AFR
RESERVED
Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 168 of 2013

this the 23rd day of Sep 2015

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Nk Abhilash Singh Kushwah (No 13622786P)
r/o Vill & Post Atagaon, The Madhougan
Distt-Jalaun (UP) of 26 Rajput Regt

……Applicant

By Legal Practitioner Maj (Retd) RD Singh, Advocate

Versus

1. Union of India, through Secretary, MOD, DHQ, PO New Delhi.
2. The Chief of the Army Staff, Army Headquarters, DHQ , PO New Delhi.
3. Commandant & OIC Records, Rajput Regimental Centre & Records, Fatehgarh (UP).
4. Commander, HQ 45 Infantry Brigade PIN 908045 C/o 56 APO.
5. Commanding Officer 26 Rajput, PIN 912126 C/o 56 APO.

……Respondent

By Legal Practitioner Shri Mukund Tewari, Ld. Counsel for the Respondents, Assisted by Lt Col Subodh Verma, Departmental Representative for the Respondents.

(Per. Devi Prasad Singh, J.)

1. This is an application under section 14 of the Armed Forces Tribunal Act 2007 (in short Act) by applicant being aggrieved with the punishment awarded on the ground of Alcohol Dependency Syndrome.

2. The applicant was enrolled in the Army (PARA Regt) on 17.04.1998 and latter on posted to 7 PARA. He was transferred to Rajput Regiment being non PARA institution on 30.01.2011 and thereby posted to 26 Rajput on 30.04.2011. He was discharged from service on 07.01.2003 in pursuance of powers conferred by Army Rule 13 (3) (3) iii (v) read with Rule 17 being undesirable to retain in service. A copy of movement order dated 07.01.2013 and letter dated 30.11.2012 have been filed as Annexure No CR1, CR2 and CR-3 respectively.

3. Counsel for the Applicant submits that the applicant has been removed from service because of ‘red ink entries’ and on unfounded grounds. It is also submitted that the Alcohol Dependency Syndrome has not been affirmed by Medical Board hence the order of discharge is arbitrarily and malafidly

based on extraneous consideration and without any application of mind. The procedure prescribed by Army Order has not been followed as per law and harsh decision has been taken in haste without any regular enquiry and also without providing any opportunity to the applicant for his defence. The order is without application of mind to the vital point of issue as well as of natural justice. The applicant has not been granted the opportunity to improve himself for laxity if any. The order has not been passed by the Competent Authority. It is also submitted that discharge from service consequent to red ink entries is not legal requirement. The Commanding Officer should not be so harsh with the individuals especially when they are about to complete their pensionable service.

4. On the other hand it is brought on record that the punishment awarded to the applicant is based on different ground in the form of charge (red ink entry) reproduced in Para 5 of the Counter Affidavit. The relevant portions are reproduced as under :-

Ser No	AA Sec	Offences	Date of punishment	Punishment Awarded	Exhibit
(a)	48	Intoxication	18 Dec	Severe	Annexure

			2010	Reprimand	No CR-4
(b)	48	Intoxication	18 Aug 2011	Severe Reprimand and 14 days pay fine	Annexure No CR-5
(c)	39 (b) and 48	Without sufficient cause overstaying leave granted to him and found in intoxicated state while rejoined from OSL.	25 Apr 2012	Severe Reprimand and 14 days pay fine	Annexure No CR-6
(d)	39 (a)	Absenting himself without leave	18 Jun 12	Severe Reprimand and 14 days pay fine	Annexure No CR-7
(e)	39 (a)	Absenting himself without leave	13 Aug 2012	Severe Reprimand	Annexure No CR-8
(f)	48	Intoxication	05 Nov 2012	Severe Reprimand	Annexure No CR-9

5. It is further stated that the applicant had developed Alcohol Dependency Syndrome and was referred to Military Hospital, Jaipur. On account of Alcohol Dependency he became dangerous to his own safety. In consonance thereon a Show Cause Notice dated 30.12.2012 was issued to the petitioner in response to which the applicant replied vide letter dated 31.12.2012. On perusal of the Show Cause Notice, it was found that the punishment was awarded from time to time is the part of Show Cause Notice and reply was sought within

30 days. In response to Show Cause Notice issued under Army Rule 17 read in conjunction with Army Rule 13 (3) iii (v) the applicant seems to have half heartedly admitted his mistake vide letter dated 31.12.2012 and conveyed that he will not commit any wrong acts in future and be permitted to complete pensionable tenure. However admission seems to be, with regard to the red ink entries.

6. After the receipt of response to the Show Cause Notice the applicant has been discharged from service. Apart from Alcohol Dependency Syndrome the punishment awarded to the applicant is based on misconduct recorded through red ink entries seems to be admitted fact on record. Applicant has not denied that was not punished as stated above. After considering the applicant's reply the Brigade Commander held that the applicant is a undesirable soldier and he should be discharged in terms of powers conferred vide Army Rule 13 (3) iii (v) read with the Army Rule 17.

7. The provisions contained in Army Rule 13 (3) iii (v) shows that Brigade or Sub Area Commander before ordering discharge, if the circumstances of the case permit, shall provide

an opportunity to Show Cause Against the contemplated discharge. In the present case a Show Cause Notice dated 30.11.2012 was served on the applicant containing the charge with regard to Alcoholism and absent without leave. In Para 2 of the Show Cause Notice received by the applicant, it is alleged that despite repeated measures elicited by the unit the applicant has been failed to improve himself. Hence he was required to respond the Show Cause Notice within a month as to why his services should not be terminated. Para 2 and 3 of the Show Cause Notice for connivance is reproduced as under :-

> *(a) It is apparent that <u>despite repeated correcting measures initiated by unit, you have made no evident efforts to improve your conduct. Your repeated offences have a negative impact on other soldiers and also adversely affect the unit discipline state</u>. Keeping the above in mind, I call upon you to show cause to the undersigned as to the reasons why your service should not be terminated as an undesirable soldier under the provision of Army Rule 17 read in conjunction with Army Rule 13 (3) iii (v).*

(b) Your reply should reach to the undersigned through proper channel within 30 days of receipt of this notice, failing which it will be presumed that you have nothing to state in your defence and the competent authority will be free to initiate action to terminate your service under existing rules and regulations.

8. After serving the Show Cause Notice on receipt of reply (supra) by the impugned order the applicant's services were terminated vide order dated 07.01.2013. So far as the provision contained in section 13 (3) iii (v) is concerned the requirement is only the serving a Show Cause Notice with regard to proposed punishment which seems to have been duly complied with. However notice is silent as to what corrective measures were initiated by the unit.

9. Rule 13 (3) iii (v) required only the serving of Show Cause Notice for proposed punishment. The provision does not contemplate of a regular enquiry. Statutory provision warrants only for a Show Cause Notice which seems to be in compliance of nature justice.

Constitutional Mandate

10. Before considering the arguments advanced by the learned Counsel for the parties, firstly, it is necessary to have a look over constitutional as well as statutory provisions, since the arguments advanced by the learned counsel for the petitioner relates to application of principles of nature justice in the present case. Article 33 of the Constitution of India provides that Parliament may by law determine to restrict or abrogate the applicability of fundamental rights guaranteed under part III of the Constitution of India for the discharge of duties by the members of armed forces. For convenience, Article 33 of the Constitution of India is reproduced as under :-

> *"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. – 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 maintenance of public order; or*

(c) Persons employed in any bureau or other organization established by the State for purpose of intelligence or counter intelligence; or

(d) Persons employed in, or in connection, with the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

11. The Government of India has framed Army Rules, 1950 (herein short referred as rules) which provides the service conditions of the Army Personnel. On the basis of the submissions of the learned counsel for the parties, the provisions contained in Sections 20, 21 and 22 of the Army Act are relevant for the purposes of the present controversy which are reproduced as under :-

*"20. **Dismissal, removal or reduction by the Chief of the Army Staff and by other officers**: (The Chief of the Army Staff) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.*

(3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may

dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer.

(4) Any such officer as is mentioned in sub section (3) may reduce to a lower grade or rank or the ranks , any warrant officer or any non-commissioned officer under his command.

(5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.

(6) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non- commissioned officer, or if he has not permanent grade above the ranks, to the ranks.

(7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder.

*21. **Power to modify certain fundaments rights in their application to persons subject to this Act**: Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof the Central Government may, by notification, make rules, restricting to such extent and in such manner as may be necessary the right of any person subject to this Act-*

(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association or any class of societies, institutions or associations.

(b) To attend or address any meeting or to take part in any demonstration organized by anybody or persons for any political or other purposes.

(c) To communicate with the press or to publish or cause to be published any book, letter or other document.

*22. **Retirement, release or discharge**: Any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed."*

12. Under Section 191 & 192 of the Army Act, the Central Government has got power to frame the rules. Under section 193 of the Act, the rules and regulations are to be published in official gazette. In pursuance to the powers conferred under section 191 of the Army Act, the Government of India had framed rules namely Army Rules, 1950 (in short referred in above as Rules). Under Rule 13, the power of the various authorities to pass the order of discharge has been mentioned.

