

**Court No. 1 (List B)**  
**Reserved**

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

**Transferred Application No.1207 of 2010**

**Thursday this the 25th day of May 2017**

**Hon'ble Mr. Justice D.P. Singh, Member (J)**

**Hon'ble Lt Gen Gyan Bhushan, Member (A)**

Smt Vimla Devi wife of No.13615861-L Late (Gdr) Vimal Kumar Singh, Formerly of 13 Grenadiers (Ganga Jaiselmer) Village Kolapur, P.O. Shri Niwas Dham, District Mirzapur.

..... Petitioner

By Legal Practitioner : Shri Rohit Kumar  
Ld. Counsel for the Petitioner.

Vs.

1. Union of India through Chief of the Army Staff,  
New Delhi.
2. Commandant-cum-CRO, GRC and Records,  
Jabalpur.
3. C..C.D.A. Pensions)  
Draupadi Ghat,  
Allahabad.
4. Lt Col D.S.C.Varma,  
Commanding Officer,  
13-Gradeniers (Ganga Jaiselmer) ,  
C /o 56 APO
5. Union of India through Secretary,  
Min of Defence, New Delhi ..... Respondents

By Legal Practitioner : Ms Amrita Chakraborty,  
Ld. Counsel for the respondents.

**ORDER**

**“Per Hon’ble Lt Gen Gyan Bhushan, Member (A)”**

1. The husband of the petitioner Late (Gdr) Vimal Kumar Singh was discharged from service on the ground of earning more than four red ink entries. Aggrieved, she preferred Civil Misc. Writ Petition No. 46618 of 2003 before the Hon’ble High Court of Judicature at Allahabad, which has been transferred to this Tribunal and has been registered as T.A. No. 1207 of 2010, in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007, whereby she has claimed the following reliefs :

*“(a) To summon and quash the impugned illegal show cause notice dated 30<sup>th</sup> Nov 1994, with all the consequential benefits to the applicant.*

*(b) To summon and quash the impugned illegal discharge order effective from 08 December 1994, with all the consequential benefits to the applicant.*

*(C) To quash the cryptic rejection order of the Chief of Army Staff dated 15<sup>th</sup> September 2003, with all the consequential benefits to the applicant.”*

2. Brief facts, as borne out from the Transferred Application, are that the husband of the petitioner Late (Gdr) Vimal Kumar Singh was enrolled in the Indian Army on 31 October 1984 and while in service he incurred seven Red Ink Entries, the details of offences committed and punishment awarded are as under :

Sl No.	Offence	Date	Punishment awarded	Date of award
1.	AA Sec 39(a) absent without leave	25.03.85	14 days Rigorous imprisonment in Military custody	13.04.85

2.	AA Sec 39(b) Over staying leave	21.06.87	28 days imprisonment in Military custody	29.07.87
3.	AA Sec 39(b) Over staying leave	21.09.89	28 days Rigorous Imprisonment in Mil custody	10.01.90
4.	AA Sec 40© using insubordinate language to his superior officer	20.04.90	07 days Rigorous imprisonment in Mil custody	09.06.90
5.	AA Sec 39(a) absent without leave	03.12.93	28 days Rigorous imprisonment in Mil custody	04.12.93
6.	AA Sec 54(b) losing by neglect Identity Card the property of Govt issued to him for his use.	17.10.93	14 days Rigorous imprisonment in Mil custody	22.04.94
7.	AA Sec 63 An omission prejudicial to good order and Military discipline	07.11.93	Tried by SCM and awarded 1 month Rigorous imprisonment in Mil custody	05.10.94

The husband of the petitioner was discharged from service on 08.12.1994 under Rule 13(3) Item III (v) of the Army Rules, 1954. On the date of discharge, the husband of the petitioner had 09 years and 274 days of service, including 129 days of non qualifying service, as such total service was less than minimum pensionable service of 15 years, therefore, he was not granted pension. The husband of the petitioner died on 02 August 1996. The petitioner submitted a statutory petition before the Chief of the Army Staff, which was pending and the petitioner preferred Civil Misc. Writ Petition No.353 of 2003 in the High Court of Judicature at Allahabad and the said writ petition was decided on 14<sup>th</sup> May 2003 directing the Chief of Army Staff to decide the statutory petition. On 15 Sept 2003, the Chief of Army Staff rejected the said petition. Being aggrieved,

the petitioner filed Civil Misc. Writ Petition No.46618 of 2003 before Hon'ble High Court of Judicature at Allahabad, which has been transferred to this Tribunal and registered as T.A.No.1207 of 2010.

3. We have heard Shri Rohit Kumar, Learned Counsel for the petitioner, Ms Amrita Chakraborty, Learned Counsel for the respondents and perused the record.

