A.F.R
Reserved
Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 222 of 2011

Tuesday, this 01st day of December 2015

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

Shri Rajesh Kumar (No. 6396890K Sep/Chef Mess)
son of Nafe Singh, r/o Village Sorkhi, Tehsil Hansi,
District Hisar, Haryana.

……Applicant

Ld. Counsel for the: **Col (Retd) Ashok Kumar, Advocate**
Applicant

Versus

1. The Union of India, through Secretary, Ministry of Defence, New Delhi.

2. Major, Adjutant, 531, Armed Service Core Battalion

   C/o 56 APO.

3. Colonel Adjutant, HQ 31 Armed Division, PIN 908431 C/o 56 APO.

…Respondents

Ld. Counsel for the : Respondents. **Shri Mukund Tewari, Central Govt Counsel assisted by Lt Col Subodh Verma, OIC, Legal Cell.**

Per Justice Devi Prasad Singh

1. The instant Original Application under Section 14 of the Armed Forces Tribunal Act, 2007 (for short, Act, 2007) has been preferred by the applicant being aggrieved with the impugned order of discharge dated 30.04.2011 passed in pursuance of red ink entries with the allegation that it has been passed without holding any preliminary enquiry.

2. We have heard Ld. Counsel for the applicant Col (Retd) Ashok Kumar and Shri Mukund Tewari, Ld. Counsel for the respondents and perused the records.

3. Applicant joined the Indian Army as Sepoy (Chef) on 08.11.2002. Through show cause notice dated 22.10.2010 the applicant was directed to explain his conduct based on six red ink entries and show cause why his services may not be dispensed with being undesirable soldier. Copy of the show cause notice has been annexed as Annexure 5 to the O.A.

4. According to the applicant his wife Anita fell ill in 2005 and after prolonged illness expired on 13.01.2007 because of Bone Cancer. Death certificate dated 24.01.2007 has been annexed with the O.A. as annexure-3. It has been submitted that on account of prolonged illness and ultimate death of his wife on account of Bone Cancer, the applicant was under disturbed mental condition, hence for short period he overstayed and absented from service and also started to consume liquor which he

used to purchase from CSD Canteen. After receipt of applicant's reply to show cause notice (supra) applicant was discharged from army by impugned order dated 30.04.2011. A perusal of the medical opinion shows that the applicant was suffering from ALCOHOL DEPENDENCY SYNDROME and placed under low medical category S3 (T-24) and required to work under supervision.

5. In the Counter Affidavit in paras 6 and 7 it has been stated by the respondents that the applicant incurred six red ink entries as well as intoxication while serving in the army. Colonel Adjutant Headquarter of the 31 Armoured Division being not satisfied with the reply given to show cause notice directed the individual to be discharged from service. Accordingly his discharge was recommended by Commanding Officer, 531 Army Service Corps Battalion. The respondents had relied upon Army Headquarter letter dated 28.12.1988 which provides that in consequence to four red ink entries, an individual may be discharged from army.

6. The applicant had been discharged in pursuance of provisions contained in Rule 13 (3) iii (v) of the Army Rule 1954. The rule in question provides that a person may be discharged after serving show cause notice by the Brigade Commander/Sub Area Commander. While doing so, a preliminary enquiry shall be held in pursuance of Army Headquarter letter dated 28.12.1988. However, the averments contained in paragraph 6 & 7 of the counter affidavit shows that decision had not been taken by

Brigade Commander to dispense with the services of the applicant, that too without holding any preliminary enquiry. For convenience sake paragraphs 6 & 7 of the counter affidavit are reproduced as under:

"6. *That despite dealing with the offences under summary trial and punishing by summary awards as reformatory measures, the individual proved himself as incorrigible. The petitioner h as incurred sixth red ink entry on 10th September 2010 for an offence under Army Act Section 48 viz. intoxication while serving with 531 Army Service Corps Battalion. The petitioner was issued a show cause notice in terms of Army Headquarter letter No. a (c) dated 28th December 1988 vide Headquarters 31 Armoured Division letter no. 3302/736/A2 dated 22nd October 2010 duly contemplating his removal from service under the provisions of Army Rule 13 being undesirable/inefficient personnel calling for h is explanation as to why he should not be removed from service. The petitioner submitted his reply o 31st October 2010 that he would not commit any offence in future. The Colonel Adjutant headquarters 31 Armourned Division not satisfied with the reply given to show cause notice had directed that the individual be discharged from service. Accordingly, his discharge was recommended by Commanding Officer 531 Army Service Corps Battalion and sanctioned by General Officer Commanding Headquarters 31 Armoured Division on 3rd December, 2010 being the Competent Authority.*

7. That as per Army Headquarters letter No. A/13210/159/AG/PS 2 (c) dated 28th December, 1988, the person consequent to four red ink entries will be locally discharged from service as undesirable and inefficient soldier."