The relevant portion of the said rules as produced by the learned Standing for the Central government is reproduced as under :-

> *"13. **Authorities empowered to authorize discharge***
> *(1) Each of the authorities specified in column 3 of the Table below shall be the competent authority to discharge from service person subject to the Act specified in Column 1 thereof to the Act specified in Column 1 thereof on the grounds specified in column*
>
> *(2) Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority superior to it.*
>
> *(2A) Where the central Government or the Chief of the Army Staff decides that any person or class or persons subject to the Act should be discharged form service, either unconditionally or on the fulfillment of certain specified conditions, then, notwithstanding anything contained in this rule, the Commanding Officer shall also be the competent authority to discharge from service such person or any person belonging to such class in accordance with the said decision.*
>
> *(3) In this table "Commanding Officer" means the officer commanding the corps or department to which the person to be discharged belongs except that in the case*

of junior commissioned officers and warrant officers of the Special Medical Section of the Army Medical Corps, the "commanding officer" means the Director of the Medical Services, Army, and ion the case of junior commissioned officer and warrant officers of Remounts, veterinary and farms Corps, the "Commanding Officer " means the Director Remounts, Veterinary and Farms.

TABLE

Category Grounds of discharge competent authority Manner	*To authorize discharge of*	*Discharge*
III(v) All Other classes of discharge.	*Brigade/Sub. Area Commander*	*The Brigade or Sub Area Commander Before ordering the Discharge, shall, if the circumstances of the case permit give to the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge.*

13. Under sub-rule 3 of Rule 13, 'Commanding Officer' means, the officer commanding the Corps or department, which

in the present case includes Brigade or Sub Area Commander. Sub-rule 2A of Rule 13 of the Army Order empowers to provide specific conditions to regulate function of Commanding Officer for exercising power under Rule 13.

Power conferred by sub-rule 2A of Rule 13 of the Army Order is coupled with duty. It is for the Government as well as Chief of the Army Staff to ensure that no discontentment originates or persists in the army because of arbitrary exercise of power, accordingly authorized to provide specified conditions to secure fundamental rights under Part III of the Constitution of India.

14. Thus, power under sub-rule 2A of Rule 13 is coupled with duty and the Chief of the Army Staff must genuinely address itself to the matter before him/her. He must have regard to all relevant considerations and not shirk from his duty for the good of all army personnel.

Supreme Court in a case of ***Andhra Pradesh S.R.T.C. vs. State Transport Appellate Tribunal & Ors***., (1998) 7 SCC 353, while interpreting power conferred by statute coupled with

duty held that the statutory power conferred to statutory authority should be exercised and such authority must not shirk to promote alien to the letter and spirit of the legislation that gives it power to act and must not act arbitrarily and capriciously.

This principle has been reiterated in ***Comptroller and Auditor General of India, Gian Prakash, New Delhi and Anr. Vs. K.S. Jagannathan & Anr,*** AIR 1987 SC 537, ***Dai-Ichi Karkaria Ltd. Vs. Union of India & ors***., (2000) 4 SCC 57, ***Consumer Action Group & Anr. Vs. State of T.N. & Ors***. (2000) 7 SCC 425 & ***Praveen Singh vs. State of Punjab & Ors.***, (2000) 8 SCC 633.

15. In the case of, ***Kameshwar Prasad and others****, vs.* ***State of Bihar*** reported in AIR 1962 Supreme Court 1166, the Hon'ble Supreme Court had considered the rights conferred by Article 33 read with para 3 of the Constitution for the Govt servants with regard to extent of exclusion of prospects of the fundamental rights under para 3. The relevant portion is reproduced as under :-

"(a) In our opinion, this argument even if otherwise possible, has to be repelled in view of the terms of Art 33. That article selects two of the services under the state members of the armed forces and forces charged with the maintenance of public order and saves the rules prescribing the conditions of service in regard to them- from invalidity on the ground of violation of any of the fundamental rights guaranteed by Part III and also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and the maintenance of discipline among them. The Article having thus selected the services members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, we consider that other classes of servants of government in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being govt servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restrictions of certain freedoms as we have pointed out in relation to Art. 19 (1) (e) & (g)".

16. Another Constitution Bench of Hon'ble Supreme Court in a case of **Ram Sarup V. Union of India**, reported in AIR 1965 SC 247 while considering the power flowing from Section 153, 154 and 164 (2 of the Army Act) with regard to finding a sentence of General Court Martial, held that the Central Govt has not appointed any other officer to exercise his power by some other officer. Government can itself exercise the power while considering Article 33 of the constitution of India. The Hon'ble Supreme Court held that the Army Act 1950 is a law made by Parliament as in case it tends to affect the fundamental right of any part of Article 33 of the Constitution, the provision does not become void and it must be taken with Parliament to exercise its powers under Article 33. The Hon'ble Supreme Court with regard to cover under Article 14, 20 and 22 has considered. The relevant portion is reproduced as under :-

> *"(a) Lastly, Mr Rana Ld. Counsel for the petitioner urged in support of the first point that in the exercise of the power conferred on Parliament under Article 33 of the Constitution to modify the fundamental rights guaranteed by Part III, in their application to the Armed Forces, it enacted S. 21 of the Act which empowers the Central*

Govt, by notification, to make rules restricting to such extent and in such manner as may be necessary, the right of any person with respect to certain matters, that these matters do not cover the fundamental rights under Article 14, 20 and 22 of the Constitution, and that this indicated the intention of Parliament not to modify any other fundamental right. The learned Attorney General has urged that the entire act has been enacted by parliament and if any of the provisions of the act is not consistent with the provisions of any of the articles in Part II of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however, of the opinion that the provisions of S.125 of the Act are not discriminatory and do not infringe the provisions of Art. 14 of the Constitution. It is not disputed that the persons to whom the provisions of S. 125 apply do form a distinct class.

They apply to all those persons who are subject to Act and such persons are specified in S. 2 of the Act".

17. Keeping in view the aforesaid principles the Supreme Court while laying down the guidelines with regard to supply of ACR entries not extended it to military officers, in a case of **Dev Dutt Vs. Union of India and others,** 2008 Supreme Court Cases 725, the relevant portion is reproduced as under :-

"We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this court in ***Union of India V. Major Bahadur Singh****. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants)".*

Accordingly the applicability of the principle of Natural Justice may be restricted, with reasonable conditions, so far as armed forces personnel are concerned.

Red Ink Entries

18. Section 4, Regulations 386, 387 and 388 of Army Regulation contains the provisions for maintenance of conduct sheet and red ink entries, reproduced as under :-

386. Conduct Sheet to be Maintained. A conduct sheet shall be prepared and maintained for every person subject to Army Act. The conduct sheets of Officers, JCOs and WOs will be kept as confidential documents; those of NCOs and men will be kept with other service documents.

387. Conduct Sheet Entries.

(a) Entries will be made in the conduct sheets of officers in respect of all convictions by court martial, criminal court or summary punishments awarded under Army Act Sections 83 or 84.

(b) The following entries will be made in the conduct sheets of JCOs, WOs and OR as red ink entries :-

(i) Forfeiture of seniority of rank (JCOs and WOs only).

(ii) Conviction by a court martial.

(iii) Conviction by a civil court, except when a fine was the only punishment and the CO does not consider that a red ink entry should be made.

(iv) Reduction of a NCO to a lower grade or to the ranks for an offence but not for inefficiency.

(v) Deprivation of an appointment or of lance or acting rank, for an offence but not for inefficiency.

(vi) Severe reprimand (JCOs, WOs and NCOs only).

(vii) Imprisonment.

(viii) Detention.

(ix) Field punishment (on active service only).

(x) Confinement to the lines exceeding fourteen days.

(xi) Forfeiture of good service or good conduct pay.

(c) Black ink entries will be made in the conduct sheets of JCOs, WOs and OR in respect of all punishments not included in the list of red ink entries convictions by civil courts not meriting in the CO's opinion a red ink entry.

388. Manner in which Entries are to be Made.

(a) Entries will be made in the conduct sheets as follows :-

(i) The statement of offence as set out in Army Rules will be entered. Where the statement does not disclose the full nature of offence such as charges under Army Act, Sections 42 (e) and 63, the purport of the particulars will be added, thus :

"Neglecting to obey garrison orders – bathing in the river at a prohibited hour".

"Act prejudicial to good order and military discipline – negligent performance of duties".

(ii) The original sentence, together will any alteration, revision or variation by a competent authority will be recorded in the column "punishment awarded". In case of sentences by courts martial the remarks of the confirming/reviewing officer and the date of confirmation/counter signature will be entered immediately under "punishment awarded". When the accused is found guilty of a charge different from the one on which arraigned, the charge on which found guilty will also be entered in column – "punishment awarded".

