

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

CIRCUIT BENCH NAINITAL

ORIGINAL APPLICATION No 255 of 2010

Monday, this the 05th day of September 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex No. 40813388-M Dinesh Singh Sajwan s/o Nandan Singh Sajwan belonging to 12 Garhwal Rifles residing at Ashok Nagar, Post Office- Milap Nagar Roorkee, Distt-Haridwar, Uttrakhand.

...Applicant

Ld. Counsel for the: **Shri H.S. Sharma, Advocate.**
Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence.
2. Chief of the Army Staff, Army Headquarters New Delhi.
3. Chief Record Officer, Garhwal Rifles, Centre and Records Landawn, District, Pauri Garhwal, Uttrakhand.
4. Commanding Officer, 12 Garhwal Rifles, C/O 56 APO.

.....Respondents

Ld. Counsel for the : **Shri Ramesh Chandra Shukla,**
Respondents Central Govt Counsel assisted by
Capt R.D. Sneha, OIC Legal Cell.

ORDER (Oral)

1. We have heard Shri H.S. Sharma, Ld. Counsel for the applicant and Shri Ramesh Chandra Shukla, Ld. Counsel for the respondents assisted by Capt SD Sneha, OIC Legal Cell and perused the records.
2. The present application under Section 14 of the Armed Forces Tribunal, 2007 has been preferred against the impugned order of discharge dated 21.06.2009 a copy of which has been annexed as **Annexure 1** to the O.A. on the ground the applicant has been discharged in pursuance of four red ink entries without holding any preliminary inquiry and without serving report of the preliminary inquiry along with the show cause notice.
3. The undisputed facts as borne out from pleadings on record and arguments advanced by Ld. Counsel for the parties is that the applicant was enrolled in the Army in Garhwal Rifles on 07.04.1999. Thereafter he was detailed to serve at various places. According to Ld. Counsel for the applicant in March 2002 one Nk Ashutosh in an intoxicated state misbehaved with the applicant and being upset the applicant left the barracks and came back after about five hours. Thereafter he was charge sheeted on 10.03.2002 and awarded seven days RI for being absent without leave. Again in December 2004 the applicant met with an accident and on account of severe head injuries he was admitted to Military Hospital, Roorkee where he was operated by the Neuro Surgeon. On account of intoxication he was charge sheeted and awarded 28 days RI and 14 days pay fine

on 01.08.2005. It is submitted by Ld. Counsel for the applicant that in September 2008 while the applicant was posted at Dharmshala one Rifleman Sanjeev Kumar made a request to him to provide mobile number of a lady. However the applicant refused to provide the number. Anyhow when said Rifleman Sanjeev Kumar got access to the number of the lady he made a call to the lady in consequences of which the lady made a complaint to the Commanding Officer. Since Rifleman Sanjeev Kumar was attached to the second in command, no action was taken against him rather the applicant was made a scapegoat and was charged. It is submitted that during course of inquiry the lady concerned had made a specific statement that the applicant had not made any call to her. Yet again the applicant was charged and punished for overstaying leave and was awarded 14 days RI with 14 days pay fine on 16.01.2009. According to Ld. Counsel for the applicant being annoyed with the applicant he was discharged from service since he did not tender apology.

4. Ld. Counsel for the respondents has made a feeble attempt to denied this fact, but from the material on record it is amply borne out that the lady to whom the telephone call was made had given the statement in favour of the applicant. However it is admitted fact that the applicant was awarded red ink entries from time to time and in consequence thereof he was discharged from service after serving a show cause notice. For convenience sake show cause notice is reproduced as under:-

“CONFIDENTIAL”

HQ 33 Mtn Bde
PIN-908033
C/O 56 APO

22800/4/A

16 May 09

4081388M Rfn Dinesh Singh Sajwan
12 GARH RIF
PIN-910712
C/O 56 APO

SHOW CAUSE NOTICE

1. It is seen from the record maintained by your unit that you have been awarded the following punishment incurring 'Four Red Ink Entries' during your service:-

