation. The language used by the framers is unambiguous and categorical. A plain reading of Article 33 would reveal that the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. The Constitution-makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the armed force personnel and, therefore, Article 33 empowered Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution insofar as the armed force personnel are concerned.

Again, in **Union of India and Others v. Ex.Flight Lt.**

**G.S.Bajwa [ (2003) 9 SCC 630 ],** their Lordships of the Supreme Court have held that since the Air Force Act is a law duly enacted by Parliament in exercise of its plenary legislative jurisdiction read with Article 33, the same cannot be held to be invalid merely because it has the effect of restricting or abrogating the right guaranteed under Article 21 or for that reason under any of the provisions of Chapter III of the Constitution.

In **Lt.Col. Prithi Pal Singh Vedi v. Union of India [ (1982) 3 SCC 140 ],** their Lordships of the Supreme Court have held that Article 33 empowers Parliament to decide the extent of restriction or abrogation of the rights under Part III to ensure the proper discharge of duties by the Armed Forces and the maintenance of discipline among them. But Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading with Article 33 a requirement which it does not enjoin. Hence, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as mental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act.

In **Delhi Police Non-Gazetted Karmchari Sangh and Others v. Union of India and Others [ (1987) 1 SCC 115 ]**, it was held by their Lordships of the Supreme Court that Article 33 which confers power on the Parliament to abridge or abrogate such rights in their application to the Armed Forces and other similar forces shows that such rights are available to all citizens, including government servants. But it is, however, necessary to remember that Article 19 confers fundamental rights which are not absolute but are subject to reasonable restrictions. What has happened in the case is only to impose reasonable restrictions in the interest of discipline and public order.

In defences services, Rules and Regulations are framed, keeping in view the safety and security of the Country as well as the welfare of the defence personnel. But, no one should be allowed to resort to take the benefit of the habitual offender policy by claiming discharge from service as a matter of right. The Indian Air Force is an elite organization. The country spends a huge amount on the training of its personnel. The Policy of habitual offender has been formulated to put restrictions on the personnel, so that they will not commit offences and also to maintain the discipline in the Air Force, which is a primary requirement of the defence forces. It is true that the Habitual Offender Policy has been formulated to deal with such type of

acts of the Air Force Personnel, like that of the petitioner, but the same is directory in nature. So, the discharge from the service under the said Policy cannot be claimed as a matter of right. The petitioner has committed the offences frequently and became habitual offender thinking that this is the quickest way to leave the service. If like the petitioner the personnel of defence forces become the habitual offender intentionally, for leaving the service, it will cause a heavy loss to the state. Apart from that, it will not be in the interest of the Nation also. The case of the petitioner for necessary action is under consideration of the Appropriate Authorities. The proper administrative procedure is also being followed by the Competent Authorities by giving show cause notices as well as warnings to the petitioner, so that he can mend himself and desist from the act of indiscipline. Apart from that, so far as discharging the petitioner from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969 is concerned, it is the discretion of the Competent Authorities to take appropriate decision/action in the matter.

The petitioner by earning Red Ink entries cannot claim as a matter of right to discharge him from service under Rule 15 (2) (g) (ii) of the Air Force Rules. The matter is under consideration of the Authorities and the Court cannot sit over the discretion of the Authorities in view of Article 33 of the Constitution of India. However, the scope of interference under Article 226, of the

Constitution of India is very wide, but, looking to the peculiar facts and circumstances of the instant case, particularly defence services, the scope of interference is very limited. The Court cannot direct the Competent Authorities to discharge the petitioner from service. This is the discretion of the Competent Authorities to take appropriate decision in the matter keeping in view the Air Force Rules as well as the conduct and service records of the petitioner.

Thus, taking an overall view of the peculiar facts and circumstances of the instant case, I do not find any merit in this writ petition. The same is, therefore, dismissed.

(R.P.VYAS), J.

scd.