

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION NO 49 of 2015**Thursday, this the 03rd day of December 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal Anil Chopra, Member (A)No 15664458 Sigmn Mukesh Kumar,
Son of Late Shri Bijendra Singh, Village and Post Office-Akola,
District Agra (UP)

....Applicant

Ld. Counsel for the: **Col (Retd) Y.R. Sharma, Advocate**
Applicant

Verses

1. Union of India, Through Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Chief of the Army Staff, Army Headquarters, South Block, New Delhi-110011.
3. Sub Area Commander, MP C & Allahabad Sub Area, Allahabad-211001, (UP).
4. Commandant, No. 1 Signal Training Centre (STC), Jabalpur (MP).
5. Commanding Officer, 1 MTR, No. 1 Signal Training Centre (STC), Jabalpur (MP).

...Respondents

Ld. Counsel for the : **Shri Mukund Tewari, Central**
Respondents. **Govt Counsel assisted by**
Capt Priti Tyagi, OIC, Legal Cell.

ORDER (ORAL)

1. The Applicant a soldier of Indian Army being aggrieved with the order of discharge on account of five red ink entries preferred Writ Petition bearing No 13723 of 2009 (SS) in the High Court of Judicature at Jabalpur (MP). Later on the petition was transferred to Armed Forces Tribunal, Regional Bench, Lucknow and re-numbered as T.A. No. 93 of 2013. The petition was dismissed as withdrawn with liberty to file a fresh on 19.08.2014 hence the controversy is raised in the present Original Application is before this Tribunal.

2. We have heard Col (Retd) YR Sharma, Ld. Counsel for the applicant and Shri Mukund Tewari, Ld. Counsel for the respondents assisted by Capt Priti Tyagi, OIC Legal Cell and perused the original record pertaining to case.

3. Admitted facts as pointed out by Ld. Counsel for the parties and borne out from the record show that the applicant was enrolled in the Indian Army in the Corps of Signal on 21.12.1996. Between 08.11.1999 to 20.11.2004, the applicant was punished 3 times for overstaying the leave under Army Act Section 39 (b) and one time for not rejoining duty in time under Army Act Section 39 (a).

4. A show cause notice dated 30.07.2005 was served upon the applicant by officiating Commanding Officer 1 MTR in

response to which the applicant submitted his reply on 31.07.2005. The officer issuing the notice was holding the post in officiating capacity. By order dated 16.01.2006, the applicant was punished under Section 39 (a) for absenting himself without leave. The applicant explained that he was at Agra and had proceeded on leave with the permission of JCO incharge temporary duty party. Another show cause notice dated 23.02.2006 was served by the Commanding Officer to which applicant submitted his reply dated 24.02.2006. It seems to be admitted fact that on the basis of material on record including the original document produced before the Tribunal that after submission of reply to show cause notice by the applicant, no written order was communicated.

5. On 25.02.2006, the applicant was sent and admitted to Military Hospital, Jabalpur on account of Alcohol Dependency Syndrome. The Commanding Officer sent a letter to Allahabad Sub-Area with recommendation that the applicant be discharged from service under Army Rule 13 (3) iii (v) of the Army Rules, 1954. It is submitted that letter was served upon the applicant while he was admitted in the Military Hospital, Jabalpur.

6. The Commanding Officer ordered a Court of Inquiry on 18.04.2006 to investigate the circumstances under which the applicant earned 5 red ink entries while the applicant was

admitted in the Military Hospital. On 25.04.2006 the applicant was discharged from Military Hospital, Jabalpur in Medical Category S3 (T-24). Court of Inquiry was held on 28.04.2006 to investigate the circumstances with regard to awarding 5 red ink entries. Thereafter another show cause notice dated 25.05.2006 was served upon the applicant by Commander HQ MP, C and Allahabad Sub-Area to show cause as to why he should not be discharged from service under Army Rule 13 (3) iii (v) of the Army Rules, 1954. No documents were given to the applicant.

7. Against the show cause notice dated 25.05.2006 the applicant submitted his reply dated 27.05.2006. After receipt of reply submitted by the applicant, a letter was issued by the Adjutant that the applicant shall be discharged from 01.08.2006. The applicant was discharged verbally from the Army without any written order on 22.07.2006.

