

**RESERVED**  
**Court No. 1**

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

**O.A. No. 182 of 2017**

Monday, this the 15<sup>th</sup> day of October, 2018

**Hon'ble Mr. Justice SVS Rathore, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Neeraj Bhatt (**No 5340980A Ex Sepoy**), Son of Shri Neeladhar Bhatt, resident of Village: Wadda, Post: Wadda, District- Pithoragarh (UK).

.... Applicant

Ld. Counsel for the: **Shri R. Chandra**, Advocate.  
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, Government of India, New Delhi
2. The Chief of the Army Staff Integrated Headquarters New Delhi-11
3. The Officer-In-Charge Bengal Engineer Groups Records PIN-900477 C/o 56 APO
4. Officer Commanding 410(I) Engr Sqn Pin-913410 C/o 56 APO.

...Respondents

Ld. Counsel for the: **Dr. Shailendra Sharma Atal**, Advocate.  
Respondents.

**ORDER**

**“(Per Hon'ble Mr Justice SVS Rathore, Member (J))”**

1. By means of this O.A. under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has made the following prayers:-

“(i) The Hon’ble Tribunal may be pleased to quash the order dated 01/09/2012 discharging the applicant from service w.e.f. 31/12/2008 (ANNEXURE NO A-1), order dated 23/04/2015 (ANNEXURE NO A-2)

(ii) To direct the respondents to re-instate the applicant in service till he reaches completion of 15 years of service and further he be granted service pension of 15 years with all consequential retiral benefits with the interest of 24 percent per annum.

(iii) Any other appropriate order or direction which the Hon’ble Tribunal may deem just and proper in the nature and circumstance of the case.”

2. In brief the facts of the present case are that the applicant was enrolled in the Army on 28.09.2001. During the course of service he remained posted on different places. Ultimately on 31.12.2008 he was discharged under the provisions of Army Rule 13(3) item III (v) of Army Rules, 1954 after issuing show cause notice to the applicant by the Commander 55 (I) Mechanical Brigade. It is pleaded that the applicant was awarded three punishments in his whole service. On 01.09.2012 the applicant was issued discharge book through Zila Sainik Kalyan Evam Punarvas Adhikari, Pithoragarh. Thereafter the applicant on 31.03.2015 submitted an appeal for his reinstatement in service with all consequential benefits because his order of discharge was passed without following the procedure. On 02.08.2015 counsel for the applicant gave a legal notice because no reply was given to the aforesaid appeal of the applicant. On 04.09.2015 the

respondent no.3 gave reply of the said appeal and it was intimated that the appeal has already been decided on 23.04.2015 and the applicant was locally discharged from service w.e.f. 31.12.2008 on disciplinary grounds. It was further said that a show cause notice was issued to the applicant on 01.12.2008 and reply to the show cause notice was given by the applicant on 08.12.2008. The applicant was locally discharged from service after completion of 07 years, 03 months and 04 days service and such local discharge was ordered without following the procedure.

3. In the counter affidavit it is pleaded that the applicant rendered 07 years, 03 months and 04 days service in the Army, which includes 281 days of non qualifying service. As per the service record the applicant was a habitual offender. He had been awarded six red ink entries within 07 years, 03 months and 04 days, including non qualifying service. Due to his unauthorised absence and other offences on various occasions despite ample opportunities being given to him for improvement, he kept on repeating the similar offences, showing utter disregard to the discipline of the Army. Noticing no improvement in his behaviour, he was issued a show cause notice by the Commander, HQ 55 (i) Mechanical Brigade on 01.12.2008 and thereafter he was discharged from service w.e.f. 31.12.2008.

4. In the counter affidavit details of the various punishments awarded to the applicant have also been mentioned by the respondents, which are reproduced as under:-

<b>Ser No</b>	<b>Details of Offence</b>	<b>Period of absence</b>	<b>Punishments awarded</b>
(a)	Army Act Section 39 (a) (Absenting himself without leave)	133 days (21 Mar 2003 to 01 Aug 2003)	Award 14 days RI. Date of award-09 Aug 03.
(b)	Army Act Section 39(a) (Absenting himself without leave)	14 days (31 May 2004 to 01 Jun 2004)	Awarded 07 days RI Date of award-07 Jul 04.
(c)	Army Act Section 54 (b) (Losing by neglect Identity Card the property of the Govt issued to him for his use)	-	Awarded 07 days RI. Date of award - 12 Nov 05.
(d)	Army Act Section 39 (a) (Absenting himself without leave)	01 days (13 Jul 2006 to 13 Jul 2006)	Awarded 07 days RI. Date of award - 10 Aug 06.
(e)	Army Act Section 39(b) (Without sufficient cause overstaying leave granted to him).	22 days (21 Apr 2008 to 12 May 2008)	Awarded 14 days RI Date of award-03 Jul 08.
(f)	Army Act Section 39(a) (Absenting himself without leave)	112 day (18 Jul 2008 to 06 Nov 2008)	Awarded 07 days RI. Date of award-20 Nov 08.

5. The submission of the learned counsel for the applicant is that in view of the policy on the subject, a preliminary enquiry ought to have been held and the respondents have not conducted any preliminary enquiry.

