

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

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

**Transferred Application No. 77 of 2013**

Friday this the 27<sup>th</sup> day of January, 2017

**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Lt Gen Gyan Bhushan, Member (A)**

Jainendra Kumar  
Son of late Sri Ram Awadh,  
Resident of Gram and Post Khorabar  
Thana Khorabar  
District Gorakhpur

..... Petitioner

By Legal Practitioner - Shri Virat Anand Singh, Advocate

Versus

01. Union of India through its Secretary,  
Ministry of Defence, New Delhi.
02. Lt. OIC NER Group, for OIC Records,  
58, Gorakha Rifles Abhilekh, Records 58,  
Gorakha Rifles, Happy Valley,  
Shillong-793007

..... Respondents

By Legal Practitioner - Shri G.S. Sikarwar,  
Learned Counsel for the  
Central Government

**ORDER (ORAL)**

1. The petitioner, being discharged from the Army on the ground of red ink entries, preferred Civil Misc. Writ Petition No. 2815 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. 77 of 2013.

2. Brief facts, as borne out from the Transferred Application is that the petitioner was enrolled in the Army as Washerman in 8 GR on 13.03.1987. He was posted to 2/8 GR on 17.03.1988 and served with 33 RR from 05.03.1997 to 18.07.1999 and thereafter was posted to 3/8 GR with effect from 19.07.1999. The petitioner was discharged with effect from 31 10.1999 being undesirable soldier after rendering 12 years, 07 months and 10 days of service. During the above period, the petitioner was awarded 5 red ink entries under Section 39 of Army Act. The petitioner was served with Show Cause Notice by Commander 30 Infantry Brigade and on receipt of reply, he was discharged from Army service under Army Rules 1954, under Item 13 (3) III (v).

3. We have heard Shri Virat Anand Singh, Learned Counsel for the applicant, Shri G.S. Sikarwar, Learned Counsel for the respondents and perused the record.

4. 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 vs. Union of India & others** (O.A. No. 168 of 2013, decided on 23.09.2015 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 inquiry as per Army Headquarters letter No. A/13210/159/AG/PS2 (c) dated 28.12.1988 has not been conducted.

5. 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, the petitioner can not 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.*

*(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. 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 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.*

*Ina 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.”*

7. In view of the judgments of this Tribunal and Hon'ble The Apex Court, Transferred Application deserves to be allowed.

8. Thus, in the result, Transferred Application No. 77 of 2013 is allowed and the impugned orders dated 31.10.1999 and 05.09.2002 passed by the respondents are set aside. The petitioner shall be notionally treated in service till he would be entitled for service pension. The applicant shall not be entitled for back wages from the date of discharge to the date he reaches pensionable service. The applicant shall be entitled to terminal benefits and pension as per Pension Regulations for the Army, 1961 along with 9% interest on arrears. The respondents are directed to comply with the order within four months from the date of production of a certified copy of this order.

9. No order as to costs.

(Lt Gen Gyan Bhushan)  
Member (A)

Dated : January, 2017

PKG/SB

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