(iii) Every suspension of a sentence under Army Act, Section 182 will be entered in the "remarks" column, showing the date on which and the authority by whom the suspension was ordered. If the sentence was subsequently put into execution or remitted, a further entry will be made in the same column to this effect, stating the date and the authority.

(iv) When the record of a court martial or a summary award is ordered to be removed, the entry will be erased and the authority quoted.

(v) No entry will be made of any charge of which the accused has been found not guilty.

(b) In the case of JCOs, WOs and OR, the number of days spent in hospital on account of disease due to neglect or misconduct and willful, self-inflicted injury will be recorded in the sheet roll under the heading "prominent occurrences affecting conduct and character".

(c) In the case of boys, conduct sheet entries will be made on IAFK-1166. IAFK-1166 will be destroyed and the ordinary conduct sheet be brought into use on a boy attaining the age of sixteen. These entries will also be similarly made in the statement of service page of the sheet roll.

19. Regulations for the Army under Section 4 provide the procedure with regard to entries and maintenance of Conduct Sheet. Regulation 386, 387 and 388 are relevant (supra).

20. In view of the above, red or black ink entries made in the conduct sheet of the officer depends upon serious and major misconduct and in case a person is aggrieved by such entries, he has right to submit statutory complaint or approach the

Tribunal for judicial review. In case it is not challenged at the time of awarding entries, then it shall attain finality.

21. So far as the discharge under Rule 13 (3) iii (iv) read with Rule 17 of the Army Order 1988 is concerned provision of inquiry is to take it into account the subsequent development in person's career and in case improvement has been made, or red ink entries are not so serious, then red ink entry may not suffice to be sole ground to discharge or dismiss an army personal. Broadly for this reason preliminary inquiry seems to be conducted in pursuance of 1988 Army Order.

22. During arguments, the learned counsel for the applicant relied upon the Army Order dated 18.01.1988. Since his personal cause was broadly based on order dated 28.12.1988 which is reproduced as under :-

"Copy of Additional Directorate General Personal Services (PS2), AG's Branch, Army Headquarters letter No A/13210/159/AG/PS2© dated 28 December 1988 addressed to All Commands with copy to All Records Offices, circulated vide Records, the Grenadiers, Post Bag No 17, Jabalpur (MP) vide letter No. 0201/A/164/Adm-1 dated 18 January 1989.

PROCEDURE FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs and OR

1. The procedure outlined in the succeeding paragraphs will be followed for the disposal of undesirable and inefficient JCOs, WOs and OR.

JCOs, WOs and OR who have proved undesirable

(a) An individual who has proved himself undesirable and whose retention in the service is considered inadvisable will be recommended for discharge/dismissal. Dismissal should only be recommended where a court martial, if held, would have awarded a sentence not less than dismissal, but trial by court martial is considered impracticable or inexpedient. In other cases, recommendations will be for discharge.

(b) Should it be considered that a JCO's discharge/dismissal is not warranted and that transfer will meet the case, he will be transferred in his substantive rank and not recommended for further promotion and/or increment of pay until he proves his fitness for promotion and/or increment of pay in his new unit.

(c) Should it be considered that a WO or an NCO's discharge/dismissal is not warranted and that transfer will meet the requirements of the case,

he will be transferred. If the merits of the case so warrant, he may be reduced to a lower grade or rank or the ranks under AA Sec 20 (4) by an officer powers not less than a Brigade or equivalent Commander, before he is transferred. A WO reduced to the ranks shall not be required to serve in the ranks. AA Sec 20 (5) refers.

(d) Should it be considered that an acting NCO's discharge/dismissal is not warranted and that transfer will meet the requirements of the case, he may be reverted by his CO to his substantive rank and if he has no substantive NCO rank then he may be reverted to the ranks under AA Sec 20 (6) before he is transferred.

(e) In cases where it is considered that all or part of JCOs/WO's/OR's pension should be withheld, this fact will be noted on the recommendation for discharge.

JCOs, WOs and OR who have proved inefficient

3. (a) Before recommending or sanctioning discharge, the following points must be considered:-

(i) If lack of training is the cause of his inefficiency, arrangements will be made for his further training.

(ii) If an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) Should it be decided to transfer a JCO, he may be transferred in his acting/substantive rank according to the merits of the case and will not be recommended for further promotion and/or increment of pay until he proves his fitness for promotion and/or increment of pay in his new unit.

(c) Prior to transfer, if such a course is warranted on the merits of the case, a WO or an NCO may be reduced to one rank lower than his substantive rank under Army Act Section 20 (4).

Procedure for Dismissal/Discharge of Undesirable JCOs/WOs/OR

4. AR 13 and 17 provide that a JCO/WO/OR whose dismissal or discharge is contemplated will be given a show cause notice. As an exception to this, services of such a person may be terminated without giving him a show cause notice provided the competent authority is satisfied that it is not expedient or reasonably practicable to serve such a notice. Such cases should be rate, eg, where the interests of the security of the state so require. Where the serving of a show cause notice is dispensed

with, the reasons for doing so are required to be recorded. See provision to AR 17.

5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, it set out below :-

*(a) **Preliminary Enquiry**. Before recommending discharge or dismissal of an individual the authority concerned will ensure:-*

(i) that an impartial enquiry (not necessarily by a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity for putting up his defence or explanation and of adducing evidence in his defence.

(ii) that the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case.

*(b) **Forwarding of Recommendations**. The recommendations for dismissal or discharge will be forwarded, through normal channels, to the authority competent to authorize the dismissal or discharge, as the case may be, alongwith a copy of the proceedings of the enquiry referred to in (a) above.*

(c) ***Action by Intermediate Authorities****. Intermediate authorities through whom the recommendations pass will consider the case in the light of what is stated in (a) above and make their own recommendations as to the disposal of the case.*

(d) ***Action by Competent Authority****. The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is warranted, he should direct that a show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings of the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.*

(e) ***Action on Receipt of the Reply to the Show Cause Notice****. The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorize his dismissal/discharge*

together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.

(f) ***Final Orders by the Competent Authority****. The authority competent to sanction the dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. If the competent authority considers that termination of the individual's service is not warranted but any of the actions referred to in (b) to (d) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactory, he will pass orders accordingly.*

Note 1. As far as possible, JCO, WO and OR awaiting dismissal orders will not be allowed to mix with other personnel.

2. Discharge from service consequent to four red ink 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. Such discharge should be approved by the next higher commander.

(g) ***Carrying Out Dismissal/Discharge****. On receipt of the orders of the competent authority for dismissal/discharge, all action to effect dismissal/discharge will be taken by the Regt Centre/Record office, or the unit, as the case may be.*

Procedure for Discharge of Inefficient JCOs/WOs/OR

6. Such JCO, WO and OR will remain with their unit and will be dealt with as in Paras 4 and 5 above in so far as it relates to discharge from service.

7. This letter supersedes the provisions of this HQ letter of even number dated 23 August 1965 and 14 March 1985.

Sd/- xxxxxxx
(RP Agarwal)
Maj Gen
Addl DG PS
For Adjutant General"

23. The provision contained in Army Order 1988 for the supply of preliminary inquiry report seems to be in tune with the constitutional spirit as affirmed by Constitution Bench in the case of ***Managing Director Ecil vs. B.K Karunakaran***, (1993) 4 SCC 727.

24. Learned Counsel for the Applicant relying upon the case reported in 2009 in respect ***of Rifleman Tilak Raj Vs. UOI and others,*** 2009 (4) SCT 645 delivered by J&K High Court, followed by another judgment reported in respect of Jagdish Chand vs. State of Delhi, ***Surinder Singh Sihag vs. UOI*** (2003) (1) SCT 697) : (2002) DLT 705 in Delhi High Court, ***Prithi Pal Singh Vs. UOI and others*** 1985 LAB IC 264 (J&K High Court), ***Vinayak Daulat Rao Nalawade Vs. Corps, GOC 15 Corps*** 1987 LAB IC 860, submits that non compliance of procedure prescribed by 1988 circular (supra) vitiates the impugned order.

It is submitted by respondents' counsel that the case AR 180, relates to disciplinary proceedings and has no concern to present dispute.

25. However, Lt Col Subodh Verma, Departmental Representative invited attention to a judgment of Armed Forces Tribunal Chandigarh delivered on 07.01.2013 in Ex Sep Arun Bali Ram Chuge V. Union of India and others alongwith other connected cases by a bench of Justice Rajesh Chandra, Judicial Member and Lt Gen N.S. Brar (Retd) at Chandigarh where after relying upon the case reported in ***UOI & others vs. Dipak Kumar Santra*** (2009) 7 SCC 370 held that the policy guidelines by the COAS has no place to affect the proceeding under Rule 13 of the Army Rule (supra). However, as discussed hereinafter the judgment of ***Dipak Kumar Santra*** (supra) seems to be incorrectly interpreted by the bench of Chandigarh in view of follow up discussion.