8. It has been pleaded by Ld. Counsel for the applicant that between 23.07.2006 to 15.03.2007 the applicant continuously requested the authority concerned to provide him a copy of the discharged order, but he failed to get copy of the discharge order. The applicant submitted statutory complaint which seems to have been rejected, but no communication has been received by the applicant. Being aggrieved, the applicant has preferred the Writ Petition and thereafter this Original Application.

9. We have perused the original record which shows that no written order was passed by Brigade/Sub-Area Commander in response to notice (supra). On a perusal of show cause notice it is further revealed that it was served upon the applicant indicating therein that the competent authority proposed to discharge him on account of 5 red ink entries. No other ground has been mentioned in the show cause notice. It has also not been shown in the show cause notice that some Inquiry was held by the competent authority which may make out a case for discharge of the applicant as an undesirable soldier.

10. Attention has been invited by Ld. Counsel for the respondents towards Army Rule 177 which empowers the respondents to hold Court of Inquiry. For convenience, Army Rule 177 is reproduced as under:

*“177. **Court of Inquiry** (1) A court of Inquiry is an assembly of officers or junior commissioned officers or of officers and junior commissioned officers, warrant officers or non commissioned officers, directed to collect evidence and if so required to report with regard to any matter which may be referred to them.*

(Emphasis supplied)

(2) The court may consist of a Presiding Officer, who will either be an officer or a junior commissioned officer, and

of one or more members. The Presiding Officer and members of court may belong to any Regt or Corps of the service according to the nature of investigation.

(3) A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps,”

11. A plain reading of Army Rule 177 (supra) shows that the Court of Inquiry is an assembly of officers or junior commissioned officers or of officers and junior commissioned officers, warrant officers or non commissioned officers, directed to collect evidence and if so required to report with regard to any matter which may be referred to them. As is apparent from Rule 177, the court of inquiry is merely a fact finding body. Participation of the army personnel in the fact finding inquiry seems to be not necessary. Accordingly, merely on the basis of court of inquiry, it appears that a person may not be discharged without compliance of the principles of natural justice. Needless to say that under Army Rule 177, where inquiry is held in the event of invalidment of the character of a army personnel, then presence of officer during whole time of inquiry is must.

12. On the other hand Army Policy of 1988, which has been held by this Tribunal as well as the Hon'ble Supreme Court cases discussed hereinafter, requires a preliminary inquiry with due participation of the charged army personnel and thereafter service

of notice to the army personnel concerned along with copy of the inquiry report. Accordingly, discharge on the basis of court of inquiry convened under Rule 177 (supra) seems to be not permissible unless evidence so collected is used against the army personnel in appropriate proceeding in accordance with statutory mandate with due opportunity to the charged army personnel to rebut the evidence collected during the court of inquiry.

13. It is well settled law that where an authority is mandated under a statute to do certain thing, then it has to be done in the manner provided by the statute and not otherwise, vide **Nazir Ahmed Vs. King Emperor**, AIR 1936 PC 253; **Deep Chand Versus State of Rajasthan**, AIR 1961 SC 1527, **Patna Improvement Trust Vs. Smt. Lakshmi Devi and others**, AIR 1963 SC 1077; **State of U.P. Vs. Singhara Singh and other**, AIR 1964 SC 358; **Barium Chemicals Ltd. Vs. Company Law Board** AIR 1967 SC 295, (Para 34) **Chandra Kishore Jha Vs. Mahavir Prasad and others**, 1999 (8) SCC 266, **Delhi Administration Vs. Gurdip Singh Uban and others**, 2000 (7) SCC 296; **Dhanajay Reddy Vs. State of Karnataka**, AIR 2001 SC 1512, **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others**, 2002 (1) SCC 633; **Prabha Shankar Dubey Vs. State of M.P.**, AIR 2004 SC 486 **Ramphal Kundu Vs. Kamal Sharma**, AIR 2004 SC 1657, **Taylor Vs. Taylor**, (1876) 1 Ch.D. 426; **Nika Ram Vs. State of Himachal Pradesh**, AIR 1972

SC 2077; **Ramchandra Keshav Adke Vs. Govind Joti Chavare and others**, AIR 1975 SC 915; **Chettiam Veettil Ammad and another Vs. Taluk Land Board and others**, AIR 1979 SC 1573; **State of Bihar and others Vs. J.A.C. Saldanna and others**, AIR 1980 SC 326, **A.K. Roy and another Vs. State of Punjab and others**; AIR 1986 SC 2160; **State of Mizoram Vs. Biakchhawna**, 1995 (1) SCC 156.

