

Court No.2**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No 351 of 2012**Wednesday, this the 16th day of March 2016**Hon'ble Mr. Justice D.P. Singh, Member (J)****Hon'ble Air Marshal Anil Chopra, Member (A)**

Ex-Rifleman (Sepoy) Vishal Thapa (No. 5048140-Y) of 5th Battalion of 1st Gorkha Rifles (5/1 GR), C/o 56 APO son of Shri Chandra Bahadur Thapa, resident of Village & Post Office-Nehrugram, Dehradun (Uttarakhand), Pin code-248001.

...Applicant

Ld. Counsel for the: **Shri P.N. Chaturvedi, Advocate**
Applicant

Versus

1. Chief of Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi-110011.
2. Officer-in-Charge, Artillery Records, 14 Gorkha Rifles Training Centre, Sabathu (Himachal Pradesh).
3. Commanding Officer, 5th Battalion of the Gorkha Rifles, C/o 56 APO.
4. Principal Controller Defence Accounts (Pension), Draupadi Ghat, Allahabad.

.....Respondents

Ld. Counsel for the : **Mrs Deepti Prasad Bajpai, Advocate**
Respondents **Central Govt Counsel assisted by**
Lt Col Subodh Verma, OIC Legal
Cell.

ORDER (ORAL)

1. This is an application under Section 14 of the Armed Forces Tribunal Act, 2007 preferred by the applicant being aggrieved with the impugned order of discharge dated 15.03.2008 on account of five red ink entries.
2. We have heard Ld. Counsel for the parties and perused the record.
3. Admitted facts are that the applicant was enrolled in the Army on 02.01.2000 in 14 Gorkha Rifles. Show cause notice dated 19.01.2008 was served on the applicant as contained in Annexure A-2 to the O.A. to show cause as to why his services may not be terminated on account of five red ink entries in pursuance to provisions contained in Army Order dated 28.012.1988. After considering the reply submitted by the applicant, the applicant was discharged from service on 15.03.2008.
4. Submission of Ld. Counsel for the applicant is that no discharge certificate was issued to the applicant at the time of discharge. It has further been submitted that no preliminary inquiry was held in accordance with Army Order dated 28.12.1988 which has been supplemented by Army Order of the year 2011 and the discharge merely on the basis of red ink entries is not sustainable. Ld. counsel for the petitioner

relied upon the judgment of this Tribunal delivered in O.A. No. 168 of 2013 **Abhilash Singh Kushwah vs. Union of India** decided 23.09.2015. The principle of law laid down by this Tribunal in the case of **Abhilash Singh Kushwah** 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** decided on 16.10.2015. For convenience sake para 75 of the judgment of this Tribunal in **Abhilash Singh Kushwah's** case (supra) 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".

5. 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 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 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”.

6. Accordingly, the O.A. deserves to be allowed and the impugned order of discharge deserves to be set aside.

7. The O.A. is allowed. Order dated 15.03.2008 discharging the applicant from service is set aside with all consequential benefits. However, payment of back wages to the applicant is confined to 25%, but for all other service benefits he shall be deemed to be in service. The order shall be complied with expeditiously, say, within four months from the date a certified copy of this order is produced before the competent authority. We further provide liberty to the respondents to proceed against the applicant afresh in case advised to do so.

8. O.A. is **allowed** accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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