26. Under the above facts and provisions of law laid down by Hon'ble Supreme Court, the right conferred by Article 14 of the Constitution of India, which includes the principles of natural justice, shall not be available to persons covered by Article 33

of the Constitution of India with same vigor or force which is available to other employees or government servants subject to legislation by Parliament. Article 33 of the Constitution of India has been included in the Part III itself of the Constitution. For the larger cause i.e. to protect the boundary and sovereignty of the country and preserve the discipline in the Indian Armed Forces, someone has to sacrifice more than others. This is what is expected from the persons occupying posts in the various fields referred in Article 33 of the Constitution of India, may be, by sacrificing their fundamental rights to some extent to serve the country and society at large. There may be some incorrect decision on the part of an officer passing a consequential order in pursuance of disciplinary proceedings, but that should be accepted unless it causes serious miscarriage of justice or prejudice.

27. In the present case, after due selection, petitioner was enrolled as Sepoy and after completion of probation period, at the time of attestation provided under rule 17, allegations were brought on record by the complainant. Accordingly, after serving notice in the manner discussed herein above, the

impugned order was passed. Admittedly, the Brigadier/Sub Area Commander who had passed the original order was the competent authority to pass the same. Rule 13 (III) (5) provides that Brigadier or Sub Area Commander before ordering to discharge, shall permit to give the affected person opportunity to show cause against the contemplation to discharge and admittedly, a show cause notice was given and after receipt of reply, the competent authority found it fit to discharge the petitioner for the reasons discussed hereinabove.

A show cause notice dated 16th of May, 1991, copy of which has been filed as C.R.-3 to the Counter Affidavit was served on the petitioner and after receipt of petitioner's reply, the impugned order was passed.

28. Validity of Rule 13 III (v) is not in question and it is also not disputed that Brigadier or Sub Area Commander has got power to pass the impugned order. The arguments advanced by the learned counsel for the petitioner relates to the competence of Commanding Officer and involvement of principles of natural justice i.e. for holding of regular departmental inquiry in the manner provided by law for the govt.

employees seems to be misconceived. Army Rules provides the procedure referred herein above. While interpreting the statutory provisions in the present case, principle of literal interpretation of the provision should be applied as there seems to be no vacuum under the rule. Rule 13 III (v) specifically provides that order of discharge may be passed by competent authority, after providing the opportunity to show cause against the contemplated discharge. Rule does not provide that regular enquiry should be held before issuance of a show cause notice. A perusal of the rule further shows that discretion has been given to the Brigade or Sub Area Commander to issue a show cause notice if circumstance of the case permits to do so. It means that there may be cases where in national interest or for some reasonable cause, the competent authority may pass orders of discharge without issuing a show cause notice of the contemplated discharge. However, that may be done only in rarest of rare cases in national interest and in exceptional circumstances. But, it shall always be the subject to judicial review by the competent Court/Tribunal.

29. Since Rule 13 (III) (v) does not provide for holding of a regular departmental enquiry which includes recording of oral evidence and provide the opportunity of cross examination and to defend, this court while exercising jurisdiction of judicial review may not expand the procedure provided by the Rule by adding its own view. What cannot be done directly, it cannot be done indirectly. Where the language of the rule is clear, then nothing can be read within it by addition. A plain and unambiguous provision of the rule should be read in the same manner, what is being reflected by it literal interpretation, vide ***Dayal Singh and others Vs. Union of India and others***, (2003) 2 Supreme Court Cases 593

Subject to aforesaid statutory provisions and the Army Order, Rule 13 should be interpreted in accordance with settled provisions of law after taking into account the Army Order of 1988 (supra).

Jurisdiction

30. Under Army Rule 13 (3) (iv) power of discharge has been conferred on Brigade or Sub Area Commander and it is the

Brigadier and the Sub Area Commander, as the case may be, to issue notice of show cause. The Brigadier is the head of a Brigade. An officer of the rank of Brigadier may also be the head of Sub Area whereas Commanding Officer is of the rank of Colonel. Under rule (supra), power has been conferred on the Brigade or Sub Area Commander, means the person issuing a notice or passing order of discharge should be of the rank of Brigadier. We have been informed that sometimes the post of Sub Area Commander is held by Brigadier. In any case the two ranks have been delegated to pass the order of discharge under rule (supra) is above the rank of Commanding Officer.

31. In the present case show cause notice has been issued by Brigadier P.K. Jayswal, Commander 45 Infantry Brigade and order of discharge has also been sanctioned by him. There appears to be no illegality in the impugned order so far as question of jurisdiction is concerned. Arguments advanced by learned counsel for the applicant to this extent fails.

Interpretation:

32. It is well settled proposition of law that while interpreting a statute, each word of the statute must be given its original meaning. "*Contemporanea exposition*" Rule is well settled Rule of interpretation of statutes. It refers to exposition which the statute received from contemporary authorities. However, where language is clear, plain and unambiguous, rule must be given weight. Statute is to be construed according to the intent of the Legislature and make it a duty of the Court to act upon true intention of the legislature. While interpreting statute, every section, line and every word and statute as a whole should be looked into and in the context in which it is used and not in isolation. Statute should be read in entirety and purpose and object of the Act be given its full effect by applying principle of purposive construction if required. It must be construed having regard to its scheme and the ordinary state of affairs and consequence flowing there from. It can be construed in such a manner so as to effective and operative on the principle of *"ut res magis valeat quam pereat*". Further if a statute is silent and there is no specific provision, then statute should be interpreted

so as to advance cause of justice. (Vide ***District Mining Officer vs. Tata Iron and Steel Co***; (2001) 7 SCC 358 ***Rohitash Kumar and others vs. Om Prakash Sharma and others*** JT 2012 (11) SC 218 ***Grasim Industries Ltd. Vs. Collector of Custom***; (2002) 4 SCC 297: ***Bhatia International Vs. Bulk Trading S.A*** (2002) 4 SCC 105 ***Deepal Girish Bhai Soni Vs. United India Insurance Ltd***; (2004) 5 SCC 385 ***Pratap Singh Vs. State of Jharkhand*****,** (2005) 3 SCC 551 and ***State of Goa Vs Western Builders*** (2006) 6 SCC 239.

33. In the case of ***Bhatia International*** (supra) the Hon'ble Supreme Court has held that where statutory provision can be interpreted in more than one way, court must identify the interpretation which represents the true intention of legislature. While deciding which is the true meaning and intention of legislature, court must consider the consequences that would result from the various alternative constructions.

Court must reject the construction which leads to hardships, serious inconvenience, injustice, anomaly or uncertainty and friction in very system that the statute concerned is supposed to regulate.

34. (i) In a recent judgment reported in ***Vipulbhai M. Chaudhary vs. Gujarat Coop. Milk Mktg. Federation Ltd.*** (2015) 8 SCCC 1, the Hon'ble Supreme Court has held:-

> *"In the background of the constitutional mandate, the question is not what the statute does say but what the statute must say. If the Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the court to read the constitutional spirit and concept into the Acts."*

In the same judgment Hon'ble Supreme Court, while applying interpretative jurisprudence, further emphasized to implement constitutional mandate in the following words:-

> *'When the Constitution is eloquent, the laws made thereunder cannot be silent. If the statute is silent or imprecise on the requirements of the Constitution, it is for the court to read the constitutional mandate into the provisions concerned and declare it accordingly."*

Again the Hon'ble Supreme Court has said as under:

> *"Where the Constitution has conceived a particular structure of certain institutions, the legislative bodies are bound to mould the status accordingly. Despite the constitutional mandate, if the legislative body concerned*

does not carry out the required structural changes in the statutes, then, it is the duty of the court to provide the statute with the meaning as per the Constitution. As a general rule of interpretation, no doubt, nothing is to be added to or taken from a statute. However, when there are adequate grounds to justify an interference, it is the bounden duty of the court to do so."

(ii) According to the 'Maxwell on The Interpretation of Statutes (12th Edition Page 36), to quote:-

"A construction which would leave without effect any part of the language of a statute will normally be rejected."

(iii) In ***Deevan Singh vs. Rajendra Prasad Ardevi*** 2007 (10) SCC 28, Hon'ble Supreme Court held that while interpreting Statute the entire statute must be read as a whole, then section by section, clause by clause, phrase by phrase and word by word.

Further it is the settled law that *causus omissus* (Principle of reading down) may be applied in case there is any ambiguity or absurdity in the statutory provisions, vide ***Gujrat Urja Vikash Nigam Ltd vs. Essar Power Ltd***, 2008 (4) SCC 755.