14. In the present case, the procedure prescribed by the Rules seems to have been violated and while discharging the applicant the well defined statutory provisions have been grossly violated.

15. This Tribunal in the case of **Abhilash Singh Kushwah vs. Union of India and others** (O.A. No. 168 of 2013 decided on 23.09.2015) which has been affirmed by Hon'ble the Supreme Court in the case of **Veerendra Kumar Dubey vs. Chief of Army Staff and others** (Civil Appeal D. No. 32135 of 2015) decided on 16.10.2015. In para-75 of **Abhilash Singh Kushwah's** case, has held as under:

*“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”.*

16. The Hon'ble Supreme Court in the case of **Veerendra Kumar Dubey** (supra) while affirming the aforesaid proposition of law held that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable. For convenience para-12 of aforesaid judgment of the Hon'ble Supreme Court is reproduced as under :-

“12. The argument that the procedure prescribed by the competent authority de hors the provisions of Rule 13 and the breach of that procedure should not nullify the order of discharge otherwise validly made has not impressed us. It is true that Rule 13 does not in specific terms envisage an enquiry nor does it provide for consideration of

factors to which we have referred above. But it is equally true that Rule 13 does not in terms make it mandatory for the competent authority to discharge an individual just because he has been awarded four red ink entries. The threshold of four red ink entries as a ground for discharge has no statutory sanction. Its genesis lies in administrative instructions issued on the subject. That being so, administrative instructions could, while prescribing any such threshold as well, regulate the exercise of the power by the competent authority qua an individual who qualifies for consideration on any such administratively prescribed norm. In as much as the competent authority has insisted upon an enquiry to be conducted in which an opportunity is given to the individual conducted in which an opportunity is given to the individual concerned before he is discharged from service, the instructions cannot be faulted on the ground that the instructions concede to the individual more than what is provided for by the rule. The instructions are aimed at ensuring a non-discriminatory fair and non-arbitrary application of the statutory rule. It may have been possible to assail the circular instructions if the same had taken away something that was granted to the individual by the rule. That is because administrative instructions cannot make inroads into statutory rights of an individual. But if an administrative authority prescribes a certain procedural safeguard to those affected against arbitrary exercise of powers, such safeguards or procedural equity and fairness will not fall foul of the rule or be dubbed ultra vires of the statute. The procedure prescribed by circular dated 28th December, 1988 far from violating Rule 13 provides safeguards against an unfair and improper

use of the power vested in the authority, especially when even independent of the procedure stipulated by the competent authority in the circular aforementioned, the authority exercising the power of discharge is expected to take into consideration all relevant factors. That an individual has put in long years of service giving more often than not the best part of his life to armed forces, that he has been exposed to hard stations and difficult living conditions during his tenure and that he may be completing pensionable service are factors which the authority competent to discharge would have even independent of the procedure been required to take into consideration while exercising the power of discharge. Inasmuch as the procedure stipulated specifically made them relevant for the exercise of the power by the competent authority there was neither any breach nor any encroachment by executive instructions into the territory covered by the statute. The procedure presented simply regulates the exercise of power which would, but for such regulation and safeguards against arbitrariness, be perilously close to being ultra vires in that the authority competent to discharge shall, but for the safeguards, be vested with uncanalised and absolute power of discharge without any guidelines as to the manner in which such power may be exercise. Any such unregulated and uncanalised power would in turn offend Article 14 of the Constitution”.

17. Apart from above, while deciding Original Application No. 222 of 2011: **Rajesh Kumar vs. Union of India** (decided on

01.12.2015), we have taken note of Army Order dated 31.10.2011 which provides detailed provision for carrying out proceedings under Army Rule 13 (3) iii (v) of the Army Rules, 1954 regulating removal of undesirable and inefficient army personnel.

18. It is vehemently argued by Ld. counsel for the respondents that court martial proceedings were initiated against the applicant and he was punished on account of absence without leave and in consequence thereto he was awarded red ink entries. There appears to be no doubt that the applicant was punished on account of overstaying leave and absence without leave and in consequence thereto he was awarded red ink entries, but that aspect of the matter does not co-relate with the procedure to take a decision by following the procedure in terms of Army Rule 13 (3) iii (v). Once red ink entry attains finality then it shall be incumbent upon the army authorities to take separate action keeping in view the decisions of this Tribunal and law propounded by Hon'ble Supreme Court in the cases referred to hereinabove.

