

COURT NO. 2**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 308 of 2015****Tuesday, this the 16th day of August, 2016****"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"**

No. 15167463H Ex.Gnr. (GD) Bimay Kumar son of Shri Nand Kishore, R/O
Village Turki Mau Post Girsi, District Kanpur Dehat.

.... Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence (Army) South Block New Delhi.110001.
2. The Brigadier, Hqrs. 26 Arty, Brigade Pin Code 926126 C/o 56 APO.
3. The Officer-in-Charge Records, Nasik Road Camp-422102
APS Pin 908802.

....Respondents

Ld. Counsel appeared for the: Shri Krishna Lal, Advocate
Applicant

Ld. Counsel appeared for the: Shri Kaushik Chatterji, Central
Respondents Govt Standing Counsel assisted
By Maj Soma John, OIC Legal
Cell.

ORDER (ORAL)

- 1 This petition under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred being aggrieved with the impugned order of discharge from Army service in pursuance to provisions contained in Rule 13 (3) III(v) of Army Rules, 1954 of the basis on five red ink entries.
2. We have heard Ld. Counsel for the applicant and Ld. Counsel for the respondents assisted by OIC Legal Cell at length and perused the record.
3. Brief facts as are borne out from the record are that the applicant was enrolled in the Army as Gunner on 05.09.2003. He was served with a show cause notice on 20.10.2011. Reply to the show cause notice was submitted by the applicant on 01.11.2011. The applicant was discharged from Army service on 25.11.2011.
4. At the very threshold, Ld. Counsel for the applicant submitted that no preliminary inquiry was held in pursuance of Army Order dated 28.12.1988 with due participation of the applicant in utter contravention to the law settled by the Tribunal as well as Hon'ble Supreme Court of India. Ld. Counsel invited attention to the decision of this Tribunal O.A. No. 168 of 2013: ***Abhilash Singh Kushwah vs. Union of India & ors*** decided on 23.09.2015 as well as case ***of Veerendra Kumar Dubey vs. Chief of Army Staff & ors*** in Civil Appeal (D) NO. 32135 of 2015 decided by Hon'ble the Supreme Court.
5. Ld Counsel for the respondents could not dispute that along with the show cause notice, no preliminary inquiry report has been attached and served on the applicant. This fact in itself indicates that without holding any

preliminary inquiry with due participation of the applicant, he has been discharged from service.

6. This Tribunal in the case of ***Abhilash Singh Kushwah vs. Union of India & ors.*** (supra) held that Army Order 28.12.1988 is statutory in nature and discharge from Army without following the procedure provided by Army Order 1988 (supra) seems to suffer from vice of arbitrariness. 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 petitioner 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 remains 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”.

7. The Hon'ble Supreme Court while affirming the aforesaid proposition of law also held in the case of **Veerendra Kumar Dubey** (supra) 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. Insomuch 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”.

8. In view of what has been said above, we are of the view that the order of discharge suffers from vice of arbitrariness and deserves to be set aside.

9. O.A. is accordingly **allowed**. Discharge order dated 25.11.2011 is set aside. The applicant shall be restored in service forthwith with all consequential benefits, but without back wages.

10. However, it shall be open for the respondents to proceed against the applicant for any future cause of action in accordance with rules.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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