

**Court No. 1**  
**Reserved Judgment**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW**

**Original Application No. 400 of 2017**

**Friday this the 13<sup>th</sup> day of July, 2018**

**Hon'ble Mr. Justice S.V.S.Rathore, Member (J)**  
**Hon'ble Air Marshal B.B.P.Sinha, Member (A)**

**No. 15501647P Ex Swr Guru Prakash Pandey,  
S/o Ramashankar Pandey, R/o Vill & Post – Hinauta,  
Tehsil- Manjhanpur, District - Kausambi**

**..... Applicant**

By Legal Practitioner: Shri P.K. Shukla, Advocate  
Learned Counsel for the Applicant.

Versus

1. Union of India through the Secretary,  
Ministry of Defence, 101 South Block,  
New Delhi-110001.
2. Chief of The Army Staff, Integrated Headquarter of Ministry of  
Defence (Army), South Block, New Delhi 110011.
3. Officer-in-Charge Armoured Corps Records,  
PIN- 900476, C/O 56 APO.
4. Commanding Officer, 82 Armoured Regiment,  
Pin 912682, C/O 56 APO.

**..... Respondents**

By Legal Practitioner: Shri Bhanu Pratap Singh,  
Learned counsel for the Respondents

**ORDER**

**Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**

1. By means of this Original Application under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has made the following prayers :-

*“A. Issue/pass an order or directions to set aside/quash the Discharge order dated 27.07.2016 and rejection of statutory complaint vide order dated 23.08.2017.*

*B. To issue/pass an order or directions to set aside/quash the Five Red Ink entry and Three Black entry mentioned in show cause notice dated 26.05.2016.*

*C. To issue/pass an order or directions to re-instate applicant in the service along with all the consequential benefits from the date of discharge.*

*D. To issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*

*E. To allow this original application with costs.”*

Though in the relief clause, date of discharge order has been mentioned as 27.07.2016 but actual date of discharge order is 10.06.2016 passed by General Officer Commanding, 23 Infantry Division.

2. In brief, the facts necessary for the purpose of the instant O.A., may be summarised as under.

3. The applicant was enrolled in the Army on 27.07.2005 and was discharged from service after completion of 11 years' including non-qualifying service under Rule 13 (3) III (v) of the Army Rules, 1954

on the ground of 5 Red Ink Entries and 3 Black Ink Entries. The applicant was served with a show cause notice on 16.03.2016 by Commanding Officer 82 Armed Regt and seven days time was given to furnish his reply. The applicant submitted his reply on 18.03.2016 and made a request that he be permitted to continue in service. After about two months, on 26.05.2016 one more show cause notice was served upon the applicant by HQs 23 Inf Div, Pin – 908423, C/o 56 APO, stating that *“you have been given enough opportunity to improve your conduct by your superiors and the evidence on record does not show any improvement despite you having served in various units and in changed environment”*. The applicant was given one month time to furnish his reply to second show cause notice. On 03.06.2016, the applicant submitted his reply and requested to give him one more opportunity to continue his service. Commandant, 82 Armd Regt, recommended not to consider the applicant for retention in army service. Thereafter, GOC, 23 Inf Div, sanctioned discharge of the applicant vide letter dated 10.06.2016 and the applicant was discharged from service as an undesirable soldier on 27.07.2016. The applicant preferred a Statutory Complaint on 30.01.2017 under Section 26 of Army Act 1950 challenging his discharge order dated 10.06.2016 and the same was rejected vide order dated 23.08.2017. Feeling aggrieved thereby, the instant O.A. has been filed.

4. The submission of learned counsel for the applicant is that, in this case the procedure prescribed vide Army Headquarters letter No. A/13210/159/AG/PSC2(c) dated 28.12.1988 for disposal of undesirable and inefficient JCOs, WOs and ORs was not duly followed. No preliminary enquiry was conducted by the respondents before issuing of show cause notice. In the counter affidavit, the details of Red Ink and Black Ink entries have been given and the other facts mentioned by the applicant in O.A. have not been denied. It is nowhere pleaded in the counter affidavit that any preliminary enquiry was conducted before issuing show cause notice.

5. Learned counsel for the applicant has argued that Hon'ble Apex Court in the case of **Veerendra Kumar Dubey v Chief of Army Staff** (2016 (2) SCC 627) has considered this aspect therefore, the applicant is entitled to get the benefit of the said pronouncement of Hon'ble Apex Court.