4. Learned counsel for the petitioner submitted that he does not want to go into the illegality of the punishment awarded, but basically wants to restrict his arguments to major policy issue which has been violated resulting in illegal discharge of the husband of the petitioner and he restricted his arguments to the following issues :

(A) Preliminary enquiry in terms of Army Headquarters Policy Letter no. A/13210/159/AG/PS2(c) dated 28<sup>th</sup> December 1988 has not been conducted.

(B) Show cause notice should have been signed by an Officer of a rank of Brigadier, whereas it has been signed by Lt. Colonel as Officiating CO.

(C) Sufficient time was not provided to the petitioner's husband to reply to the Show Cause Notice.

5. So far as the Point (A) is concerned, it has been submitted by the learned counsel for the petitioner that no preliminary enquiry in terms of the Army Headquarters Policy Letter no. A/13210/159/AG/PS2(c) dated 28<sup>th</sup> December 1988 was conducted. The action of the respondents was in violation of the judgment of this Tribunal in the case of **Abhilash Singh Kushwah vs. Union of India & others** (O.A.No.168 of 2013) decided on 23.09.2015. Learned counsel for the respondents conceded

to this arguments advanced by the learned counsel for the petitioner that no enquiry as required vide letter of Army HQ of 1988 was conducted before issuance of Show Cause Notice and discharge.

6. While assailing the impugned order of discharge, Learned Counsel for the petitioner has relied upon the Division Bench Judgment of this Tribunal passed in **Abhilash Singh Kushwah** (supra) and another judgment decided by Hon'ble The Supreme Court in the case of **Veerendra Kumar Dubey vs. Chief of Army Staff & ors** (Civil Appeal (D) No. 32135 of 2015. On the other hand, Learned Counsel for the respondents defended the impugned order on the ground of issuance of Show Cause Notice, which seems to be sufficient for compliance of law. However, he admitted that preliminary enquiry as per Army Headquarters letter No. A/13210/159/AG/PS2 (c) dated 28.12.1988 has not been conducted.

7. Learned counsel for the petitioner next contended that Show Cause Notice issued on 30 Nov 1994 has been signed by Lt Colonel as Officiating CO, whereas it should have been signed by a Brigadier, which is in violation of Rule 13(3) Item III (v) of the Army Rules, 1954 and no sufficient time for reply has been provided to the husband of the petitioner. From a bare perusal of the Show Cause Notice, it is evident that it had been issued on 30 Nov 1994 to the husband of the petitioner and signed by Lt Colonel as Officiating CO, and reply was called for on the same day. This issue has not been contested by the learned counsel for the respondents. Therefore, the husband of the petitioner was denied the opportunity of filing proper reply to the Show Cause Notice, which is misuse of process of law.

8. In the case of Abhilash Singh Kushwah (supra), the Bench of this Tribunal has considered the letter of 1988 whereby it has been provided that before passing the order of discharge on the ground of four red ink entries, a preliminary inquiry should be held. In case, no preliminary inquiry has been held, straightway after serving a Show Cause Notice is issued, the petitioner cannot be discharged from service, as held in the case of Abhilash Singh Kushwah (supra). The relevant portion of the judgment of Abhilash Singh Kushwah (supra), i.e. paragraph 75, 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.*

*(vi) 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”*

11. Apart from it, after the decision of Abhilash Singh Kushwah, the Supreme Court has reiterated the same principles of law in the cases **Veerendra Kumar Dubey** (supra) and **Vijay Shankar Mishra vs. Union of India & Others** 2016 (12) SCALE 979. The relevant portion of paragraph 12 of the judgment of **Veerendra Kumar Dubey** (supra) 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.*

*In 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.”*

12. It clearly comes out that no preliminary enquiry has been conducted. Show Cause Notice issued on 30 Nov 1994 has been signed by Lt Colonel as Officiating CO, whereas it should have been signed by a Brigadier, which is in violation of Rule 13(3) Item III (v) of the Army Rules, 1954 and reply was called for on the same day of issuance of Show Cause Notice, as such, the husband of the petitioner was denied the opportunity of filing proper reply, therefore, in view of the judgments of this Tribunal and Hon’ble The Apex Court, Transferred Application deserves to be allowed.

13. Thus, in the result, **Transferred Application No.1207 of 2010** is allowed and the impugned orders passed by the respondents are set aside. The petitioner shall be notionally treated in service till he would be entitled for service pension. The petitioner shall not be entitled for back wages from the date

of discharge to the date he reaches pensionable service. The petitioner shall be entitled to terminal benefits and pension as per Pension Regulations for the Army, 1961. The respondents are directed to comply with the order within four months from the date of production of a certified copy of this order. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

14. No order as to costs.

(Lt Gen Gyan Bhush  
Member (A)

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

Dated : May, 2017  
PKG