

Court No.3**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****Original Application No. 284 of 2011**Wednesday, this the 14th day of October 2015**Hon'ble Mr. Justice D.P. Singh, Member (J)**
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex Gunner (DMT) Niraj Singh (No. 15164930-K) of
313 Field Regiment, PIN 920313, son of Shri
Chaturgun Singh, presently residing at C/O
Amresh Kumar Singh, Bada Lalpur Near Madawa
Gaon Chocklate & Namkeen Factory, District-
Varanasi (Uttar Pradesh)-7

.....Applicant

Ld. Counsel for : **Shri P.N. Chaturvedi,**
the Applicant **Advocate**

Versus

1. Chief of the Army Staff, Integrated Headquarter
Of the Ministry of Defence, South Block, New Delhi-110001.
2. General Officer Commanding, 24 Infantry Division,
C/O 56 APO.
3. Commander 24 Artillery Brigade, PIN-926924,
C/O 56 APO.
4. Commanding Officer, 313 Field Regiment,
PIN 920313, C/o 56 APO.
5. Officer-in-Charge Records Artillery, Nasik Road Camp,
Maharashtra.

.....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 records.
2. This is an application under section 14 of AFT Act 2007 against impugned order of discharge as recorded in movement order dated 10.06.2010 passed in pursuance of Army Rule 13 (3) iii (v) read with Army Order dated 28.12.1988.
3. The solitary arguments advanced by the Ld. Counsel for the applicant is that by passing the impugned order of discharge no separate order has been passed. Further it has been submitted that provisions of Army Order dated 28.12.1988 which ipsi dixit have been relied by the respondents but no preliminary inquiry was held in pursuance of Army Order dated 28.12.1988 while discharging the applicant.
4. Respondents Ld. counsel has submitted that the applicant had not preferred any statutory complaint against the impugned order hence the matter may be relegated to the appropriate army authority.
5. We have considered the arguments advanced by the Ld. Counsel for the applicant. The application has been admitted and affidavits have been exchanged.
6. The controversy seems to have been set at rest by this tribunal's order passed in O.A. No. 168 2013 decided on 23.09.2015. In these circumstances we are of the view that relegation shall be wastage of time. Accordingly we decide the

O.A. on merit after hearing the Ld. Counsel for the parties at length.

7. It has not been disputed that Army Order dated 28.12.1988 contain the provision to hold preliminary inquiry and thereafter serve notice alongwith copy of preliminary inquiry report upon the incumbent. In the present case no inquiry was held, rather only Show Cause Notice was served on the applicant indicating as to why he be not discharged on account four red ink entries.

8. Merely four red ink entries do not make out a case for discharge from army unless some inquiry is held and a finding is recorded that the incumbent is not improving his conduct after awarding of red ink entry and has become undesirable soldier. Further after service of show cause notice it is incumbent upon the authority to pass a reasoned order assigning the ground under which the incumbent has been held to be undesirable soldier. In the present case attention has not been invited to any order after service of show cause notice and only in the movement order the applicant has been declared as undesirable soldier. In the case of **Abhilash Singh Kushwah** (Supra) 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”.

9. In view of the above the impugned order seems to suffer from vice of arbitrariness. Army Order dated 28.12.1988 having statutory force, its non compliance vitiates the impugned order of discharge.

10. The O.A. deserves to be allowed, hence allowed.

11. Impugned order dated 10.06.2010 is set aside with all consequential benefits. Applicant shall be deemed to be in service upto his age of superannuation. However, salary is confined to 25% payable to the applicant in accordance with rules.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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