

Court No.3

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

TRANSFERRED APPLICATION NO 817 of 2010

Monday, this the 23rd day of November 2015

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

Shri Nagender Kumar s/o Shri Sudeshwar Singh, r/o Village Sultanpur, P.O. Habbipur, Tehsil Hilsa, District, Nalanda Bihar at present residing at 128/H/325 Kidwai Nagar, Kanpur Nagar.

.....Petitioner

Ld. Counsel for the: **Shri R. Chandra, Advocate**
Petitioner

Versus

1. The Union of India, Defence Ministry through its Sachiv, New Delhi.
2. The Chief of Army Staff, Army Headquarter, New Delhi.
3. The Officer I/C, Record, Armed Core, Ahmad Nagar, (Maharashtra).
4. The Commanding Officer, No. 13 Armed Regiment, Surat Garh (Rajasthan), c/o 56 A.P.O.

...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. Counsels for the parties and perused the records.
2. Being aggrieved by order of discharge from service on 24.12.1989 on account of four Red Ink Entries the petitioner preferred writ petition No 40255 of 1994 in the High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance of provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007. Admittedly the applicant was enrolled in the army on 29.10.1982 and thereafter continued to serve the army as soldier. After serving for about 7 years, on account of eye problem he was recommended to join civil service. However records shows that he was discharged from service on account of 4 Red Ink Entries. Before passing impugned order of discharge show cause notice dated 30.09.1980 was served on the petitioner, copy of which has been annexed with supplementary affidavit dated 17.11.2015 on record. Perusal of the impugned notice shows that the petitioner was treated as a person whose retention in army was considered detrimental to good army discipline, hence in pursuance of provisions of section 13 (3) iii (v) of the Army Rule 1954, a notice was served seeking reply within 30 days and subsequently he was discharged from army.
3. Solitary arguments advanced by Ld. counsel for the petitioner is that at no stage any preliminary enquiry was held and the petitioner was discharged merely on the ground of four Red

Ink Entries which is not sustainable in view of Army Order 28.12.1988. However, Ld. Counsel for the respondents vehemently submitted that preliminary enquiry was held though preliminary enquiry report was not annexed with the show cause notice. Ld. Counsel for the respondents could not repel the contention of Ld. Counsel for the petitioner that preliminary enquiry report should have been served on the petitioner alongwith show cause notice in view of law settled by Hon'ble Supreme Court in the case of ***Mohinder Singh Gill & Anr Vs. the Chief Election Commissioner, New Delhi and Anrs reported in 1978 SCR (3) 272***, wherein their Lordship have held that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented in the shape of affidavit or otherwise. Impugned order should stand on its own leg. Neither a notice nor the order of discharge of the petitioner from army contains any reference to preliminary enquiry held against the petitioner. Hence there is a presumption that no preliminary enquiry was held.

4 Submission of the petitioner's counsel is that no preliminary enquiry was held under rule (supra) and the discharge merely on the basis of red ink entries is not sustainable. Ld. counsel for the petitioner relied upon the judgment of this Tribunal delivered in **O.A. No. 168 of 2013 Abhilash Singh Kushwah vs. Union of India dated 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”.*

5. 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 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”.

6. In view of the above, we allow the T.A. and set aside the impugned order of discharge dated 24.12.1989 with all consequential benefits. The petitioner shall be treated in service to full length of period of superannuation of his rank in accordance with rules and be paid pension. However payment of back wages is confined to 25%. Let appropriate decision be taken in the light of observations made herein above expeditiously, say, within four months from the date of presentation of certified copy of this order with due communication to the petitioner.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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