

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
COURT NO. 2

O.A. No. 377 of 2012

Wednesday ,this the 13th day of April, 2016

"Hon'ble Mr. Justice D.P. Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

Arvind Kumar, Army No. 14639130M Sepoy, son of Late Shri Rich Pal Singh, Age about 28 years, r/o - Village - Shikarpur, Tehsil- Baraut, Distt - Baghpat (Uttar Pradesh) Unit : OIC Records, 3 EME Centre Commanding Officer 627 EME Battalion, C/O 56 APO Also Officer Commanding 860 Fd. Workshop Company, EME, C/O 56 APO.

.... Applicant

Versus

1. Union of India, through its Secretary, Govt of India, Ministry of Defence, South Block, New Delhi – 110 011
2. The Chief of Army Staff
Army Headquarters
New Delhi – 110 011
3. Officer-in-charge, EME Records
Secunderabad – 21
4. General Officer Commanding
27 Mountain Division
C/O 56 Army Post Office.
5. Officer Commanding 860 Field Workshop
Care of 56 Post Office
6. Commanding Officer
627 EME Battalion
C/O 56 APO

....Respondents

Ld. Counsel appeared for the Applicant

**- Shri S.K.Singh,
Advocate**

Ld. Counsel appeared for the Respondents

**- Shri Yogesh Kesarwani,
Central Govt.
Standing Counsel**

ORDER (ORAL)

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act 2007 assailing the impugned order of discharge passed on the ground of red ink entries.
2. We have heard Shri Shailendra Kumar Singh learned counsel for the Applicant and Shri Yogesh Kesarwani, learned counsel for the respondents. We have also been taken through the materials on record.
3. Admittedly, the Applicant joined the Indian Army on 30.06.1997. While continuing in service, he was served with a show cause notice on 18.10.2005 a copy of which has been annexed as Annexure A-1 to the present O.A. The notice shows that the applicant was given punishment on eight occasions with red and black ink entries and hence he was called upon to show cause why his services may not be terminated in pursuance of the provisions of Army Rule 13 (3) Item III (v) and Army HQ letter dated 28.12.1988. After receipt of show cause notice, the Applicant submitted his reply. Thereafter, he was discharged from service by the impugned order dated 26.11.2005. Being aggrieved, the applicant filed a writ petition being Writ Petition No 52219 of 2007 in the High Court at Allahabad which was disposed of by order dated 25.10.2007 directing the respondents to decide the statutory appeal preferred by the petitioner within three months. The statutory appeal was rejected vide communication issued under the signatures of OIC Records dated 06.04.2008. It is stated that the counsel engaged by the Applicant was given fee to file writ petition in the High Court but the same was not filed which the Applicant came to know after inordinate delay and thereafter, he preferred the present

O.A. The aforesaid O.A was admitted by the Tribunal vide order dated 15.10.2015.

4. While assailing the impugned order of punishment, the learned counsel for the Applicant submitted that it has been passed solely on the ground of four red ink entries and four black ink entries which were inflicted on the Applicant without holding preliminary enquiry and serving notice under rule (supra) and discharge merely on the basis of red ink entries is not sustainable. Reliance has been placed upon the judgment of this Tribunal delivered in **O.A. No. 168 of 2013 Abhilash Singh Kushwah vs. Union of India dated 23.09.2015.** The principle of law laid down by this Tribunal seems to have been affirmed by Hon'ble Supreme Court in recent judgment passed in **Civil Appeal D. No. 32135 of 2015 Veerendra Kumar Dubey Vs. Chief of Army Staff and others dated 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. Non 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, 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”.

6. While allowing the aforesaid appeal, the Hon'ble Supreme Court has restored the appellant of the case with continuity of service till the time he would have completed the qualifying service for grant of pension. However, no back wages were made admissible.

7. In view of the above, the O.A deserves to be allowed and the impugned order deserves to be set aside with all consequential benefits.

8. As a result of foregoing discussions, the O.A is allowed. The impugned order dated 26.11.2005 and the order of rejection of statutory complaint dated 06.04.2008 with all consequential benefits. However, the past wages are confined to 25%. For the purpose of post retiral dues, the Petitioner shall be deemed to be in service to the full length of his rank and consequential benefits would accrue to him accordingly. Let consequential benefits be provided within four months from the date of receipt of a certified copy of this order.

9. There shall be no order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dt April ,2016

MH/-