

Court No.3

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

ORIGINAL APPLICATION NO 183 of 2015

Friday, this the 05th day of February 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No 14827694N Ex Sepoy Hari Krishna Kumar,
Son of Mahaveer Singh
Resident of Village and Post : Parsoli,
Tehsil: Mant, District: Mathura.

.....Applicant

Ld. Counsel for the: **Shri Rohit Kumar, Advocate**
Advocate

Versus

1. Chief of Army Staff, New Delhi.
2. Commandant cum Chief Records Officer, ASC Centre and Records (North) Bangalore.
3. Union of India, Through Secretary, Ministry of Defence, New Delhi.

.....Respondents

Ld. Counsel for the : **Shri Yogesh Kesarwani, Central Govt Counsel assisted by Lt Col Subodh Verma, OIC Legal Cell.**
Respondents.

ORDER (ORAL)

1. Heard Ld. Counsels for the parties and perused the record.
2. Present application under section 14 of Armed Forces Tribunal Act, 2007 has been preferred being aggrieved by the impugned order of discharge from Army on account of eight Red Ink Entries and one Black Ink Entry.
3. It is not disputed that the applicant was enrolled in the Army in ASC on 10.07.2001. After serving for more than eleven years, a show cause notice dated 13.02.2012 was served upon the applicant as to why his services may not be terminated on account of red ink entries. Thereafter applicant submitted reply and denied the allegations and prayed for continuance of service. After considering the reply submitted by the applicant, the competent authority has discharged the applicant. Statutory complaint dated 31.08.2012 filed by the applicant was rejected on 27.05.2015.
4. While assailing the impugned order of discharge Ld. Counsel for the applicant submits that it is well settled proposition of law that a soldier cannot be discharged from service without holding preliminary inquiry. On the other hand Ld. Counsel for the respondents vehemently argued and submits that applicant's conduct was not proper and on account

of red ink entries, such persons should not be retained in the Army.

5. We have heard arguments advanced by Ld. Counsel for the parties and perused the records.

6. So far as submission of Ld Counsel for the applicant is concerned, the question involved in the present O.A is no more res Integra and seems to be correct. Ld. counsel for the applicant relied upon the judgment of this Tribunal delivered in O.A. No. 168 of 2013 **Abhilash Singh Kushwah vs. Union of India** decided on 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** 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”.*

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

8. We have been informed that the applicant shall be completing his tenure on 10.07.2016 of the rank he was holding at the time of discharge from service.

9. In view of the settled proposition of law, the O.A. deserves to be allowed and the impugned order of discharge dated 26.03.2012 forwarded by letter dated 25.03.2012 and order dated 27.05.2014 rejecting the statutory complaint of the applicant deserves to be set aside.

10. Accordingly O.A. is allowed and impugned order of discharge dated 26.03.2012 forwarded by letter dated 25.03.2012 and order dated 27.05.2014 rejecting the statutory complaint submitted by the applicant is set aside with all consequential benefits. However, keeping in view the arguments advanced by Ld. Counsel for the respondents, we refrain from awarding back wages to the applicant on the principle of no work no pay. The respondents shall permit the applicant to continue in service on the rank he was holding and provide him all consequential benefits. It shall be open to the respondents to proceed afresh, if they so desire to maintain standard and discipline of the army.

11. Subject to above, the O.A. is allowed. Let order be complied with by the respondents within one month from the date of receipt of certified copy of this order.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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