7. Rule 13 (3) iii (v) of the Army Rule 1954 confers power upon the Brigade Commander/Sub Area Commander to take independent decision on his own at local level for discharge of undesirable and inefficient soldier. It appears that decision has not been taken by the local Brigade Commander/Sub Area Commander but decision to discharge applicant was taken by Colonel Adjutant, Headquarters 31 Armoured Division which has been complied with by the Officer Commanding while sanctioning for discharge. Once a statutory authority authorises service of notice and to take decision for discharge from services, then that should be done by the same authority by applying his/her own mind and not by others by passing a speaking and reasoned order. It is well settled proposition of law that a thing should be done in the manner provided under the Act or statute and not otherwise. It appears that no decision has been taken by the Brigade Commander/Sub Area Commander himself by applying his individual mind with regard to suitability of the applicant for continuance in service. The manner provided in the Rule has not been followed.

8. In the case of ***Mansa Ram Yadav & ors vs. State of U.P. & ors*** reported in 2009 (27) LCD 1232, it has been observed by

their Lordships of Hon'ble Supreme Court that settled law is that a thing should be done in the manner provided by the Act or statute and not otherwise. While construing an Act, Rule or Regulation, each word should be given meaning and considered in its totality.

9. In ***CCT vs. Shukla and Brothers***, reported in 2010 (4) SCC 785 the law settled by Hon'ble Supreme Court is that 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 (Para 24). Their Lordships further held that 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 principles 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 (Para 13).

10. In a plethora of cases, it has been held that authorities have to record reasons disclosing the ground of punitive action otherwise it may become a tool for harassment of the delinquent in the hands of authority. (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&S) 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).

11. Since the procedure prescribed in Rule 13 (3) iii (v) of the Army Rule 1954 has not been followed and decision has not been taken individually by the same authority, the impugned order of discharge suffers from vice of arbitrariness, hence hit by Article 14 of the Constitution of India.

12. Apart from above, attention has been invited to Circular dated 31.10.2011 regulating procedure for removal of undesirable and inefficient JCOs and others. Circular dated 31.10.2011 issued by the Army Headquarter is reproduced as under:

"Additional Directorate General
Discipline and Vigilance
Adjutant General's Branch,
Integrated HQ of MOD (Army
New Delhi- 110 011.

41776/AG/DV-1(P) *31 Oct 2011*

Headquarters
Southern Command (DV)
Eastern Command (DV)
Western Command (DV)
Central Command (DV)
Northern Command (DV)
South Western Command (DV)
Army Trg Command (A)
Andaman & Nicobar Command
Strategic Forces Command

DISCIPLINE-REMOVAL OF PBOR WITH RED INK ENTRIES

1. Reference this HQ letter No.41776/48/AG/DV-1(P) dated 07 Apr 2004 and No. 41776/AG/DV-1(P) dated 29 Apr 2011.

2. Henceforth, cases for dismissal/discharge on four red ink

entries are to be referred to DJAG Corps/Comds for legal vetting prior to sanction by the Bde Cdrs. Status quo will be maintained in respect of the sanctioning authority for discharge/dismissal i.e. Bde Cdr.

Sd/-
(Indulekha Haldar)
Dir
AG/DV-1
For Adjutant General"

PROCEDURE FOR REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs WO's AND OR

Check-list

Ser No.	*Event*	*Action by*	*Working Days*	*Remarks*
1	*CO/OC unit intends to recommend an individual for discharge/dismissal under AR 13 and AR 17*	*CO/OC Unit*	*D*	
2	*.Preliminary Enquiry conducted in accordance with Para 5 (a) of the policy letter dated 28 Dec 1988*	*CO/OC Unit*	*D+1 to D+3*	
3.	*The case for discharge/dismissal is fwd to competent authority duly recommended through normal channel alongwith the proceedings of the enquiry (referred to at Para 2 above)*	*-do-*	*D+4*	
4.	*Intermediate authorities through whom recommendations pass will consider the case in the light of what is stated in the prelimin enquiry proceedings and make their own recommendations. The case will be few by last intermediate auth to competent authority for decision.*	*Intermediate authorities*	*D+4 to D+10*	
5.	*The competent auth will consider the case in the light of Preliminary enquiry and recommendations of the intermediate authorities and if satisfied that the termination of service of the indl is warranted, will direct the issue of a Show Cause Notice to the indl in accordance with Para 5 (d) of policy letter dt 28 Dec 1988.*	*The competent authority`*	*D+10*	
6.	*On receipt of direction from the competent authority, a show cause notice alongwith a copy of enquiry proceedings held in the case will be issued to the individual.*	*Show cause notice will be issued either by the competent authority himself or by his staff/CO/OC Unit on his behalf*	*D+11*	
7.	*Individual's reply to the show cause notice will be fwd through normal channel to the competent authority.*	*CO/OC Unit*	*D+14*	
8.	*The case will be reconsidered by the competent authority in the light of*	*The competent authority*	*D+16*	

