AFR
Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO 130 of 2014

Tuesday, this the 09th day of February 2016

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

Adesh Kumar No. 2895984Y, (Ex. Sep/Rfn), son of Sri Suresh Chand, resident of Village: Mohammadpur Nadai, Post: Gurha, Tehsil: Shikohabad, P.S.-Nasirpur, District: Firozabad (UP)-205141.

……..Applicant

Ld. Counsel for the: **Shri V.K. Pandey, Advocate**
Advocate

Versus

1. Union of India through Secretary to the Government of India, Ministry of Defence, South Block, R.K. Puram, New Delhi-110011.

2. General Officer Commanding, HQ 18 Inf Division c/o 56 APO.

3. Brigade Commander, 74 Inf Bde, 12 A2.

4. Commanding Officer, 5 Raj Rif, c/o 56 APO.

5. Additional Directorate General Desep & Vigilance (DV-3A) Adjutant General Branch, AHQ, DHQ, PO New Delhi-110011.

…….Respondents

Ld. Counsel for the : Respondents. **Mrs. Appoli Srivastava, Central Govt Counsel assisted by Lt Col Subodh Verma, OIC Legal Cell.**

ORDER (ORAL)

1. Heard Ld. Counsel for the parties and perused the records.

2. This application under Section 14 of the Armed Forces Tribunal Act 2007 has been filed being aggrieved with the discharge from army orally through the movement order without serving any discharge order to the applicant.

3. The admitted position borne out from the arguments advanced by Ld. Counsel for the parties reveals that the applicant was recruited as Sepoy/GD Soldier in Rajput Rifles on 05.07.1999 and after due training he was attested as Infantry Solder on 08.04.2000 and served the army from 1999 to 2007. According to Ld. Counsel for the applicant the applicant solemnized marriage with one Smt. Madhu Devi on 08.04.2000. Further submission is that in July 2001, the applicant came back to his house but could not find his wife. It was in January 2002, the applicant came to know that his wife has become pregnant allegedly without any physical relationship with the applicant. It appears that the applicant left his wife to secure the honour of his family. It is alleged by Ld. Counsel for the respondents that the applicant has re-married with another lady, namely, Smt. Shashi Kumari and after necessary inquiry, he was discharged from service on 24.10.2007. Submission of Ld. Counsel for the respondents is that regular inquiry was held and thereafter the applicant has been discharged from service.

4. While assailing the conduct of the respondents, the applicant has categorically pleaded that no regular inquiry was held nor summary of evidence was recorded nor the applicant was charge sheeted. It has also been stated in para 4.9 of the O.A. that only in the movement order dated 24.10.2007, it is mentioned that the applicant has been discharged from service. For convenience sake para 4.9 of the O.A. is reproduced as under:-

> *"4.9 That there is no Court of Inquiry, Summary of Evidence, Summary Court Martial, Defence Lawyer, Charge sheet and sentence was made in the case of the applicant and applicant has been directly discharged from service by giving only movement order dated 24.10.2007. The copy of the movement order passed by the respondent No 4 is being filed herewith as* ***Annexure No. 2*** *to this original application".*

5. In response to averment contained in para 4.9 of the O.A., on behalf of the respondent, in para 32 of the Counter Affidavit, it has been stated that since the applicant has contacted plural marriage during the period when his first marriage was sustaining as such he was discharged from the army. Para 32 of the Counter Affidavit is reproduced as under:-

> *"32. That in reply to contents of paragraph 4.9 according to AO 44/2001/DV and para 333 (B) (h) of Regulations for the Army 1987, when a person has contracted plural marriage whose previous marriage is subsisting, no discp action by way of trial by court martial or summary disposal will*

be taken against him, but administrative action to terminate his service will be initiated and the case shall be reported to higher authorities. As far as JCOs/OR is concerned the case will be obtained for administrative action should be taken against the indl. As per the aforesaid rules, Respondent No 4 (i.e. 5 RAJRIF) took up case with HQ South Western Command for administrative action against the applicant".

