

**Court No.3****ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****ORIGINAL APPLICATION NO 438 of 2012**Friday, this the 11<sup>th</sup> day of December 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal Anil Chopra, Member (A)**

Rakesh Kumar Singh (No. 1588820L Ex Nk/Clk), son of Late Gulab Chand Singh, resident of village-Gopalpur Jaldi, Post Office-Banjaripur, District-Ghazipur (Uttar Pradesh).

.....Applicant

Ld. Counsel for the: **Shri Yashpal Singh, Advocate**  
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. General Officer Commanding, Maharashtra, Gujrat and Goa Area, Mumbai-05
4. Officer-in-Charge (Records), Record Office, Bombay Engineers Group, PIN-900462, C/O 56 APO.
5. Commanding Officer, Record Office, Bombay Engineers Group, PIN-900462, C/O 56 APO.
6. Garrison Engineer, Sagour, Madhya Pradesh.
7. Major Harsh Raghuvanshi (the then Garrison Engineer, Sagour, Madhya Pradesh) through the Chief Engineer, Bhopal Zone, Military Engineering Services, Bhopal.

...Respondents

Ld. Counsel for the : **Shri Namit Sharma, Advocate**  
Respondents **assisted by Capt Priti Tyagi,**  
**OIC Legal Cell.**

**ORDER (ORAL)**

1. Heard Shri Yashpal Singh, Ld. Counsel for the applicant and Shri Namit Sharma, Ld. Counsel for the respondents assisted by Capt Priti Tyagi, OIC Legal Cell and perused the record.
2. The applicant being aggrieved by order of discharge from army service has preferred the instant Original Application under Section 14 of the Armed Forces Tribunal Act, 2007.
3. The applicant was enrolled in the army as soldier Clerk GD on 29.12.1995 and later on was promoted as Naik in the year 2000. It is submitted by Ld. Counsel for the applicant that in September 2003 when the applicant was posted in the office of Garrison Engineer, Sagar (MP), he was given charge of E-4 Section dealing with processing of local purchases, maintenance of accounts and clearance of bills relating to expenditure incurred. While discharging duty in the office of Garrison Engineer the applicant came to know regarding certain malpractice and misappropriation of public funds. He brought the factual matrix to the knowledge of the superiors in the Headquarters, Chief Engineer Bhopal Zone and other higher authorities. An inquiry was initiated and thereafter it was found that Major Harsh Raghuvanshi, the then Garrison Engineer, Saugar and certain officers working under him were involved to some extent and this act of the applicant prejudiced

them. It is submitted that Major Harsh Raghuvanshi Called the applicant and threatened him with dire consequences. He also recommended field posting of the applicant. On the recommendation of Major Harsh Raghuvanshi, on 15.09.2006, movement order was issued assigning the applicant to temporary duty to attend Court of Inquiry as a witness. An application was moved by the applicant inviting attention towards the abuse of power by the authorities involved in misappropriation of public fund.

4. Further submission is that Show Cause Notice dated 31.11.2006 was issued by the Commandant, Record Office, Bombay Engineer Group in pursuance to provisions contained in Army Rule 13 (3) iii (v) of the Army Rules, 1954 on the ground that the applicant incurred five red ink entries during the course of service. In response to it the applicant submitted reply and thereafter impugned order of discharge was passed. It is submitted that without taking into account the case set up by the applicant, he has been discharged from service. The applicant submitted an appeal to the Chief of the Army Staff against discharge order. However the appeal preferred by the applicant remained pending. Thus the applicant preferred Writ Petition No. 9646 of 2007. The High Court directed the authority concerned to decide the appeal and in consequence thereto the appeal was dismissed and applicant's discharge from service was upheld by General Officer Commanding,

Maharashtra, Gujrat and Goa Area. Feeling aggrieved, the present O.A. has been preferred.

5. Solitary arguments advanced by Ld. Counsel for the applicant is that no inquiry was held in pursuance of Army Order dated 28.12.1988, which has got statutory force. Ld. counsel for the applicant relied upon the judgment of this Tribunal delivered in the case of **Abhilash Singh Kushwah vs. Union of India** O.A. No. 168 of 2013 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 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 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 28<sup>th</sup> 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. Before parting with the case we feel it pertinent to observe that the foundation of the case as set up by the applicant in defence is that there was serious malpractice, misappropriation of public fund and abuse of power on the part of certain superior officers. However, nothing has been brought on record as to what was the fate of the inquiry set up by the respondents in pursuance of complaint made by the applicant. Since we have permitted the respondents to proceed afresh with the inquiry, and in case it is done so, the respondents shall also look into the allegations raised by the applicant against higher-ups in the jurisdiction of Garrison Engineer, Sagar (MP) with regard to misappropriation of public funds. Copy of the complaint filed as annexure 4 to the O.A. contains serious



charges and ordinarily such complaints should be looked into by conducting appropriate inquiry and in case something is found amiss then, for the sake of purity in system and confidence reposed by the public at large in the army, action should be taken in accordance to rules.

8. In view of above the O.A. deserves to be allowed and is accordingly allowed. The impugned order of discharge 06.12.2006 and order dated 17.04.2008 passed by the General Officer Commanding, Maharashtra, Gujrat and Goa Area, Mumbai dismissing the appeal preferred by the applicant are set aside with all consequential benefits. The applicant shall be reinstated in service. However, back wages are confined to 50% as admissible to the applicant. Let the consequential benefits be provided to the applicant within four months from the date of production of certified copy of this order.

However, we leave it open to the respondents to proceed afresh against the applicant if so advised and if contingency so requires.

No orders as to costs.

**(Air Marshal Anil Chopra)**  
**Member (A)**

anb

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