Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO 122 of 2012

Monday, this the 14th day of December 2015

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

Ex. Sep. Prem Singh, (14658430H) Son of Sri Sovran Singh, Resident of Vilage Nagla Todar, Post-Sonkhera, Tehsil-Mant, District-Mathura.

……Applicant

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

Versus

1. Union of India through its Secretary Ministry of Defence, South Block, Sena Bhawan, New Delhi.

2. Chief of Army Staff, through Officer-in-Charge, Records, Secunderabad.

3. Commanding Officer, 77 Armed Workshop (601 EME Bn), Second Core Ambala, Cantt.

…Respondents

Ld. Counsel for the Respondents: **Dr. S.N. Pandey, Central Govt Counsel assisted by Capt Priti Tyagi, OIC, Legal Cell.**

ORDER

1. We have heard Ld. Counsel for the parties and perused the records.

2. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved with the impugned order of discharge whereby the applicant's services were terminated in pursuance to Army Rule 13 (3) iii (v) on account of 6 Red Ink Entries.

3. Applicant had joined the Indian Army as Sepoy on 04.02.2003. He was served a Show Cause Notice on 18.07.2011 to show cause as to why he should not be dismissed from service on account of 6 Red Ink Entries. In response to the Show Cause Notice the applicant submitted reply dated 30.07.2011. Thereafter in pursuance to Army Order 28.12.1988, the impugned order of discharge has been passed.

4. At the thresshold, Ld. Counsel for the applicant submitted that the the respondents have not conducted preliminary inquiry and in utter violation of the statutory mandate have passed the impugned order of discharge. Hence the impugned order of discharge is illegal. On the other hand, OIC Legal Cell invited our attention to the letter dated 30.10.2009 pointing out that the preliminary inquiry was held.

5. On perusal of letter dated 30.10.2009 it is borne out that some inquiry was conducted by Officiating Commanding Officer which seems to be exparte and the fact finding inquiry and not in tune of Army Order 1988. Report dated 30.10.2009 shows that with 6 red ink entries the applicant is not suitable to continue in service. The applicant was neither permitted to participate in the inquiry nor copy of the inquiry report was served on him. Submission of the applicant's counsel that though preliminary enquiry was held but the applicant was not permitted to participate in the inquiry and was discharged merely on the basis of red ink entries is sustainable. 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*** dated 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".

6. The Hon'ble Supreme Court while affirming the aforesaid proposition of law also held that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable. For convenience 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".

7. In view of above the present O.A. deserves to be allowed, hence allowed and impugned order of discharge dated 03.10.2011 is set aside with all consequential benefits. However, we decline to grant the back wages keeping in view

the gravity of offences committed by the applicant during his service. The respondents may proceed afresh if contingency so requires.

8. Let the consequential benefits be granted to the applicant by reinstating him in the service expeditiously, say, within four months from the date of production of certified copy of this order.

9. The O.A. is disposed of accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

ukt