Rule 13 of the Army Rule

35. The provision contained in Rule 13 as well as Army Order should be interpreted keeping the aforesaid broader principle of interpretative jurisprudence. Sub rule 2A, which has been added through amendment with effect from 12th March, 1964 empowers Central Government as well as Chief of the Army Staff to decide that any person or class of persons subject to the Act should be discharged from service, either unconditionally or on the fulfillment of certain specified conditions, then, notwithstanding anything contained in this rule, (Rule 13) the Commanding Officer shall also be the competent authority to discharge from service such person or any person belonging to such class in accordance with the said conditions. Sub-Rule 2A gives statutory power to the Central Govt as well as the Chief of The Army Staff to provide certain specified conditions to comply the provisions contained in Rule 13 in addition to procedure contained there. So far as the Chief of Army Staff is concerned, the conditions may be provided by Army Order. Apart from Rule 13 Army Act and Rules further

empowers the Chief of The Army Staff to dismiss or remove from service any person subject to provisions contained in the Act. Section 22 of the Army Act provides that any person subject to the Act may be retired, released or discharged from service by such authority. Section 21 of the Army Act provides that subject to the provisions of the Act the regular army or any branch thereof may be deprived of the fundamental rights to some extent by the Central Government.

In view of the above while interpreting Rule 13 the provision contained in sub-rule 2A read with rule may not be ignored and must be considered alongwith other provisions. Similarly 1988 order should also be taken into account keeping in view the constitutional spirit as held by Hon'ble Supreme Court in the case ***Vipulbhai M. Chaudhary*** (supra).

36. These special provisions have been made to maintain discipline and the nature of service which armed forces personnel discharge. In view of the above, under sub-rule 2A of Rule 13, the Central Govt or the Chief of the Army Staff has got right to issue orders to specify certain condition which shall be binding for the Commanding Officers empowered under

Rule 13 to comply with the procedure while exercising powers under Rule 13.

Statutory Power:

37. Chief of The Army Staff is a statutory authority. Order passed by him in pursuance of powers conferred by the statute shall be deemed to be passed in pursuance of statutory obligation and will have statutory force. The Black's Law Dictionary defines the word 'statutory' as (1) of or relating to legislation, (2) Legislatively created, and (3) Conformable to a statute.

38. A question cropped up as to whether 1988 Army Instruction has got statutory force or is mandatory. William M. Lile in the Major Law Lexicon in Brief Making and the use of Law Books 8 (3d ed. 1914) defined' statutory law as under :-

> *"We are not justified in limiting the statutory law to those rules only which are promulgated by what we commonly cause 'legislatures'. Any positive enactment to which the State gives the force of a law is a 'statute,' whether it has gone through the usual stages of legislative proceedings,*

or has been adopted in other modes of expressing the will of the people or other sovereign power of the State. In a absolute monarchy, an edict of the ruling sovereign in statutory law. Constitutions, we direct legislation by the people, must be included in the statutory law, and indeed there are examples of the highest form that the statute law can assume. Generally speaking, treaties also are statutory law, because in this country, under the provisions of the United States Constitution treaties have not the force of law until so declared by the representatives of the people".

39. Hon'ble Supreme Court in the case of ***Inspector vs. Laxminarayan Chopra*** reported in AIR 1962, SC 159 held that a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time of enactment of statute. In the Major Law Lexicon (4th Edition) the word, 'Statutory order and statutory rule' has been interpreted as under :-

"Ordinances made whether by the Sovereign in counsel, a department of the Executive, a local authority or any

other corporation or person under powers expressly delegated by the Legislature and the sections of Acts which effects such specific delegations are referred to as "statutory powers."

40. It is well settled law that exercise of statutory discretion must conform to good administration, vide ***M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu,*** AIR 1999 SC 2468.

The implied limitations or conditions are that the person whom the powers conferred must exercise it in good faith for furtherance of the object of the statute; he must not proceed upon a misconstruction of the statute; he must take into account matters relevant for the exercise of the power; he must not be influenced by irrelevant matters; he must not act unreasonably, *i.e.* irrationally or perversely, vide, ***Rohtas Industries Ltd. Vs. S.D. Agarwal*** (AIR. 1969 SC. 707), ***Hukumchand Shyamlal Vs. Union of India***, [(1975) 2 SCC 81], ***Air India Ltd.Vs. Cochin International Airport Ltd***, (AIR. 2000 SC 801), ***Humanity and another Vs. State of West Bengal*** [(2011) 6 SCC 125].

41. It is trite law that the delegate cannot override the Act either by exceeding the authority or by making provisions inconsistent with the Act. But when the enabling Act itself permits to lay down additional conditions or modification under the rules, the rules may prevail over the provisions of the Act (vide ***State of T.N. Vs. P. Krishnamurthy*** (2006) 4 SCC 517). In the present case, sub-rule 2A read with sub rule 3 of Rule 13 of the Army Rules empowers the Chief of the Army Staff to further modify the condition with regard to matter of discharge and in consequence thereof, the Chief of the Army Staff issued Army Order in question which related back to 1988 (supra). The Order seems not to be a base policy decision, but is additional service condition and has statutory force and its compliance seems to be mandatory.

Mandatory:

42. Subject to discussion and finding recorded herein above (supra), question cropped up whether the 1988 Army Order is mandatory. Hon'ble Supreme Court in catena of judgments held that whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in

which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design, and consequences which would follow from construing it in the one way or the other way (vide ***State of U.P. vs. Manbodhan Lal Shrivastava,*** AIR 1957 SC 912, ***State of U.P. vs. Babu Ram Upadhya***, AIR 1961 SC 751, ***"Vali Pero" vs. Fernandes Lopez***, AIR 1989 SC 2206 and ***State of M.P. vs. Pradeep Kumar*** (2000) 7 SCC 372).

43. In a case reported in***, Indian Administrative Service (SCS) Ass. U.P. Vs. Union of India***, 1993 Supp (1) SCC 730 while considering the mandatory or directory element of consultation process, Hon'ble Supreme Court has culled down the preposition, which reads as under:-

> *"(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of*

consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only

directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances, it amounts to an action 'after consultation'.

(6) No hard-and-fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the court to determine in each case in the light of its facts and circumstances whether the action is 'after consultation'; 'was in fact consulted' or was it a 'sufficient consultation'."

44. Keeping the aforesaid principle, since the Army Order of 1988 (supra) is to advance and effectuate built in insulation to secure fundamental right in tune with Articles 14 and 21 of the

Constitution of India, it is mandatory and non compliance thereof shall vitiate the decision.

Executive Instructions:

45. Even if 1988 Army Order is held to be executive instruction or administrative order, it seems to have got binding force being issued in pursuance of power conferred by sub-rule 2A of Rule 13. The Constitutional Bench in the case ***of Sant Ram Sharma Vs. State of Rajasthan and anr*** (AIR 1967 SC 1910) held that, it is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. The law laid down above (supra) has constantly been followed and it is settled proposition of law that authority may issue executive instructions to supplement the statutory rules.

46. The Constitution Bench in ***Sant Ram Sharma Vs. State of Rajasthan & Ors.***, (supra) has observed as under :-

"It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed".

47. The law laid down above, has consistently been followed and it is settled proposition of law that an Authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rule but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide **The *Commissioner of Income-tax, Gujrat Vs. M/s. A Raman & Co.***, AIR 1968 SC 49; ***Union of India & ors. Vs. Majji Jangammayya & Ors***., AIR 1977 SC 757; ***The District Registrar, Palghat & ors. Vs. M.B. Koyyakutty & Ors***., AIR 1979 SC 1060; ***Ramendra Singh & Ors. Vs. Jagdish Prasad & ors***., AIR 1984 SC 885; ***P.D. Aggarwal & Ors. Vs. State of U.P. & ors***., AIR 1987 SC 1676; ***M.S. Beopar Sahayak (P) Ltd. & ors. Vs. Vishwa Nath & ors.***, AIR 1987 SC 2111; ***Paluru Ramkrishnnaiah & Ors. Vs. Union of India & Anr***., AIR 1990 SC 166; ***Comptroller &***

Auditor General of India & ors. Vs. Karnataka Lokayukta & ors., AIR 1998 SC 2496).

48. The Constitution Bench of the Supreme Court, in ***Naga People's Movement of Human Rights Vs. Union of India***, AIR 1998 SC 431, held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions. However in the present case sub rule 2A (supra) itself empowers to provide specified conditions.

49. In the present case the Army Order provides for holding of a preliminary enquiry while taking a decision for discharge from service. It further provides that mere adverse entry shall not be sufficient to discharge armed force personnel, but the authority has to apply mind and record satisfaction with regard to necessity of punishment awarded to the armed force personnel. The order shows that after preliminary enquiry, a notice is to be served on the armed force personnel (alongwith preliminary enquiry report), and after recording such satisfaction, may pass order either rejecting the reply or accepting the same, and discharge order should be approved

by the next higher authority. Army Order dated 28th December, 1988 supplements the Rule in tune with Articles 14 and 21 of the Constitution of India. Accordingly, it is not merely a policy decision, but an order by statutory exercise of power to further strengthen the constitutional rights (fundamental right) of army personnel in the matter of extreme punishment of dismissal or discharge from service. When the power conversed itself tends to follow the principles of natural justice by issuing appropriate order or framing rules, then the original Rule 13 would not come in the way. However, it does not mean that armed forces or Government have no right to curtail fundamental rights, but for that, Government of India has to frame rules or guidelines to meet out the requirement through Parliament. If once the rule is relaxed (supra), then it must be adhered to during the course of disciplinary proceedings, discharge or Court Martial as the case may be. Ofcourse the Army Order may be modified, reviewed or recalled by the Chief of the Army Staff within constitutional parameter subject to judicial review.