6. A perusal of para 32 of the Counter Affidavit shows that the respondents have relied upon A.O. 44 of 2001/DV and para 333 (B) (h) of the Regulations for the Army. For convenience sake para 333 (B) (h) of Regulations for the Army and Army Order 44 of 2001/DV are extracted as under:-

"***333. (B) (h) Plural Marriages.***- *(A) The Special Marriage Act 1954 and Hindu Marriage Act, 1955 lay down the Rule of 'Monogamy' that is, neither party has a spouse living at the time of marriage. These Acts also provide for decrees of nullity of marriage, restitution of conjugal rights, judicial separation and divorce and also orders for alimony, and custody of children. The Hindu Marriage Act applies to all Hindus, Budhists, Jains and Sikhs and also applies to all other persons (with certain exceptions), who are not Muslims, Christians, Parasis or Jews by religion. Christians, Parsis and Jews are also prohibited under their respective personal laws from contracting a plural marriage. Thus no person who has solemnised or registered his/her marriage under the Special Marriage Act or who is a Christian, Parsi or Jew or*

to whom the Hindu Marriage Act, 1955 applies, can now re-marry during the life time of his or her, wife or husband. Sub-para (C) (a) to (c) below apply to such persons only. A Muslim or such other person to whom the Hindu Marriage Act does not apply and whose personal law does not prohibit Polygamy or Polyandry can marry during the life time of his or her, wife or husband and Sub Para (B) (a) to (h) below apply to such persons only.

(B) Plural Marriage *by persons in whose case it is permissible:--*

(a) ……. .

(h) In no circumstances will disciplinary action by way of trial by Court Martial or Summary Disposal be taken against in an individual who is found to have contravened the provisions of clause (b) above.

If, however, the individual is also to have committed another offence connected with his act of contracting a plural marriage, disciplinary action for the connected offence may be taken and progressed in the normal manner".

7. In the counter affidavit the respondents have quoted contents of para 14 of AO 44 of 2001 (DV) and for the reason best known to them the other relevant provisions discussed hereinafter as contained in para 5, 6, 7 and 8 have not been quoted. The relevant portion of para 14 as quoted in the counter affidavit is reproduced as under:-

"*That when a person has contracted plural marriage whose previous marriage is subsisting, no disciplinary action by way of trial by court martial or*

Summary Disposal will be taken against him, but administrative action to terminate his service will be initiated and the case shall be reported to higher authorities. As far as PBOR is concerned the case will be submitted to GOC-in-C Command who will decide whether ex-post-facto sanction should be obtained or administrative action should be taken against the individual.

That in case, where cognizance has been taken by civil court of competent jurisdiction the matter should be treated as sub judice and action will be taken on receipt of decision taken by the court. When a pers has been convicted of the offence of bigamy or where his marriage has been declared void by a decree of court on grand of plural marriage, action will be taken to terminate his service under AA Sec 19 read with Army Rule 14 or AA Sec 20 read with Army Rule 17 as the case may be".

8. A plain reading of the aforesaid provision shows that the respondents may discharge army personnel on the ground of plural marriage through administrative action. It means that while discharging Army personnel for plural marriage the respondents have to serve show cause notice enumerating in brief the material relying upon which the charges are found to be correct with regard to plural marriage. From the record, it is borne out that a show cause notice was served on the applicant to which he submitted his reply. During the course of hearing, attention of the Court has been invited that the show cause notice was served to the applicant and the applicant has submitted his reply but neither any decision was taken in writing

nor any order was communicated to the applicant. The purpose of show cause notice is to apply mind and pass a reasoned and speaking order with due communication to the incumbent. The purpose of communicating the order is that the person being discharged from Army service may be informed how the competent authority has applied mind to dispense him from service. In case no written order is passed with regard to discharge of Army personnel, after receipt of show cause notice, it shall be in violation of principles of natural justice.

