

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

CIRCUIT BENCH NAINITAL

ORIGINAL APPLICATION No 149 of 2015

Thursday, this the 08th day of September 2016

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

Rakesh Kumar Maikhuri (No. 4080148H Rifleman) son of Pati Ram Maikhuri, resident of village Dungri, Post Office Bainoli, Tehsil Karnprayag, District Chamoli (Garhwal).

...Applicant

Ld. Counsel for the: **Shri K.K. Mishra, Advocate.**
Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence New Delhi.
2. The Chief of the Army Staff, South Block, New Delhi.
3. Brigade Commander, 32 Inf Brigade, C/O 56 APO.
4. Commanding Officer, sixteenth Battalion, the Garhwal Rifles, C/O 56 APO.

....Respondents

Ld. Counsel for the : **Shri Bhanu Pratap Singh,**
Respondents Central Govt Counsel assisted by
Capt R.D. Sneha, OIC Legal Cell.

ORDER (Oral)

1. This original application has been preferred by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved with the impugned order of discharge dated 05.07.2009 (**Annexure A-9 to the O.A**) on the ground of four red ink entries.

2. Undisputedly the applicant was recruited in the Army on 04.08.1998 as recruit in 16th Battalion Garhwal Rifles and on 06.05.1999 was appointed as Sepoy (Rifleman). Admittedly the applicant was awarded four red ink entries on 04.07.2001, 21.08.2002, 09.12.2003 and 07.05.2008. A show cause notice dated 08.09.2008 was served on the applicant and thereafter another show cause notice dated 10.01.2009 was served on the applicant. The applicant submitted reply to the show cause notice on 16.01.2009. On 23.01.2009 the Commander 32 Infantry Brigade recommended for discharge of the applicant. However without implementing the recommendation another show cause notice dated 28.06.2009 was served on the applicant. After receipt of the reply to show cause notice a copy of which has been annexed at **Annexure No A-6** to the O.A. Sanction of discharge was granted by the Commanding Officer, 16 Garhwal Rifles on 05.07.2009. Against the impugned order the applicant preferred appeal on 22.08.2009

to the Chief of the Army Staff. Subsequently on 04.04.2010 the applicant sent a reminder. It may be noticed that decision was taken on the applicant's representation by the Chief of the Army Staff in view of order dated 23.11.2010 passed by the Tribunal in O.A. No. 223 of 2010 whereby rejecting the appeal preferred by the applicant on 17.08.2011. Aggrieved by the order of Chief of the Army Staff the applicant preferred O.A. No. 413 of 2011 which was decided vide order dated 03.01.2012 directing the Chief of the Army Staff to specifically consider the points raised by the applicant in his statutory complaint as to whether the Commanding Officer was within jurisdiction to pass the impugned order and recommend discharge of the applicant from service. In pursuance thereof decision was taken by Chief of the Army Staff vide order dated 11.06.2012 rejecting the representations which was forwarded by Records Garhwal Rifles.

3. Solitary arguments advanced by Ld. Counsel for the applicant is that prior to passing of the impugned order of discharge no preliminary inquiry was held and if any preliminary inquiry was held behind the back of the applicant, copy thereof was not supplied to the applicant along with show cause notice. Specific pleading has been made in para 4.16 of the O.A, reply to which has been given in para 16 of the counter affidavit. While giving reply in para 16 of the counter affidavit it has been

stated that instructions have been followed but no specific denial has been made while submitting reply as to whether preliminary inquiry was held or not. Perusal of show cause notice dated 28.06.2009 (Annexure A-7 to the OA) at the face of record shows that the copy of the inquiry report was not served on the applicant while seeking reply.

4. Ld. Counsel for the applicant invited attention to a decision of this Tribunal in the case of **Abhilash Singh Kushwah vs. Union of India & ors.** (O.A. No. 168 of 2013, decided on 23.09.2015) whereby it has been held that Army Order dated 28.12.1988 has got mandatory force and preliminary inquiry is a must. It has further been held that while holding preliminary inquiry the delinquent should be permitted to participate in the inquiry and while serving show cause notice copy of the preliminary inquiry should be served on the applicant. Thus the settled position of law is that preliminary inquiry with due participation of the delinquent is a must. Non compliance of the Army Order dated 28.12.1988 would make the consequential order illegal and arbitrary. 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”.*

5. The Hon'ble Supreme Court while affirming the aforesaid proposition of law also held in the case of **Veerendra Kumar Dubey Vs Chief of the Army Staff & Others** (Civil Appeal (D) No. 32135 of 2015) 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”.

6. In view of the above, the O.A. deserves to be allowed, hence **allowed**. The impugned order of discharged dated 05.07.2009 is hereby set aside. The applicant shall be deemed to be in service to the full period of the rank which he was holding at the time of discharge from service with all consequential service benefits and pension. However, payment of back wages is confined to 50%. The entire exercise shall be completed by the respondents within a period of four months from the date of production of certified copy of this order.

O.A. is **allowed** accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

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