19. While parting with the order, it may be observed that we have noticed in number of cases wherein the army personnel has been discharged without passing any written order merely on the sanction of the competent authority. Such action on the part of the Army seems to be not sustainable for the reason that during the course of judicial review the Court or the Tribunal, as the case may be, shall not be able to know the reasons on the basis of

which a army personnel has been discharged. Once a army personnel is served with a notice, keeping in view the conduct and the reply given, then it shall be obligatory on the part of the competent authority of the army to pass a reasoned order, may be precisely, with due communication to the army personnel. Non communication of written order shall be violative of principles of natural justice and hit by Article 14 of the Constitution of India and may vitiate the order of punishment.

20. The purpose of written order is to ensure that not only the incumbent in favour or against whom an order is passed may know the grounds of the punishment or exoneration, but during the course of judicial review the Courts or the Tribunal may know the grounds for passing the impugned order and form an opinion for and against it. In the absence of written order, process of judicial review may suffer with adverse consequences. Apart from this, written order also require to meet out the contingency arose in the event of filing of an application under Right to Information Act to avail copy of the order against which armed force personnel is aggrieved to challenge for the purpose of judicial review.

Written order is also necessary to secure access to information under the control of public authorities and to promote transparency and accountability in the working of every public authority, vide ***Thaalappalam Service Coop. Bank Ltd. vs. State of Kerala***, (2013) 16 SCC 82.

21. Now, it is well settled principle of law that every order passed by quasi-judicial authority, must be speaking and reasoned vide, ***K.R. Deb Vs. The Collector of Central Excise, Shillong***, AIR 1971 SC 1447; ***State of Assam & Anr. Vs. J.N. Roy Biswas***, AIR 1975 SC 2277; ***State of Punjab Vs. Kashmir Singh***, 1997 SCC (L&C) 88; ***Union of India & Ors. Vs. P. Thayagarajan***, AIR 1999 SC 449; and ***Union of India Vs. K.D. Pandey & Anr.***, (2002) 10 SCC 471, ***Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota Vs. Shukla and brothers***, (JT 2010 (4) SC 35, ***CCT Vs. Shukla and Brothers*** 2010 (4) SCC 785

22. In the case of Shukla and Brothers (supra), their lordships held that the reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty, to quote :-

“Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principle are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements”.

The concept of reasoned judgment has become an indispensable part of the basic rule of law and, in fact, is a mandatory requirement of the procedural law”.

23. In another case, reported in **JT (12010) (4) SC 35: Assistant Commissioner, Commercial, Tax Department, Works, Contract and Leasing, Quota. Vs. Shukla and Brothers** their lordships of Hon'ble Supreme Court held that it shall be obligatory on the part of the judicial or quasi judicial authority to pass a reasoned order while exercising statutory jurisdiction. Relevant portion from the judgment of Assistant Commissioner (Supra) is reproduced as under :-

*“The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with high degree of satisfaction. **The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality.** The distinction between passing of an order by an administrative or quashi-judicial authority has practically extinguished and both are required to pass reasoned orders.*

24. Thus, it is well settled proposition of law that not only judicial or quasi-judicial order but even the administrative order affecting the civil rights of the citizens, should be reasoned one to cope with the requirement of Article 14 of the Constitution. Unreasoned order creates instability and distrust in people's mind towards the administration or the authority who has passed such order. In democratic polity, there is no scope to pass an order affecting civil rights of the citizens which may be unreasoned. It is constitutional obligation and right of the citizens to know the reasons in the decision making process affecting their right or cause.

25. The Chief of the Army Staff should look into the matter and issue appropriate order or circular informing all concerned to pass a written order with due communication to the charged army personnel while awarding punishment.

26. In view of the above the O.A. deserves to be allowed, hence allowed. The impugned order of discharge is set aside with all consequential benefits. The applicant shall be deemed to be in service to full of his tenure on the respective rank for the purpose of payment of post retiral benefits. However, we confine payment of back wages to 25%. Let appropriate action be taken and consequential benefits be paid to the applicant expeditiously, say, within 6 months from the date of presentation of a certified copy of this order.

No order as to costs.

26. Registrar shall send a copy of the order to the Chief of the Army Staff to issue appropriate order or circular in the light of observations made in the body of the present order.

(Air Marshal Anil Chopra)
Member (A)

ukt.

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