Ser No	AA Sec	Offence	Punishment awarded	Remarks
(a)	39 (a)	Absenting Himself without Lve	07 days RI dt 10 Mar 02.	Red Ink
(b)	48	Intoxication	28 days RI & 14 days Pay fine.	Red Ink
(c)	39 (b)	Without sufficient cause overstaying leave grant to him.	14 days RI & 14 days pay fine.	Red Ink
(d)	42 (e)	Neglecting to obey Regimental Order	07 days RI and 14 days pay fine	Red Ink

2. From the above offences committed by you, it is apparent that you have displayed a total disregard to the norms of military discipline. Retention of service personnel with persistently bad disciplinary record is not conducive to overall efficiency of the organization. Your retention in the service is, therefore, considered undesirable under provisions of Army Rule 13 Table annexed III (v) and 17 read in conjunction with Army HQ letter No A/13210/159/AG/PS2(c) dt 28 Dec 88.

3. Please show cause as to why action to discharge you from service should not be taken in the light of above facts.

4. Your reply should reach this Headquarters within 10 days after receipt of this show cause notice through CO, 12 GARH RIF, failing which it will be presumed that you have nothing to say in your

defence and the case will be progressed in accordance with the existing rules to discharge you from service.

*(KB Chand)
Brig
Cdr*

*Copy to:
12 GARH RIF
PIN-910712
C/O 56 APO*

CONFIDENTIAL

5. A plain reading of the show cause notice shows that applicant was discharged from service under Rule 13(3) (iii) (v) read with Rule 17 of the Army Rules, 1954 in conjunction with Army Order 28.12.1988.

6. It has been vehemently argued by Ld. Counsel for the applicant that no preliminary inquiry was held, and if for argument sake it may be said that preliminary inquiry was held, it was not annexed along with the show cause notice and also applicant was not called upon to participate in the preliminary inquiry. A perusal of the show cause notice at the face of the record shows that no copy of the preliminary inquiry was annexed to the show cause notice. It is borne out from the record that copy of the preliminary inquiry has also not been annexed along with the counter affidavit. Thus if argument of Ld. Counsel for the respondents is accepted, it appears that the respondents have not filed counter affidavit with clean hands and have suppressed material facts. Such conduct on the part of the respondents seems to be not justified.

6. Attention has been invited by Ld. Counsel for the respondents to the decision of this Tribunal in the case of **Abhilash Singh**

Kushwah vs. Union of India & ors. (OA. No. 168 of 2013, decided on 23.09.2015) and by Hon'ble Apex Court in the case of **Veerendra Kumar Dubey vs. Chief of Army Staff & ors** (Civil Appeal (D) No. 32135 of 2015) where the dictum of law conclusively held is that preliminary inquiry with participation of the delinquent is a must. It is further held that Army Order dated 28.12.1988 has mandatory force and non-compliance of it would make the consequential order illegal and arbitrary. Non observance of the order dated 28.12.1998 would also tantamount that the preliminary inquiry was held ex parte. 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. 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”.

9. The Hon'ble Supreme Court while affirming the aforesaid proposition of law also held 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 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.

Ina so much 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”.

10. Conspectus of our discussions made hereinabove is that the preliminary inquiry has not been carried out, and discharge of the applicant on the anvil of red ink entries seems to suffer from vice of arbitrariness and has been passed without complying due procedure prescribed by the letter of Army Headquarter (supra).

11. In the result, the O.A. deserves to be allowed; hence is allowed. Order of discharge dated 21.06.2009 is hereby set aside with all consequential benefits. In case tenure of the applicant has not come to an end, he shall be restored in service, but without back wages. In case the applicant has attained the age of superannuation, entire period shall be counted with continuity of service of the rank which he was holding for the purpose of post retiral pensionary benefits. In such circumstances the applicant shall be entitled for 50% back wages. The entire exercise shall be concluded by the respondents within a period of four months from the date of presentation of a certified copy of this order. In case arrears of pensionary benefits or salary are not paid to the applicant within a period stipulated above, the applicant shall be entitled to 10% interest from the date of the order.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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