

**ARMED FORCES TRIBUNAL, REGIONAL  
BENCH, LUCKNOW****O.A. No. 121 of 2013**Monday, this the 05<sup>th</sup> day of October, 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal Anil Chopra, Member (A)**No. 15379688F Ex Signalman Abhinandan Kumar  
Son of Rajendra Thakur  
Presently in Sector 11, Kumbh Nagar  
Sangam Area, Allahabad

.....Applicant

By Legal Practitioner Col (Retd) Ashok Kumar,  
Advocate.

Versus

1. Chief of Army Staff  
DHQ PO, New Delhi 110011
2. Commandant cum Chief Records Officer  
Signal Records Post Bag No. 5  
Jabalpur (MP)
3. Union of India through Secretary,  
Ministry of Defence, DHQPO, New Delhi

.....Respondent

By Legal Practitioner Mrs Deepti Prasad,  
Bajpai, Ld. Counsel  
for the  
Representative

**ORDER (ORAL)**

1. Heard Ld. Counsel for the parties and perused the record.
2. This application under section 14 of the Armed Forces Tribunal Act 2007 has been filed by the applicant being aggrieved with the impugned discharge order dated 22.01.2004 on account of red ink entries.
3. According to Ld. Counsel for the applicant, the applicant was enrolled in the Indian Army on 31.10.1992. Ld. Counsel for the applicant submits that applicant has discharged his duties to the full satisfaction of his superiors. However on 15.10.2003, notice was served to the applicant under Rule 13 (3) item (iii) (v). The copy of the show cause notice has been brought on record by means of supplementary affidavit which shows that show cause notice was issued by the Commanding Officer based on 5 red ink entries and 3 black ink entries. Show cause notice in its entirety is reproduced as under:-

**"CONFIDENTIAL"**

*2 Corps Sig Regt (AREN)  
C/O 56 APO*

*PC-15379688F/Sigs/02/*

*15 Oct 2003*

*15379688F Sigmn (OPCOM)  
Abhinandan Kumar  
2 Coy*

**SHOW CAUSE NOTICE-DISCHARGE FROM SERVICE**

1. *You were enrolled in the Army on 31 Oct 1992. Perusal of your records shows that you have been awarded the following punishments during the service :-*

Red Ink Entries

(a) Awarded 28 days RI and absence to be regularised as AL under AA Sec 39 (a) by Col RM Khaire, CO 27 Mtn Div Sig Regt on 16 Sep 1997.

(b) Awarded 07 days RI under AA Sec 39 (b) by Lt Col AV Dhuri, Offg CO 27 Mtn Div Sig Regt on 23 Nov 1998.

(c) Awarded 07 days RI under AA Sec 63 by Col RM Khaire, CO, 27 Mtn Div Sig Regt on 01 May 1999.

(d) Awarded 28 days RI and 14 days detention in Military Custody under AA Sec 38 (i) by Col AK Gandotra, CO 2 Corps Sig Regt (AREN) on 19 Aug 2003.

(e) Awarded 07 days RI in Military Custody under AA Sec 39 (a) by Col AK Gandotra, CO 2 Corps Sig Regt (AREN) on 07 Oct 2003.

Black Ink Entries

(f) Awarded 03 days CL under AA Sec 63 by Maj SK Katyal, OC 20 Inf Bde Sig Coy on 10 Jun 1996.

(g) Awarded 07 days pay fine under AA Sec 54 (b) by Maj SK Katyal, OC 20 Inf Bde Sig Coy on 17 Dec 1996.

(h) Awarded 07 days pay fine under AA Sec 39 (a) by Col Harminder Singh, CO 2 Corps Sig Regt (AREN) on 15 Jun 2002.

2. It may be seen from the above record that periodic counseling and corrective punishments given to you did not have any desired effect on you. Therefore, as per the existing orders, your further retention in the service is not considered desirable being detrimental to the service. You are therefore directed to show cause as to why you should not be discharged from the service.

3. Your reply to this show cause notice should reach the undersigned within seven days through your Coy Cdr.

Sd/- x x x x x x  
(AK Gandotra)  
Col  
Commanding Officer

Copy to  
2 Coy

CONFIDENTIAL

4. After receipt of reply to aforesaid show cause notice, the applicant was discharged vide impugned order dated 22.01.2004.

5. While assailing the impugned order, Ld. Counsel for the applicant submits that in pursuance to provisions contained in aforesaid Rule, notice should have been served by the Bde/Sub area Commander, but in the present case, it was served by Commanding Officer who is not competent authority under the statute. In pursuance to aforesaid notice, movement order was issued which indicates that the applicant has been discharged from service and he was required to go home. Ld. Counsel for the applicant submits that decision taken by the respondents shows that the applicant has been dismissed from service on 22.01.2004. The order of the dismissal could not have been passed without holding fact finding enquiry. Of course discharge order could have been passed after fact finding enquiry under Army Order dated 28.12.1988. Attention has been invited to this Tribunal Judgment dated 23.09.2015 passed in O.A. No. 168 of 2013, **Abhilash Singh Kushwaha vs Union of India**, decided on 23.09.2015. Submission of Ld. Counsel for the applicant is that fact finding enquiry is necessary in view of the aforesaid judgment of this Tribunal. However, since no order has been passed separately after receipt of the response to the notice from the applicant, entire action of the respondents suffer from arbitrariness.

6. Arguments advanced by learned counsel for the applicant seem to be correct. The provisions of Army Rule 13 (3) (iii) (v)

requires serving of notice. Once a statute provides for service of notice seeking explanation from the employee, it is incumbent upon the competent authority to pass reasoned and speaking order keeping in view the reply submitted by the employee, in the absence of which, the order of discharge or dismissal shall suffer from vice of arbitrariness and shall be hit by Article 14 of the Constitution.

7. It is well settled proposition of law that unless barred by some Act or statute, it is always expected that the authority while imposing punishment shall pass a reasoned and speaking order.

8. In the present case order passed after service of the notice has not been brought on record of the Tribunal while filing counter affidavit. Attention of the Tribunal has also not been invited to any discharge/dismissal/movement order passed by the respondents under Army Rule 13 (3) (iii) (v). Needless to say that the purpose of service of reasoned order upon the incumbent is meant to exercise discretion to file statutory complaint under Section 26 of the Army Act or Regulation 368 by retired person. In case no decision is communicated after service of notice in compliance of statutory provision, passing straight away movement order shall not be due compliance of principles of natural justice. An employee cannot be kept in a situation of indecisiveness.

9. In view of the above, we are of the view that respondents have not discharged the applicant as per rule as held in the

case of **Abhilash Singh Kushwaha** (supra). While considering non compliance of preliminary enquiry on the basis of red ink entries, in para 75 of the judgment, we have held 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."*

10. Thus, there appears no room of doubt that the order passed in the colour of dismissal suffers from arbitrary exercise of power by the competent authority.

11. It appears that the Commanding Officer was not advised properly and the army should tone up their legal advisory branch.

12. In view of observations made above, we allow the O.A. and set aside the discharge/movement order dated 22.01.2004. The applicant shall be deemed in service till completion of 15 years of service for the purpose of pensionary benefits. However, payment of salary to the applicant is confined to 25%. This order shall be complied with by the respondents within three months from the date of presentation of a certified copy of this order.

No order as to costs.

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

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

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