6. During the course of arguments, we repeatedly asked the learned counsel for the respondents to give a specific reply whether any preliminary enquiry as envisaged under the aforementioned Army Headquarter letter, was conducted before passing the order of discharge, learned counsel for the respondents could not give any specific reply. Even in the counter affidavit, no specific plea has been taken on behalf of the respondents that any preliminary enquiry, as required under the aforementioned Army Headquarter letter, was

conducted. Details of punishments awarded to the applicant are as under:-

<b>S.No</b>	<b>Army Act Section</b>	<b>Office</b>	<b>Punishment awarded</b>	<b>Date of Award of Punishment</b>
a	AA Section 48	Intoxication	07 days RI (Red Ink Entry) & 07 days pay fine	Col Gyanendra Kumar, OC Tps HQ 57 Armd Brigade on 22.05.2010.
b	AA Sec 48	Absent without leave	14 days RI (Red Ink Entry) & 14 days pay fine.	Col RS Shekhon, Officiating OC Tps HQ 57 Armd Brigade on 06.10.2010.
c	AA Section 48	Intoxication	14 days pay fine	Col A Khosla, Commandant 82 Armd Regt on 16.01.2014.
d	AA Section 48	Intoxication	28 days RI (Red Ink Entry)	Col A Khosla, Commandant 82 Armd Regt on 04.08.2014.
e	AA Section 48	Intoxication	03 days RI (Red Ink Entry)	Col A Khosla, Commandant 82 Armed Regt on 15.11.2014.
f	AA Section 48	Intoxication	14 days RI (Red Ink Entry)	Col S Sandil, Commandant 82 Armd Regt on 03.11.2015.
g	AA Section 48	Intoxication	14 days RI (Red Ink Entry) & 14 days pay fine.	Col S Sandil, Commandant 82 Armd Regt on 14.03.2016.
h	AA Section 48	Intoxication	14 days RI (Red Ink Entry)	Lt Col Arjun Ram Singh, Officiating Commandant, 82 Armd Regt on 12.05.2016

7. Learned counsel for the respondents has also argued that keeping in view the very adverse service history of the applicant it would be against the paramount interest of the Army to retain such personnel in the service and it would be against the discipline of the Army. It has also been argued that since the applicant was punished on various earlier occasions, therefore there was no requirement for any preliminary enquiry because the facts were established by Records itself. We also find substance in the submission made by the respondents that the applicant had very adverse service history but we are compelled to observe that even after adverse service history the procedure prescribed for discharge ought to have been followed but the same has not been followed. The preliminary inquiry is conducted to give opportunity to the applicant to explain the reason of his misconduct so that the competent authority may have sufficient material to take a correct decision on the point of punishment.

8. We may at this stage consider it appropriate to extract the relevant portion of the procedure prescribed for dismissal or discharge as under :

*“5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below :*

*(a) Preliminary enquiry. Before recommending discharge of dismissal of an individual the authority concerned will ensure :-*

*(i) That an impartial enquiry (not necessarily a Court of inquiry) has been made into the allegations against him and that he has had*

*adequate opportunity or putting up his defence or explanation and of adducing evidence in his defence.*

(ii) *That the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case."*

9. A careful reading of the aforementioned procedure clearly shows that the officer competent to direct discharge or dismissal of an individual should not only issue a show cause notice, but an enquiry into the allegations made against the individual concerned, in which he must be given an opportunity of putting his defence and the allegation must stand substantiated for ordering of discharge. In the instant case, admittedly no enquiry has been conducted by the respondents before passing the order of discharge under Rule 13 (3) III (v) of the Army Rules, 1954.

10. Learned counsel for the respondents has tried to impress this Tribunal that through show cause notice, the applicant was given an opportunity to put his defence. But this submission of the learned counsel for the respondents is devoid of merit.

11. Learned counsel for the applicant, in support of his submission, has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of *Veerendra Kumar Dubey v Chief of Army Staff* (2016 (2) SCC 627). The case of *Veerendra Kumar Dubey* (supra) was again considered by the Hon'ble Apex Court in the case of *Vijay Shanker Mishra vs. Union of India & ors* (Civil Appeal Nos.12179

and 12180 of 2016) decided on 15<sup>th</sup> December 2016. In the said judgment, the Hon'ble Apex Court in paras 7 and 8 observed as under:-

*"7 The issue which arises in the present case is not res integra. A Bench of three learned Judges of this Court including one of us (the learned Chief Justice) in Veerendra Kumar Dubey v. Chief of Army Staff held as follows :*