9. The relevant portion of AO 44/2001 (DV) relevant for the present controversy is reproduced as under :-

> "*5. No person subject to the Army Act except Gorkha personnel of Nepalese domicile, whose personal law permits plural marriage and whose previous marriage is subsisting, will marry again without prior sanction of the Central Government.*
>
> *6. An individual may, during the life time of his wife apply for sanction to contract a plural marriage on any one or more of the following grounds :-*
>
> *(a) His wife has deserted him and there is sufficient proof of such desertion;*
>
> *(b) His wife has been medically certified as being insane.*
>
> *(c) Infidelity of the wife has been proved before a court of law.*
>
> *7. Applications will state the law under which the subsisting marriage was solemnised, registered or performed and will include the following details where applicable:-*

(a) Whether the previous wife will continue to live with the husband:

(b) If the previous wife does not propose to live with the husband, what maintenance allowance is proposed to be paid and in what manner:

(c) Name, age and sex of each child by previous marriage and the maintenance allowance proposed for each in case any such child is to live in the custody of the mother.

In all cases, the applicant will render a certificate to the effect that he is not a Christian, Parsi or Jew by religion: that he had not solemnised or registered his previous marriage under the Special Marriage Act, 1954 and that the Hindu Marriage Act, 1955 is not applicable to him.

8. Applications will be forwarded through normal channels and each intermediate commander will endorse his specific recommendations. Such recommendations will be signed by the commander himself or be personally approved by him. Before making his recommendations a commander will satisfy himself that the reasons given for the proposed plural marriage are fully supported by adequate evidence.

9. An individual whose marriage is alleged to have been dissolved according to any customary law but not by a judicial decree will report, immediately after the divorce, the full circumstances leading to and culminating in dissolution of marriage together with a valid proof of the existence of alleged custody or personal law. Existence and validity of the same, if considered necessary, will be got verified from civil authorities and if it is confirmed by the civil authority action will be taken to publish casualty for the dissolution of the marriage. The individual

thereafter will not be required to obtain sanction for contracting the second marriage.

10. A literal interpretation of the aforesaid provision of AO No 44/2001(DV) shows that before taking a decision it shall be incumbent upon the appropriate authority to find out whether plural marriage is permissible or not permissible along with eligibility or ineligibility for enrolment/appointment in Army.

In the present case no exercise has been done keeping in view the aforesaid guidelines contained in AO 44/2001 (DV). Further paras 5, 6, 7, 8 and 9 (supra) show that on certain grounds plural marriage is permissible i.e. (i) in case the wife of army personal has deserted him and there is sufficient proof such desertion; (ii) his wife has been medically certified as being insane; and, (iii) there is sufficient proof of infidelity of the wife proof before the court of law and in case any one or more of said grounds are satisfied, plural marriage seems to be permissible. It means the appropriate inquiry should be done before discharging army personal keeping in view allegations with regard to plural marriage in the light of different conditions provided in AO 44/2001 (DV) (supra).

11. As stated above in the present case the provisions contained in AO 44/2001 (DV) seems to not have been complied with. The order of discharge seems to have been passed without following due process of law, hence suffers vice of arbitrariness. Opportunity must have been given with preliminary inquiry to the applicant to explain his case with

regard to plural marriage and to justify it in the light of AO 44/2001 (DV). Since admittedly no opportunity was given the order seems to be violative of principles of natural justice as well as procedure prescribed for the purpose.

12. Apart from above para 14 of AO 44/2001 (DV) provides termination will be done under AA Sec. 19 read with Army Rule 14 or AA Sec. 20 read with Army Rule 17, as the case may be.

13. While deciding Original Application No. 168 of 2013 **Abhilash *Singh Kushwah* vs. *Union of India*** it has been settled by this Court that holding of preliminary inquiry is condition precedent while discharging Army personal in pursuance of Rule 17. Army Order 28.12.1988 has got statutory provision. The relevant portion of para 75 of the judgment is reproduced 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".

14. The principle of law laid down by this Tribunal seems to have been affirmed by Hon'ble Supreme Court in judgment passed in **Civil Appeal D. No. 32135 of 2015 *Veerendra Kumar Dubey Vs. Chief of Army Staff and others***

For convenience sake, 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".

