

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

Transferred Application No. 1292 of 2010

Wednesday, This the 7th day of October 2015

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

No. 13972502-P Sepoy Radhey Shyam Gunera
Son of Shri Mangi Lalji
Resident of Premila Ganj A lot
District : Ratlam-157001.

.....Applicant

Ld. Counsel for **Col (Retd) Ashok Kumar, Advocate**
the Applicant

Versus

1. Chief of the Army Staff, Army HQ, New Delhi.
2. Officer Incharge, A.M.C. Records, Lucknow.
3. Commanding Officer, Military Hospital, Allahabad.
4. Union of India, Through, Secretary, Ministry of Defence
New Delhi.

...Respondents

Ld. Counsel for the **Shri Mukund Tewari, Advocate.**
Respondents **Central Govt. Counsel**

ORDER (ORAL)

1. Heard Ld. Counsel for the parties and perused the record.
2. While assailing the impugned order of discharge solitary argument advanced by Ld. Counsel for the petitioner is that no preliminary enquiry was held in pursuance to Army Order dated 28.12.1988. Show Cause Notice was served on the applicant containing description of red ink entries. Thereafter the applicant was discharged from service. Admittedly no preliminary enquiry was held in pursuance to Army Order 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 22.05.1995 shows that red ink entries are between the years 1990 to 1994. In case, the preliminary enquiry would have held in pursuance of Army Order dated 28.12.1988 (supra), the applicant would have got an opportunity to establish his case to continue in the army. Respondents should have taken a decision keeping the factual matrix of record. Mere red ink entries are not sufficient to discharge army person.
3. While deciding the O.A No. 168 of 2013, Abhilash Singh Kushwah decided on 23.09.2015, it has been held that merely on red ink entries and Show Cause Notice, no army personnel can be dismissed from army. Army Order 28.12.1988 (supra) has got statutory provision. The relevant portion of para 75 of the 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”.

4. In views of the above, T.A. deserved to be allowed.

5. Accordingly the T.A. is allowed with all consequential benefits. The petitioner shall be treated in service for 15 years and shall be paid all retiral dues. So far as arrears of salary is concerned, the petitioner shall be entitled to 25% be paid to him. The respondents shall comply this order within a period of three months from the date a copy of this order is produced before them.

No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

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

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