*"10. The Government has, as rightly mentioned by the learned counsel for the appellant, stipulated not only a show-cause notice which is an indispensable part of the requirement of the Rule but also an impartial enquiry into the allegations against him in which he is entitled to an adequate opportunity of putting up his defence and adducing evidence in support thereof. More importantly, certain inbuilt safeguards against discharge from service based on four red ink entries have also been prescribed. The first and foremost is an unequivocal declaration that mere award of four red ink entries to an individual does not make his discharge mandatory. This implies that four red ink entries is not some kind of Laxman rekha, which if crossed would by itself render the individual concerned undesirable or unworthy of retention in the force. Award of four red ink entries simply pushes the individual concerned into a grey area where he can be considered for discharge. But just because he qualifies for such discharge, does not mean that he must necessarily suffer that fate. It is one thing to qualify for consideration and an entirely different thing to be found fit for discharge. Four red ink entries in that sense take the individual closer to discharge but does not push him over. It is axiomatic that the Commanding Officer is, even after the award of such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects made relevant by the Government in the procedure it has prescribed."*

*This Court has in the above judgment construed the provisions of Rule 13 of the Army Rules, 1954 together with a letter of the Army Headquarters dated 28 December 1988 (bearing No. A/15010/150/AG/PS-2(c)). Emphasising the factors which have to be borne in mind, this Court held thus :*

*"16. The procedure prescribed by the Circular dated 28-12-1988 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."*

*8 In the present case, it is evident that there was no application of mind by the authorities to the circumstances which have to be taken into consideration while exercising the power under Rule 13. The mere fact that the appellant had*



*crossed the threshold of four red entries could not be a ground to discharge him without considering other relevant circumstances including (i) the nature of the violation which led to the award of the red ink entries; (ii) whether the appellant had been exposed to duty in hard stations and to difficult living conditions; (iii) long years of service, just short of completing the qualifying period for pension. Even after the Madhya Pradesh High Court specifically directed consideration of his case bearing in mind the provisions of the circular, the relevant factors were not borne in mind. The order that was passed on 26 February 2007 failed to consider relevant and germane circumstances and does not indicate a due application of mind to the requirements of the letter of Army Headquarters dated 28 December 1988 and the circular dated 10 January 1989."*

12. Before proceeding further in the matter, we would like to quote para 5 of the aforementioned judgment, which reads as under :

*"5 The contention of the appellant is that his discharge shortly before he would complete qualifying service for the grant of pension was grossly disproportionate. Moreover, reliance was placed on behalf of the appellant on circular No.0201/A/164/Admn-1 dated 10 January 1989 which provides as follows:*

*"Discharge from service consequent to four red entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service and the discharge should be ordered only when it is absolutely necessary in the interest of service".*

13. Now in the aforementioned legal background, if the facts of the instant case are testified, then it is abundantly clear that the applicant was discharged from service only after issuance of show cause notice and receiving his reply. No enquiry at all was conducted in this matter. The purpose of such an enquiry is two folds. First to place a check on the arbitrary powers of the competent authority to order discharge or dismissal of an individual and on the other hand, it requires the competent authority to consider the circumstances, the length of service of the applicant and hard conditions in which he served and also the effect of the order which the applicant would suffer, so that a reasonable and appropriate decision may be taken in

this regard. Admittedly no such enquiry has been conducted in this case, which has rendered the impugned order unsustainable.

14. The applicant has more than eleven years of service to his credit. He was discharged on 27.07.2016. He has not yet crossed the age of superannuation. A period of about two years has elapsed, since his discharge from the Army.

15. Thus, this Original Application deserves to be allowed and is hereby partly **allowed**. The impugned order of discharge dated 10.06.2016 and impugned order rejecting of statutory complaint dated 23.08.2017 passed by the respondents are set aside. The applicant shall be reinstated in service forthwith in the last rank held by him at the time of discharge and he shall continue to be in service. However, he shall not be entitled for payment of back wages for the period during which he was out of service on the principle of 'no work no pay'. The respondents are directed to give effect to this order within a period of six months from the date a certified copy of this order is produced before them.

16. No case for quashing of Red and Black ink entry is made out. So prayer B is hereby declined. Accordingly, this order would not be a bar for the respondents to initiate disciplinary action against the applicant on the basis of such entries, if deemed fit by the respondents.

No order as to costs.

**(Air Marshal B.B.P. Sinha)**  
**Member (A)**

Dated: July 2018  
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**(Justice S.V.S. Rathore)**  
**Member (J)**