

Court No.3**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****ORIGINAL APPLICATION No. 86 of 2015**Tuesday, this the 01st day of December 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal Anil Chopra, Member (A)Nk Gir Raj Singh Tomar (No 15128557),
S/o Girwar Singh Tomar of 222 Field Regt, Pin-926222
C/o 56 APO, R/o & PO Pipari Put, Tehsil-Porsa, Distt-Morena,
presently at Lucknow.

.....Applicant

Ld. Counsel for the: **Maj (Retd) R.D. Singh, Advocate**
Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence;
DHQ PO New Delhi-11.
2. Chief of the Army Staff, IHQ, South Block, DHQ PO New
Delhi-11.
3. Commandant & OIC Records Arty Regtl. Centre &
Records PIN 908802. c/o 56 APO.
4. Commander, 28 Arty Bde; Pin-926928, C/o 56 APO.
5. Commanding Officer, 222 Field Regt, Pin-926222, C/o 56
APO.

...Respondents

Ld. Counsel for the : **Shri Prakhar Kankan, Central**
Respondents. **Govt Counsel assisted by**
Lt Col Subodh Verma,
OIC, Legal Cell.

ORDER (ORAL)

1. Heard Ld. Counsel for the parties and perused the record.
2. The present Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act 2007 being aggrieved against the impugned order of discharge from army.
3. The factual matrix of the case is that the applicant was enrolled in the army on 28.04.1996 and served for about 17 years. According to Ld. Counsel for the applicant, the applicant was posted for about 9 years in High Altitude Area. During the course of his service, the applicant was awarded 5 red ink entries out of which four red ink entries were awarded under section 63 and 1 was under section 39 (b) of the Army Act 1954. Further submission of the Ld. Counsel for the applicant is that the aforesaid punishment with red ink entries were granted on invalid grounds and for extraneous reasons. However the fact remains that the red ink entries were not challenged at the relevant time hence they attained finality and no grievance can be raised once the entries attained finality. The show cause notice dated 17.07.2013 was served on the applicant to show cause as to why his services may not be terminated on account of 5 red ink entries. The ground for discharge as given in the show cause notice is based on 5 red ink entries. Notice was served by Commanding Officer (Colonel) and after receipt of reply, the

applicant was locally discharged from service by the Commanding Officer.

4. According to Ld. Counsel for the applicant, no preliminary inquiry was held in terms of Army Order dated 28.12.1988 and the applicant was never called by the Commanding Officer. On the other hand, Ld. Counsel for the respondents submitted that preliminary inquiry was held and show cause notice was issued. However, the fact remains that during the course of inquiry, the applicant was not permitted to defend his case. The order seems to be ex parte which became foundation for discharge of applicant from Army service through notice served by the Commanding Officer (Colonel) and not by the Brigade/Sub Area Commander. Under the relevant Rule 13 (3) iii (v) of Army Rules, notice is to be served by Brigade/Sub Area Commander and not by the Commanding Officer and it is for the Brigade/Sub Areas Commander to pass order of discharge after holding preliminary inquiry. There appears to be violation of Rule 13 (3) iii (v) of the Army Rules 1954 and relevant Army Orders while discharging the applicant from service.

5. Further argument advanced by Ld. Counsel for the applicant is that while discharging the applicant in pursuance of aforesaid provision, it was incumbent on the part of the respondents to have served notice on him along with copy of the preliminary enquiry. It is submitted that along with the show cause notice, copy of the preliminary enquiry report was not supplied to the applicant. Ld. Counsel for the applicant has drawn our

attention towards earlier judgment of this Tribunal delivered in **O.A. No. 168 of 2013 *Abhilash Singh Kushwah vs. Union of India*** dated 23.09.2015 wherein it has been held that non compliance of Army Order 28.12.1988 shall vitiate the punishment awarded to army personnel.

6. 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”.*

7. The Hon’ble Supreme Court while affirming the aforesaid proposition of law 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 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. 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”.

8. In view of above, the Original Application deserves to be allowed; hence allowed and impugned show cause notice dated 17.07.2013 and order of discharge dated 24.08.2013 are set aside. The applicant shall be restored in service with all consequential benefits expeditiously, say, within three months from the date of presentation of a certified copy of this order. However, after restoration of the applicant in service, it shall be open for the respondents to proceed afresh against the applicant in case advised to do so.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)
anb

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