	indl's reply to the show cause notice and pass necessary orders for termination of service or otherwise in accordance with Para 5 (f) of the policy letter dated 28 Dec 1988.			
9.	*On receipt of orders of the competent authority for dismissal/discharge, all necessary action to effect dismissal/discharge will be taken by the Unit/Record Offices concerned.*	*CO/OC Unit, Regimental Centre, Record Offices concerned*	*D+30*	

13. Circular dated 31.10.2011 provides that decision shall be referred to DJAG Corps/Comds for legal vetting prior to sanction by the Brigade Commander. In the present case, it appears that no legal vetting has been done by DJAG branch of the Army.

14. Perusal of the Circular further shows that preliminary enquiry shall be conducted according to para 5A of the policy and thereafter with due recommendation and legal vetting, on the basis of preliminary enquiry report on receipt of reply to show cause notice, the incumbent may be discharged from Army services complying procedure prescribed by Army Headquarter Letter 28.12.1988 as well as Circular letter dated 31.10.2011.

15. In a decision of this Tribunal in O.A No. 168 of 2013, ***Abhilash Singh Kushwah*** vs. ***Union of India and others*** decided on 23.09.2015, it has been held that merely on the basis of red ink entries and Show Cause Notice, no army personnel can be dismissed from service. Army Order 28.12.1988 has got statutory force. The relevant portion of order as contained in para 75 of the order/judgment is reproduced as follows:

"*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 principle of law laid down by this Tribunal seems to have been affirmed by Hon'ble Supreme Court in recent judgment dated 16.10.2015 passed in ***Civil Appeal D. No. 32135 of 2015 Veerendra Kumar Dubey Vs. Chief of Army Staff and others*****.** The Hon'ble Supreme Court while affirming the aforesaid proposition of law also 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. Before parting with, it may be noticed that since opinion of

the JAG Branch is not being obtained, petitions are filed in the Tribunals against orders of discharge from Army services suffering from vice of arbitrariness and substantial illegality and in consequence thereof there is no option but to set aside order of discharge. It shall be appropriate that the Circular dated 31.10.2011 of the Army Headquarter be complied with in its letter and spirit.

18. To sum up:

(i) The procedure prescribed by Army Headquarter Letter dated 11.10.2011 read with Rule 13 (3) iii (v) of Army Rules, 1954 has not been followed.

(ii) Decision to discharge applicant has not been taken by Brigade Commander/Sub Area Commander, hence the statutory authority appears to not have applied his mind, but he has passed order on the opinion expressed by Colonel Adjutant Headquarter, which is not permissible under the relevant Rules and Army Headquarter Letter (supra).

(iii) No preliminary inquiry was held and along with show cause notice no preliminary inquiry report was served, hence the impugned order of discharge is violative of principles of natural justice and suffers from vice of arbitrariness.

(iv) It shall be appropriate if the respondents do vetting with the JAG Branch while taking decision with regard

to dismissal or discharge or awarding punishment to armed force personnel since it affects fundamental right of livelihood conferred by Article 21 of the Constitution.

19. In view of above, the O.A. deserves to be allowed; hence is allowed.

Impugned order of discharge dated 30.04.2011 is set aside. with consequential benefits.The applicant shall be restored in service to complete the left over period of the rank till age of superannuation with all consequential benefits. However, payment of back wages shall be confined to 25% admissible under Rules along with perks. Incase the applicant has already spent the serviceable period, his continuance in service shall be notional for the purpose of post retiral dues. Let decision be taken in the light of observation made in the body of order and the applicant be provided all consequential benefits expeditiously, say, within six months from the date of production of a certified copy of this order.

Let a copy of present order be sent by Registrar for compliance to Chief of the Army Staff within a week.

No order as to costs.

(**Air Marshal Anil Chopra)**
Member (A)

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

anb