

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 183 of 2018****Tuesday, this the 23rd day of July, 2021****Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

No. No. 2996724-P Ex-Nk Arun Kumar Pandey, S/o Late Shri Raj Kumar Pandey, Village: Dhundhpur, Post: Sauna, Tehsil: Saidpur, Dist: Ghazipur (UP) – 233221.

.... Applicant

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

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi-110011.
2. The Chief of Army Staff, Min of Def (Army) South Block, New Delhi-110011.
3. HQ 63 Mtn Bde (A), PIN: 908063, C/O 56 APO.
4. OIC Records, The Rajput Regiment, PIN: 900427 C/O 56 APO.
5. PCDA (Pensions), Draupadi Ghat, Allahabad (UP)-211014.

... Respondents

Ld. Counsel for the: **Shri Amit Jaiswal**, Advocate
Respondents.

ORDER (Oral)

1. Being aggrieved by denial of service pension, applicant has filed this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, whereby he has sought following reliefs:-

(a) to quash and set aside the discharge sanction accorded by Cdr, HQ 63 Mtn Bde, PIN: 908063, C/O 99 APO dated 11.11.2011 (Exhibit III of O.A.) in respect of applicant.

(b) to issue/pass an order or directions of appropriate nature to the respondents to treat the applicant in service to the full length of his rank so as to earn pension and to grant the service pension with all consequential benefits.

(c) any other relief as considered fit and proper by the Hon'ble Tribunal be awarded in favour of the applicant.

2. Briefly stated facts of the case are that applicant was enrolled in the Indian Army on 30.04.1997. He was discharged from service on 20.11.2011 under Rule 13 (3) III (v) of Army Rules, 1954 read in conjunction with Army Headquarters letter dated 28.12.1988 as undesirable soldier. During course of service, applicant was awarded eight minor punishments under Section 39 (a), 39 (b), 48 and 63. On account of incurring four red ink entries, applicant was issued Show Cause Notice (SCN) dated 15.10.2011 to which he submitted reply on 23.10.2011 requesting the Commanding Officer to complete his pensionable service as he had put in 14 years and 06 months service at the time of issuance of SCN. While submitting reply to SCN applicant had also requested to let him continue in service till his pensionable service. It was also urged by applicant that he would mend his attitude to earn service pension. On 11.11.2011 Brigade Commander, 63 Mtn Bde

issued sanction to discharge applicant w.e.f. 20.11.2011. Accordingly, he was discharged from service w.e.f. 20.11.2011 without completing pensionable service. This O.A. has been filed for grant of service pension by condoning shortfall in service which comes out to 05 months and 11 days.

3. Learned counsel for the applicant submitted that applicant had put in more than 14 years service when he was discharged from service as undesirable soldier on account of certain red ink entries in terms of Army Headquarters policy letter dated 28.12.1988. His further submission is that as per the aforesaid policy, preliminary enquiry was not conducted prior to issuance of SCN and discharge from service. In support of his pleadings while filing O.A. in para 5 (C) and (D), applicant's counsel has relied upon O.A. No. 168 of 2013 titled **Abhilash Singh Kushwaha vs Union of India & Ors**, decided by this Tribunal on 23.09.2015, the Hon'ble Apex Court order dated 16.10.2015 passed in Civil Appeal No 32135 of 2015, titled **Virendra Kumar Dubey vs Union of India & Ors** and this Tribunal's order dated 13.04.2016 passed in O.A. No. 377 of 2012 in the case of **Arvind Kumar vs Union of India & Ors**. He concluded with a prayer for grant of service pension to applicant.