15. Attention has also been invited to Sections 22 and 23 of the Army Act which provides that if Army person is removed or discharged, he/she shall be communicated the decision taken by the authority. Section 22 and 23 (supra) has been further clarified by Army Rule 12 which is reproduced as under:-

> "***12. Discharge Certificate.***—*(1) A certificate required to be furnished under the provisions of section 23 is hereinafter called a "discharge certificate"*
>
> *(2) A discharge certificate may be furnished either by personal delivery thereof by or on behalf of the commanding officer to the persons dismissed, removed, discharged or released, or by the transmission of the same to such person by registered post."*

16. Section 23 of the Army Act, 1950 provides that an enrolled person who is dismissed, discharged, retired or released from the service shall be furnished with a certificate in the language which is the mother tongue of the person and also in the English language setting forth-(a) the authority terminating service; (b) the cause of such termination; and (c) the full period of his service in the regular Army. It is not disputed by Ld. Counsel for the respondents that no discharge order was passed and served upon the applicant. Mere mention in the movement order does not seem to be sufficient compliance of principles of natural justice or the administrative action. Much water has flown since the framing of Army Orders and Regulations with regard to providing procedure for discharge of Army personnel on account of plural marriage. Under the right to information act an incumbent has right to move application to ask for any order/decision taken by the army to discharge from service. It is always incumbent on the army authorities to pass a speaking and reasoned order after

serving show cause notice even while decision is taken for discharge from army service on account of plural marriage. Since no written communication has been made, the decision of the respondents discharging the applicant through movement order suffers from vice of arbitrariness and hit by Article 14 of the Constitution of India.

17. During course of arguments attention has been invited to para 19 of the counter affidavit according to which show cause notice was served on the applicant and the applicant submitted his reply but the fact remains that no decision or order has been communicated to the applicant. Neither the order of discharge nor any communication was made after adjudicating the controversy. The purpose of show cause notice is to apply mind and pass reasoned order with due communication to the incumbent and that the incumbent or the charged Army personal may know the grounds on which he/she has been discharged and the competent authority has applied his mind while adjudicating the controversy, which may be considered in judicial review by the Court or the Tribunal. In case no written order with regard to discharge of Army personal after receipt of reply to show cause notice is passed, it shall be in violation of principles of natural justice and it shall not be possible for the Tribunal to understand the grounds/reasons for discharge.

18. A Division Bench of Allahabad High Court, Lucknow Bench, Lucknow while deciding case relating to supply of medical records by the hospitals and nursing homes, in the

case of ***Sameer Kumar vs. State of U.P.***, [2014(32) LCD 2436] of which one of us (Justice D.P. Singh, J) was also a Member, and delivered judgment on behalf of the Bench held that supply of copy of medical prescription is necessary so that it may be used for approaching the Consumer Forum to assail the conduct of medical professionals. While relying upon the judgments of Hon'ble Supreme Court, it was held in para-26 as under:

> *"26. Section 3 of the RTI Act confers right to information to all the citizens and corresponding obligation under Section 4 on every public authority to maintain record so that the information sought for, be provided vide AIR 2014 SC 263:T.S.R. Subramanyan and others v. Unionof India and others. In the case of T.S.R. Subramanyam (supra), their lordships of Hon'ble Supreme Court settled that nothing should be done by oral instructions and the practice of giving oral directions and directions by administrative superiors and public executives, would defeat the object and purpose of RTI Act and shall give room for favouritism and corruption. In view of the above, every decision taken for the purpose of treatment of a patient or instruction issued by the doctors to their subordinates, must be converted in writing indicating the name of doctors."*

19. In view of above it is necessary that army personal should be communicated the decision in writing so that incumbent may approach appropriate forum for judicial review of the order, on specified ground.

20. Accordingly O.A. deserves to be allowed, hence allowed. We set aside the order of discharge with all consequential benefits. In case service is left, the applicant shall be re-instated in service but without back wages forthwith. We give

liberty to the respondents to proceed afresh in accordance with rules, if they desire to do so.

No orders as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

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