Statutory Force:

50. As held herein above, the Army Order dated 28 December 1988 (supra) has been passed in pursuance of power conferred by sub rule 2A of Rule 13 of the Army Rules. Since it has been issued in pursuance of power conferred by statute, that too by Chief of the Army Staff, who is statutory authority, it has statutory force and its compliance is must. Non compliance shall vitiate the proceeding or the order of punishment. It is mandatory also for the reason that for the command and control of army, power has been conferred upon the Chief of the Army Staff. It is necessary to confer certain power on the Chief of the Army Staff who is well acquainted with the ground realities of the Army. Accordingly 1988 order is mandatory.

Per incuriam

51. In the case of ***Ex Sep Arun Bali Ram Chuge V. Union of India and others*** (supra) along with other connected cases, the Chandigarh bench by order dated 07.01.2013 held that

provision contained in Army Order of 1988 is policy decision and directory. Chandigarh bench had relied upon the case reported in ***UOI & others vs. Dipak Kumar Santra,*** 2009 Vol 7 SCC 370 and has held that the policy guidelines by the COAS has no place to affect the proceeding under Rule 13 of the Army Rule (supra). It shall be appropriate to reproduce the relevant portion from the case of ***Ex Sep Arun Bali Ram Chuge*** (supra) whereby the Division Bench at Chandigarh observed that 1988 Army Order (supra) is a policy decision and is directory. Order seems to be per incuriam to sub-rule 2A read with sub-rule 3 of rule 13 and Apex Court Judgments (supra).

52. Relevant portion of the case of ***Arun Bali Ram Chuge*** (supra) is reproduced as under :-

> *"In the case of Surinder Singh Sihag, The Division Bench of the Delhi High Court 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 five red ink entries, the order was*

quashed. But we find that the Supreme Court, in the decision reported as 2009 (7) SCC 370 UOI & Ors. Vs. Deepak Kumar Santra, had taken a view contrary to the one taken by the Division Bench of the Delhi High Court. In so far as discharge by an authority exercising power under Rule 13 of the Army Rules was concerned, the Supreme Court had 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".

53. Per incuriam means in ignorance of or without taking note of some statutory provisions or the judgment of Hon'ble Supreme Court or the larger Bench, vide; 2003 (5) SCC 448, ***State of Bihar Vs. Kalika Singh and others*** (1991) 4 SCC 139 ***State of U.O. and another Vs. Synthetics and chemicals Ltd. And Another,*** AIR 1975 SC 907 ***Mamleshwar Prasad and others Vs. Kanhaiya Lal***, 2005 (1) SCC 608, ***Sunita Devi Vs. State of Bihar***, 1999 (3) SCC 112; ***Ram Gopal Baheti Vs. Giridharilal Soni and others***, AIR 1988 SC 1531; ***Municipal Corporation of Delhi Vs. Gurnam Kaur***, 1999 (5) SCC 638; ***Sarnam Singh Vs. dy. Director of Consolidation and others***, 2004 (4) SCC 590 ***State Vs. Ratan Lal Arora***;

54. The concept of “per incuriam” in all those decisions given is ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned, i.e.’ previous decisions of the Court i.e. its own court or by a Court of co-ordinate or higher jurisdiction or in ignorance of a term of a statute or by a rule having the force of law. “Incuria”, literally means “carelessness”. In practice, per incuriam is taken to mean *per ignoratium*. (Vide ***Mamleshwar Prasad & Anr Vs. Kanhaiya Lal***, (1975) 2 SCC 232; ***A.R. Antule Vs. R.S. Nayak***, (1988) 2 SCC 602; ***State of U.P. & Ors. Vs. Synthetics and Chemicals Ltd,*** (1991) 4SCC 139; ***B. Shama Rao Vs. Union territory of Pondichery,*** AIR 1967 SC 1480; ***Municipal Corporation of Delhi Vs. Gurnam Kaur***, (1989) 1 SCC 101; ***Ram Gopal Baheti Vs. Girdharilal Soni & others***, (1999) 3 SCC 112; ***Sarnam Singh Vs. Dy. Director of Consolidation & others***, (1999) 5 SCC 638; ***Government of Andhra Pradesh Vs. B. Satyanarayana Rao***, ***(dead) by L.Rs, & others***; AIR 2000 SC 1729; ***M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd***., AIR 2001 SC 2293; ***Suganthi Suresh Kumar vs. Jagdeeshan***, AIR 2002 SC 681; ***State of Bihar vs.***

Kalika Kuer, AIR 2003 SC 2443; ***Director of Settlements, A.P. & others vs. M.R. Apparao & Anr***., 2002 4 SCC 638; ***Manda Jaganath Vs. K.S. Rathnam & ors*** (2004) 7 SCC 492; ***Sunita Devi Vs. State of Bihar & others***, 2004 AIR SCW 7116; ***Central Board of Dawoodi Bohra Community & Anr Vs. State of Maharashtra & Anr***., (2005) 2 SCC 673; ***K.H. Siraj Vs. High Court of Kerala & others***, AIR 2006 SC 2339; and ***Union of India & Anr. Vs. Manik Lal Banerjee***, AIR 2006 SC 2844.

55. In ***State vs. Ratan Lal Arora*** (2004) 4 SCC 590, the Hon'ble Supreme Court held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam.

56. In ***N. Bhargavan Pillai vs. State of Kerala***, AIR 2004 SC 2317, the Hon'ble Supreme Court held that in view of the specific statutory bar, the view, if any, expressed without analyzing the statutory provision cannot, in our view, be treated as a binding precedent, and at the most is to be considered as having been rendered per incuriam.

57. A similar view has been reiterated in ***Mayuram Subramanian Srinivasan vs. CBI***, AIR 2006 SC 2449, wherein the Apex Court has observed as under:-

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Youong vs. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293, is avoided and ignored if it is rendered, "in ognoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution of India, 1950 (in short "the Constitution") which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial consigns. The position was highlighted in Nirmal Jeet Kaur vs. State of M.P., (2004) 7 SCC 58."

58. Thus at the face of the recorded the bench at Chandigarh relied upon the case of ***Dipak Kumar Santra*** (supra). In the

case of ***Dipak Kumar Santra*** Hon'ble Supreme Court has not recorded any finding as to whether the 1988 order is mandatory or directory. It was also not argued with regard to mandatory or statutory nature of 1988 order. Entire finding with regard to Rule 13 is contained in Para 6 of the judgment which is reproduced below :-

> *"It is not in dispute that Rule 13 (3) of the Rules clearly applied to the facts of the case. Reference has been made by the Ld. Counsel for the appellants to the Letter of the Army Headquarters, New Delhi laying down the procedure required to be followed in respect of the individuals who fail in the clerks' proficiency and aptitude test while undergoing the basic military training. We need not go into the applicability of the letter referred to, in view of the clear stipulation in Rule 13 (3) of the Rules, which has application to the facts of the case".*

59. A plain reading of the observations made by the Hon'ble Supreme Court in the case of ***Dipak Kumar Santra*** (supra) shows that their Lordships have not felt necessary to go into the applicability of letter placed before the court. The Hon'ble Supreme Court also did not specify that letter dated 28.12.1988

was placed before their Lordships, which is subject matter of dispute before the tribunal.

60. With profound respect in the case of Arun Bali Ram Chuge (supra), the Bench had not taken into account sub-rule 2A read with sub-rule 3 of Rule 13 and catena of judgments of Hon'ble Supreme Court with regard to interpretative jurisprudence while holding the 1988 Army Order (supra) directory. Hence for the reasons discussed hereinafter, the judgment lacks binding effect being per incuriam to statutory mandate and Supreme Court judgments.

61. It is well settled law that even if in the Army Order the statutory provision conferring power has not been mentioned, it shall be deemed to exercise within the jurisdiction and the order shall apply with vigour for the purpose it has been issued vide ***Ujjam Bai vs. State of U.P***. AIR 1962 SC 1621.

62. It is trite law that even if the source of power is not quoted or a wrong provision is quoted, it will not invalidate the order, and the exercise of the power will be referable to a jurisdiction which confers validity upon it. Similarly, when a subordinate

legislation is made without jurisdiction but expressed to be made under a wrong provision, shall be held to be valid one. (Vide ***Balakotiah vs. Union of India,*** *AIR 1958 SC 232 (at p. 236* **Hazarimal Kuthiala vs. I.T.O. ,** AIR 1961 SC 200, ***Gopalnarain vs. State of U.P.*** AIR 1964 SC 370 (at p. 377), ***Roshan Lal Gautam vs. State of U.P.***, AIR 1965 SC 991, ***P. Radhakrishna Naidu vs. Government of Andhra Pradesh***, AIR 1977 SC 854, ***Union of India vs. Tulsi Ram Patel*** (1985) 3 SCC 398, ***State of Karnataka vs. Krishnaji Srinivas Kulkarni***, (1994) 2 SCC 558, ***Union of India vs. Azadi Bachao Andolan***, AIR 2004 SC 1107 at (p.1125), ***Afzal Ullah vs. State of U.P.***, AIR 1964 SC 264, ***Peerless General Finance & Investment Co. vs. Reserve Bank of India***, AIR 1992 SC 1033 & ***Om Prakash vs. State of U.P***. (2004) 3 SCC 402.