4. Per contra, learned counsel for the respondents contended that applicant being an undisciplined soldier, habitual offender and having casual attitude towards discharging his duties, has been rightly discharged from service as undesirable soldier by following due procedure as per policy letter dated 28.12.1988. His further contention is that prior to discharge from service, a SCN dated 15.10.2011 was issued

to applicant and on receipt of reply dated 21.10.2011, he was discharged from service after taking concurrence of Brigade Commander. Further submission of learned counsel for the respondents is that during his service applicant was awarded eight punishments for the offences done mostly on account of overstayal of leave and intoxication which is not acceptable in an organization like Army. While submitting reply of para 4.5 to 4.9 of O.A., learned counsel for the respondents submitted in para 6 of counter affidavit that applicant has not completed 15 years of service to earn service pension. He pleaded for dismissal of O.A.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. It is not disputed that applicant was enrolled in the Army as Sepoy on 30.04.1997 and was discharged from service as undesirable soldier on 20.11.2011 on the ground of more than four red entries. While assailing the impugned order of discharge, solitary argument advanced by learned counsel for the applicant is that no preliminary enquiry was held in pursuance to policy letter dated 28.12.1988. Show Cause Notice dated 15.10.2011 was served on the applicant containing description of red ink entries. Thereafter, the applicant was discharged from service.

7. Admittedly, no preliminary enquiry was held in pursuance to policy letter dated 28.12.1988 (supra). In case the preliminary enquiry would have been held, then the applicant would have got an opportunity to defend his case and establish that he is entitled to continue in service. Discharge order dated 15.10.2011 shows that offences are mostly related to intoxication and overstayal of leave between the years 2002 to 2011.

In case, had the preliminary enquiry been held in pursuance of policy letter dated 28.12.1988 (supra), the applicant would have got an opportunity to establish his case to continue in the army to earn service pension. Respondents should have taken a decision keeping the factual matrix of record. Mere red ink entries are not sufficient to discharge Army person.

8. Further more, not only should there be SCN but also enquiry into allegations made against individual concerned in which he ought to be given opportunity for putting up defence, especially when he is about to complete his pensionable service, and allegations must stand substantiated for discharge to follow. In the instant case no preliminary enquiry was conducted as held in policy letter dated 28.12.1988 prior to issuance of SCN and later discharge from service. Since applicant has crossed the age of superannuation, he be treated to be in service till such time he completes qualifying service for grant of pension.

9. It is also pertinent to mention that after discharge of applicant, Smt Supriya Pandey (wife of the soldier) had also approached the Record Officer, Rajput Regimental Centre, Fatehgarh vide letter dated 28.05.2012 requesting for service pension on the plea that she has small children to take care of and without pension she is unable to run the family.

10. While deciding the O.A. No. 168 of 2013 on 23.09.2015 by this Tribunal, in the case of **Abhilash Singh Kushwaha vs Union of India & Ors**, it has been held that merely on red ink entries and Show Cause Notice, no personnel can be dismissed/discharged from Army. Policy

letter dated 28.12.1988 (supra) has got statutory provision. The relevant portion of para 75 of the aforesaid judgment 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”.*

11. Further, the Hon'ble Supreme Court while affirming the aforesaid proposition of law also held in the case of **Veerendra Kumar Dubey** (supra) that preliminary inquiry is necessary and discharge merely on the basis of red ink entries is not sustainable. For convenience sake 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.

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”.

12. While allowing the aforesaid appeal, the Hon’ble Supreme Court has restored the appellant with continuity of service till the time he would have completed the qualifying service for grant of pension. However, no back wages were made admissible.

13. In view of above the present O.A. is **allowed** and impugned order of discharge i.e. sanction accorded by Brigade Commander, 63 Mtn Bde dated 11.11.2011 for discharge of applicant is quashed.

14. Benefit of continuity of service for all other purposes shall be granted to the applicant including pension without back wages. However, arrears of pension are restricted to three years prior to filing of this O.A. which was filed on 25.07.2016. Monetary benefits and pension payable to the applicant shall be released expeditiously but not later than four months from the date of production of certified copy of this order. Default will invite interest @ 8% p.a.

15. No order as to costs.

16. Pending applications, if any, are disposed off.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated :23rd July 2021
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