

Court No.3**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****TRANSFERRED APPLICATION NO 113 of 2009**Monday, this the 1st day of February 2016**Hon'ble Mr. Justice D.P. Singh, Member (J)****Hon'ble Air Marshal Anil Chopra, Member (A)**

Sanjay Kumar (Ex. No. 13691260-N, PT/Clk) son of Sri Shiv Nath r/o village and post Talgaon, district Barabanki.

...Petitioner

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

Versus

1. The Union of India through Secretary, Ministry of Defence, Central Secretariat, New Delhi-11.
2. Chief of Army Staff, Army Headquarter, New Delhi-11,
3. G.O.C.-in-C (General Officer Commanding in Chief) Southern Command, Headquarter at Pune.
4. Brig Cdr. HQ, K.K. & G, Sub-Area Kubbon Road, Bangalore.
5. O.C. Parachute Regiment. Record Training Centre, Bangalore.

.....Respondents

Ld. Counsel for the : **Shri V.P.S. Vats, Central**
Respondents. **Govt Counsel assisted by Lt Col**
Subodh Verma, OIC Legal Cell.

ORDER ORAL

1. Being aggrieved with the impugned order of discharge on account of 4 red ink and 1 black ink entries, the petitioner preferred Writ Petition No. 638 (SS) of 2000 in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow which has been transferred to this Tribunal in pursuance to provision of Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 113 of 2009.
2. We have heard Ld. Counsel for the parties and have perused the record.
3. Admittedly, the petitioner was recruited in Indian Army on 15.03.1990. According to Ld. Counsel for the petitioner, during the course of engagement, show cause notice dated 27.05.1998 was served upon the petitioner in response to which the petitioner submitted reply on 02.06.1998. Another show cause notice dated 09.06.1998 was served upon the petitioner proposing to punish with order of discharge. The petitioner rebutted by submitting reply. After considering the reply, the petitioner was discharged from service. Statutory appeal dated 14.11.1998 was preferred by the petitioner which has not been decided.
4. Solitary argument advanced by the Ld Counsel for the petitioner is that the impugned show cause notice for discharge

from service was issued only relying on 4 red and 1 black ink entries. It is also submitted that no preliminary inquiry was held in terms of Army Order dated 22.12.1988

5. On the other hand, Ld. Counsel for the respondents vehemently agued that the conduct of the petitioner was not above board and he had tried to conduct fraud during course of engagement, hence no leniency should be shown to him. Submission of the petitioner's counsel is that no preliminary enquiry was held under rule (supra) and the discharge merely on the basis of red ink entries is not sustainable.

6. Ld. Counsel for the applicant has invited our attention to the order/judgment of this Tribunal in *O.A. No. 168 of 2013, Abhilash Singh Kushwah vs. Union of India* decided on 23.09.2015 as well as the judgment of Hon'ble Supreme Court in Civil Appeal D. No. 32135 of 2015 *Veerendra Kumar Dubey Vs. Chief of Army Staff and others* decided on 16.10.2015. In the case of *Abhilash Singh Kushwah* (supra), it has been held that merely on red ink entries and Show Cause Notice, no army personnel can be dismissed from army. Army Order 28.12.1988 (supra) has got statutory provision. The relevant portion of para 75 of the judgment 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. While allowing the aforesaid appeal, the Hon'ble Supreme Court has restored the appellant 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.

9. Adverting to the facts of the case on hand, having considered the arguments advanced by Ld. Counsel for the respondents and the material placed on record, keeping in view the principles of 'no work no pay' we refrain from awarding back wages.

10. Accordingly, the T.A. deserves to be **allowed**; hence allowed. The impugned order of discharge dated 07.08.1998 is hereby quashed with all consequential benefits except back wages. The respondents shall grant pensionary benefits of the rank petitioner was holding at the time of passing of the impugned order or discharge. Let consequential benefits be provided to the petitioner expeditiously, say, within four months from the date of presentation of a certified copy of this order.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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