Judgment:

63. It is well settled principle of law that judgment is to be read with reference to the context of particular statutory provision interpreted by the court. The decision cannot be

relied upon in support of the provision that it did not decide the fact.

64. Judgments has to be read in reference to context of particular statutory provisions interpreted by the Court. Decision cannot be relied upon in support of the proposition that it did not decide (vide **H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur & others. Vs. Union of India,** AIR 1971 SC 530**; M/s. Amar Nath Om Parkash & others. Vs. State of Punjab & others** AIR 1985 SC 218**; Rajpur Ruda Meha & others vs. State of Gujrat,** AIR 1980 SC 1707**; C.I.I. Vs. Sun Engineering Works (P) Ltd.,** (1992) 4 SCC 363**; Sar Shramik Sangh, Bombay Vs. Indian Hume Pipe Co. Ltd. & Anr.,** (1993) 2 SCC 386**; Haryana Financial Corporation & Anr. Vs. Mehboob Dawod Shaikh vs. State of Maharashtra,** (2004) 2 SCC 362**; ICICI Bank & Anr. Vs. Municipal Corporation of Greater Bombay & others:** AIR 2005 SC 3315**; M/s. Makhija Construction and Enggr. Pvt. Ltd. Vs. Indore Development Authority & others:** AIR 2005 SC 2499**; and Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. & Anr.**, (2005) 7 SCC 234**.**

65. The expression ‘Judgment’ has been defined in Section 2(9) of C.P.C., as “judgment means the statement given by the Judge on the grounds of a decree or order”. Thus the essential element in any ‘judgment’ is the statement of grounds of decision, meaning thereby the Court has to state the ground on which it bases its decision. It must be intelligible and must have a meaning. It is distinct from an order as the latter may not contain reasons. Unless the judgment is based on reason, it would not be possible for an Appellate/Revisional Court to decide as to whether the judgment is in accordance with law. (Vide Surendra ***Singh & Ors. Vs. State of U.P***., AIR 1854 SC 194; and ***Arjan Das Ram Lal Vs. Jagan Nath Sardari Lal***, AIR 1966 Pune 227).

66. The expression ‘judgment’ means a final adjudication by the court of the rights of the parties; an interlocutory judgment, even if it decides an issue or issues without finally determining the rights and liabilities of the parties, is not a judgment, however cardinal the issue may be. (***M/s. Tarapore & Madras Vs. Tractors Export Moscow***, (Vide AIR 1970 SC 1168).

67. Judgment is statement of reasons given by the Judge. (Vide ***Vidyacharan Shukla Vs. Khubchand Baghel & Ors.,*** AIR 1964 SC 1099 (C.B.).

68. A judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and the arguments, it means a judicial determination, vide ***U.J.S. Chopra Vs. State of Bombay***, AIR 1955 SC 633 and ***State of Bihar vs. Ram Naresh Pandey & Anr.,*** AIR 1957 SC 389***.*** In ***Ghourlal Mitra Vs. Smt. Hara Sundari Paul,*** AIR 1974 Cal 331, it was held that 'judgment' means a decision which affects the merits of the question between the parties by determining some right or liability and such decision might be either final, preliminary or interlocutory.

69. In view of the above, with profound respect, we feel that the Bench at Chandigarh (supra) has not applied its mind in reference to the context of ***Santra's*** case (supra) in the light of aforesaid proposition of law. Hence it seems to be *per incuriam* to the law settled by Hon'ble Supreme Court and statutory provision. In nutshell judgment in the case of ***Ex Sep Arun Bali Ram Chuge*** (supra) is *per incuriam* to the statutory

provisions and the law settled by Supreme Court for the following reasons:

(i) The provision contained in sub Rule 2A read with sub-rule 3 of Rule 13 has been given a go by while declaring Army Order of 1988 as policy matter and holding it to be directory statutory provisions (supra). It has not been considered at all.

(ii) The case of **Santra** (supra) has not been looked into by the bench at Chandigarh in its totality. Keeping in view the settled proposition of law (supra), it appears to be over sighted by the members of the bench with regard to its true interpretation.

(iii) Power to issue Army Order 1988 has been conferred by sub-rule 2A read with sub-rule 3 of Rule 13 to provide additional specific circumstances or conditions for exercising the powers by the commanders. Chief of the Army Staff is a statutory authority and admittedly the 1988 order has been issued by him, hence it has got statutory force.

(iv) Reliance placed by the applicant's counsel upon the division bench judgment of Jammu & Kashmir High Court reported in ***Vinayak Daultatrao Nalawade vs. Core Commander Lt. Gen. G.O.C., H.Q. 15 Corps*** reported in 1987 LAB. I.C. 860 has not been considered. High Court being constitutional forum, its orders and judgments have binding effects unless it is held that the judgment is per incuriam or has not considered statutory provisions or apex court's judgments.

70. With profound respect in the case of Arun Bali Ram Chuge (supra), the Bench had not taken into account sub-rule 2A read with sub-rule 3 of Rule 13 and catena of judgments of Hon'ble Supreme Court with regard to interpretative jurisprudence while holding the 1988 Army Order (supra) directory. Hence for the reasons discussed hereinafter, the judgment lacks binding effect being per incuriam to statutory mandate and Supreme Court judgments.

71. It is well settled law that even if in an Order the statutory provision conferring power has not been mentioned, it shall be deemed to exercise within the jurisdiction and the order shall

apply with vigour for the purpose it has been issued vide **Ujjam Bai vs. State of U.P**. AIR 1962 SC 1621.

72. It is trite law that even if the source of power is not quoted or a wrong provision is quoted, it will not invalidate the order, and the exercise of the power will be referable to a jurisdiction which confers validity upon it. Similarly, when a subordinate legislation is made without jurisdiction but expressed to be made under a provision, shall be held to be valid one. (Vide ***Balakotiah vs. Union of India,*** *AIR 1958 SC 232 (at p. 236* **Hazarimal Kuthiala vs. I.T.O.**, AIR 1961 SC 200, ***Gopalnarain vs. State of U.P.,*** AIR 1964 SC 370 (at p. 377), ***Roshan Lal Gautam vs. State of U.P.***, AIR 1965 SC 991, ***P. Radhakrishna Naidu vs. Government of Andhra Pradesh***, AIR 1977 SC 854, ***Union of India vs. Tulsi Ram Patel*** (1985) 3 SCC 398, ***State of Karnataka vs. Krishnaji Srinivas Kulkarni***, (1994) 2 SCC 558, ***Union of India vs. Azadi Bachao Andolan***, AIR 2004 SC 1107 at (p.1125), ***Afzal Ullah vs. State of U.P.***, AIR 1964 SC 264, ***Peerless General Finance & Investment Co. vs. Reserve Bank of India***, AIR

1992 SC 1033 & ***Om Prakash vs. State of U.P***. (2004) 3 SCC 402.

73. The Division Bench of the Delhi High Court, in a case reported in ***Surinder Singh Sihag vs. Union of India,*** 2003 (1) SCT 697 held that discharge in pursuance to red ink entries after show cause notice, without giving opportunity to defend himself shall not be sustainable. The relevant portion is reproduced as under:

> *"In the aforementioned situation, the respondents were bound to follow the procedure laid down in the circular letter dated 28.12.1988."*

74. The Jammu & Kashmir High Court in the case ***of Ex. Rifleman Tilak Raj vs. Union of India and others*** reported in 2009 (4) SCT 645 also held that enquiry should be held in pursuance of circular letter dated 28.12.1988. Justice Sunil Hali,J, in aforesaid judgment, held:-

> *"The aforementioned procedure clearly provides that before recommending discharge/dismissal of an individual, the authority concerned will ensure that preliminary enquiry be conducted and adequate opportunity of putting up his defence be given to the*

person. Note-2 reveals that discharge from service consequent to four red ink entries is not mandatory or legal requirement. In such, cases, the Commanding Officer must consider the nature of the offence for which each red ink entry has been awarded and not to be harsh with the individual."

Some other cases relied upon by the learned counsel for the applicant need not be discussed for the reason that they neither relate to Army Rule 180 or applicability of principles of natural justice where the Courts have not taken into account the provision contained in Article 33 of the Constitution of India.

75. In view of above, since the applicant has been discharged from Army without following the additional procedure provided by A.O. 1988 (supra) seems to suffer from vice of arbitrariness. **Finding with regard to applicability of Army Order 1988 (supra) is summarized and culled down as under**:

(i) In view of provision contained in sub-rule 2A read with sub-rule 3 of Rule 13 of the Army Order (supra), in case the Chief of the Army Staff or the Government add certain additional conditions to the procedure provided by Rule 13 of the Army Rule

1954 (supra), it shall be statutory in nature, hence shall have binding effect and mandatory for the subordinate authorities of the Army or Chief of the Army Staff himself, and non compliance shall vitiate the punishment awarded thereon.

(ii) The Chief of the Army Staff as well as the Government in pursuance to Army Act, 1950 are statutory authorities and they have right to issue order or circular regulating service conditions in pursuance to provisions contained in Army Act, 1950 and Rule 2A of Rule 13 (supra). In case such statutory power is exercised, circular or order is issued thereon it shall be binding and mandatory in nature subject to limitations contained in the Army Act, 1950 itself and Article 33 of the Constitution of India.

(iii) The case of ***Santra*** (supra) does not settle the law with regard to applicability of Army Order of 1988 (supra), hence it lacks binding effect to the extent the Army Order of 1988 is concerned.

(iv) The judgment of Jammu & Kashmir High Court and Division Bench judgment of Delhi High Court as well as provisions contained in sub-rule 2A of Rule 13 of the Army Act, 1950 and the proposition of law flowing from the catena of judgments of Hon'ble Supreme Court and High Court (supra) relate to interpretative jurisprudence, hence order in ***Ex Sepoy Arun Bali*** (supra) is per incuriam to statutory provisions as well as judgments of Hon'ble Supreme Court and lacks binding effect.

(v) The procedure contained in Army Order of 1988 (supra) to hold preliminary enquiry is a condition precedent to discharge an army personnel on account of red ink entries and non-compliance of it shall vitiate the order. Till the procedure in Army Order of 1988 (supra) continues and remain operative, its compliance is must. None compliance shall vitiate the punishment awarded to army personnel.

(iv) The procedure added by Army Order of 1988 is to effectuate and advances the protection provided by Part III of the Constitution of India, hence also it has binding effect.

(vii) Order of punishment must be passed by the authority empowered by Rules 13, otherwise it shall be an instance of exceeding of jurisdiction, be void and nullity in law.

76. A prayer has been made by the applicant to set aside red ink entries which do not seem to be sustainable at this belated stage since the applicant had not challenged red ink entries awarded to him at the relevant time. Now it is not open to him to challenge the same with common prayer under O.A., hence we declined to interfere with the red ink entries.

77. Subject to aforesaid findings, discussions and observations made in the body of the present order, and while parting with the case, we draw attention to certain observations made by Kautilya in his famous treatise *'The Arthashastra'*. (edited, rearraged, translated and introduced by L.N.

Rangarajan). Kautilya says that the army should be well paid, honoured and kept up to strength. It should not have any traitors or dissension within its ranks. It should not be scattered but kept together. It should always have adequate reinforcements. It should not be allowed to become too tired by long marches or otherwise during peace.

78. Kautilya while considering calamities (supra) which effect adversely the army observed, to quote:

"- not given due honours;
- not paid;
- not healthy;
- tired after a long march;
- exhausted after a battle;
- depleted in strength;
- having suffered a set-back
- after defeat in a frontal battle;
- having to fight in an unsustainable terrain;
- having to fight in an unsuitable season;
- low in morale;
- abandoned by its commander;
- having women in it;
- with traitors in it;
- an angry one;
- a disunited one;

- one which has run away (from battle);
- a dispersed one;
- one finding along with another;
- one absorbed in another force;
- one obstructed;
- one encircled;
- one cut off from supplies;
- one cut off from reinforcements;
- one demobilized and dispersed;
- one threatened (also) by an army in the rear;
- one whose base has been weakened and
- one without leaders.

An unhonoured army will fight if honoured with money; not so a dishonoured army which holds resentment inits heart.

An unpaid army will fight if paid immediately, but not so a sick army, which is unfit to fight.

An army newly arrived in a region will fight if, mixed with experienced, it learns about the region from others; not so an army tired after a long march.

An exhausted army will fight after refreshing itself by bathing, eating and sleeping but not so a depleted army, having been reduced in fighting men and draught animals.

An army repulsed will fight if rallied by heroic men; not so an army defeated after a frontal attack since it would have lost many of its brave men.

An army (made to fight) in an unsuitable season will do so if provided with suitable vehicles, weapons and armour. An army cannot fight in unsuitable terrain because its movement will be impeded and it cannot undertake raids.

A Despondent army will fight if its hopes are fulfilled, but not an army abandoned by its chief.

An army with women (accompanying it) will fight if the women are separated from it; not so an army with traitors and enemies in it.

An angry army (whose officers are provoked for some reason) will fight if their resentment is overcome by conciliation and similar means; not so disunited army whose members are estranged from each other.

(A defeated army may take refuge in one state or be scattered in many states.) An army staying together and taking refuge with an ally or in a fortress will fight if persuaded by diplomatic and conciliatory tactics. It is more dangerous to try to collect together a scattered army.

(In the case of a joint expedition, one's own army may be encamped near another and fight alongside or may be merged completely into another.) An army fighting alongside can fight the enemy separately because it will have its own positions and possibilities of mounting independent attacks. An army completely integrated with another has no independence of movement.

An obstructed army can fight the (enemy), being obstructed on all sides.

An army with its supply of grain cut off can fight if grain is brought in from elsewhere; it can also subsist on (locally available) animals and vegetables. But an army cut off from reserves of men cannot fight, being bereft of reinforcements.

An army kept dispersed in one's own land can be collected together in case of trouble, being disbanded in one's own territory; not so an army dispersed in the land of an ally, being far removed in place and (requiring) time (to collect and move it.)

An army full of traitors will (still) fight if officered by trustworthy commanders who can isolate the traitorous units; not so an army with a hostile army in the rear being frightened of an attack from behind.

An army with a denuded capital city behind it will fight after it is fully mobilized with the support of the citizens; not so an army cut off from its leaders being without king or commander.

An army whose commander is dead will fight under a new commander; not so a blind (leaderless) army.

The means of prevailing calamities to an army are : removal of vices and defects, reinforcement with fresh troops, entrenching oneself in a strong (defensible) place, reaching over the enemy (to secure allies or to attack him from the rear) and making a treaty with one who can help (in counteracting the calamity)."

The king shall always guard his army carefully against troubles caused by enemies and strike at the weak points of the enemy's army.

The different conditions visualized by the Kautilya some times 2004 years back broadly still guide how to administer and discipline army so that it may be ready to meet out the challenges from its enemies or natural calamities.

79. If the members of the armed force are dealt in an autocratic and feudalistic manner, then, they may loose morale and have resentment in heart with ill consequences.

Compliance of fair and just procedure while dealing with them even if mis-conduct is serious one is must as it shall boost the morale of the army with a message that at no stage injustice shall be done to them while serving the Nation as members of armed forces. The Army Order 1988 broadly meet out this requirement, keeping in view the constitutional spirit.

80. It should be kept in mind that major contribution to the integrity and unity of the country is upon the shoulders of judiciary and armed forces. Neither they are chosen nor appointed on the basis of cast, creed and religion. In case their anguish, angriness, discontentment and frustration or a feeling of injustice continues then the country may suffer with disastrous consequences. By nature and on account of discipline, members of the armed forces ordinarily in majority of cases do not raise voice to ventilate their grievances. Trade unionism is neither justified nor practical or graceful even after retirement. However, after constitution of Armed Forces Tribunal, their grievances are attended efficaciously to impart justice. Hence, the circular letter or Order which facilitate the applicability of fundamental rights conferred by Part III of the

Constitution of India should be enforced rigorously subject to limitation contained in the Army Act itself.

81. Once country expects that armed force personnel should serve the country with dedication and may sacrifice their life to protect the boundaries, then, it is for the countrymen and the Government to look into their grievances within constitutional spirit, by giving much more financial and other benefits (perks) than what is being provided to the bureaucracy and legislature as was at the dawn of independence or suitably higher.

Army Order, 1988 (supra) seems to has been issued with the same spirit so that even if an armed force personnel committed some serious misconduct, he or she should feel that they have been dealt with fairly and justly, keeping in view constitutional spirit.

82. John Webster c 1580-c.1634 in his book (Play) *'The White Devil"* commented with regard to discontent in a person in the following words:-

"Tis just like a summer birdcage in a garden;
The birds that are without despair to get in,

and the birds that are within despair,
and are in consumption,
for fear they shall never get out."

83. In view of the above, the O.A. deserves to be allowed, hence allowed in part.

84. Order dated 07.01.2011 as contained in Annexure-1 and the order dated 11.01.2013 as contained in Annexure 1A to the extent of discharge are set aside with all consequential benefits. Let the applicant be provided consequential benefits within three months. However, we declined to grant relief (b) with regard to prayer made for setting aside red ink entries, hence rejected.

No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

anb/-