6. Before proceeding further, we would like to quote the procedure for dismissal. We may at this stage consider it

appropriate to extract the relevant portion of the procedure prescribed for dismissal or discharge as under :

*“5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below :*

*(a) Preliminary enquiry. Before recommending discharge or dismissal of an individual the authority concerned will ensure :-*

- (i) That an impartial enquiry (not necessarily a Court of inquiry) has been made into the allegations against him and that he has had adequate opportunity or putting up his defence or explanation and of adducing evidence in his defence.*
- (ii) That the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case.”*

7. A careful reading of the aforementioned procedure clearly shows that the officer competent to direct discharge or dismissal of an individual should not only issue a show cause notice, but a preliminary enquiry into the allegations must also be conducted which is a necessary condition precedent. In such enquiry he must be given an opportunity of putting his defence and the allegation must stand substantiated for ordering discharge. In the instant case, absolutely no enquiry has been conducted by the respondents before passing the order of discharge under Rule 13 (3) III (iv) of the Army Rules, 1954.

8. Learned counsel for the respondents has tried to satisfy the Court only on the basis of the show cause notice that the applicant was given an opportunity to put his defence. But this submission of the learned counsel for the respondents is devoid of

merits. Learned counsel for the respondents on the basis of record and instructions has admitted that no such preliminary enquiry was conducted.

9. Learned counsel for the applicant, in support of his submission, has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Veerendra Kumar Dubey v Chief of Army Staff** (2016 (2) SCC 627). The case of Veerendra Kumar Dubey (supra) was again considered by the Hon'ble Apex Court in the case of **Vijay Shanker Mishra vs. Union of India & ors** (Civil Appeal Nos.12179 and 12180 of 2016) decided on 15<sup>th</sup> December 2016. In the said judgment, the Hon'ble Apex Court in paras 7 and 8 observed as under :

*" 7 The issue which arises in the present case is not res integra. A Bench of three learned Judges of this Court including one of us (the learned Chief Justice) in **Veerendra Kumar Dubey v. Chief of Army Staff** held as follows :*

*"10. The Government has, as rightly mentioned by the learned counsel for the appellant, stipulated not only a show-cause notice which is an indispensable part of the requirement of the Rule but also an impartial enquiry into the allegations against him in which he is entitled to an adequate opportunity of putting up his defence and adducing evidence in support thereof. More importantly, certain inbuilt safeguards against discharge from service based on four red ink entries have also been prescribed. The first and foremost is an unequivocal declaration that mere award of four red ink entries to an individual does not make his discharge mandatory. This implies that four red ink entries is not some kind of Laxman rekha, which if crossed would by itself render the individual concerned undesirable or unworthy of retention in the force. Award of four red ink entries simply pushes the individual concerned into a grey area where he can be considered for discharge. But just because he qualifies for such discharge, does not mean that he must necessarily suffer that fate. It is one thing to qualify for consideration and an entirely different thing to be found fit for discharge. Four red ink entries in that sense take the individual closer to discharge but does not push him over. It is axiomatic that the Commanding Officer is, even after the award of such entries, required to consider the nature of the offence for which such entries have been awarded and other aspects made relevant by the Government in the procedure it has prescribed."*

*This Court has in the above judgment construed the provisions of Rule 13 of the Army Rules, 1954 together with a letter of the Army Headquarters dated 28 December 1988 (bearing No. A/15010/150/AG/PS-2(c)). Emphasising the factors which have to be borne in mind, this Court held thus :*

*"16. The procedure prescribed by the Circular dated 28-12-1988 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. Inasmuch 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."*

*8 In the present case, it is evident that there was no application of mind by the authorities to the circumstances which have to be taken into consideration while exercising the power under Rule 13. The mere fact that the appellant had crossed the threshold of four red entries could not be a ground to discharge him without considering other relevant circumstances including (i) the nature of the violation which led to the award of the red ink entries; (ii) whether the appellant had been exposed to duty in hard stations and to difficult living conditions; (iii) long years of service, just short of completing the qualifying period for pension. Even after the Madhya Pradesh High Court specifically directed consideration of his case bearing in mind the provisions of the circular, the relevant factors were not borne in mind. The order that was passed on 26 February 2007 failed to consider relevant and germane circumstances and does not indicate a due application of mind to the requirements of the letter of Army Headquarters dated 28 December 1988 and the circular dated 10 January 1989."*

10. Before proceeding further in the matter, we would like to quote para 5 of the aforementioned judgment, which reads as under :

*"5 The contention of the appellant is that his discharge shortly before he would complete qualifying service for the grant of pension was grossly disproportionate. Moreover, reliance was placed on behalf of the appellant on circular No.0201/A/164/Admn-1 dated 10 January 1989 which provides as follows:*

*"Discharge from service consequent to four red entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service and the discharge should be ordered only when it is absolutely necessary in the interest of service".*

11. Now in the aforementioned legal background, if the facts of the instant case are testified, then it is abundantly clear that the

applicant was discharged from service only after issuance of show cause notice and receiving his reply. No impartial enquiry at all was conducted in this matter. The purpose of such an enquiry is two folds. First to place a check on the arbitrary powers of the competent authority to order discharge or dismissal of an individual and on the other hand, it requires the competent authority to consider the circumstances, the length of service of the applicant, the effect of the order which the applicant would suffer, so that a reasonable and appropriate decision may be taken in this regard. Admittedly no such enquiry has been conducted in this case, which has rendered the impugned order unsustainable. During the course of argument learned counsel for the respondents on the basis of original records has fairly conceded that in this case no preliminary enquiry was conducted by the respondents before passing the order of discharge.

12. In view of the admitted facts of this case, no preliminary enquiry was conducted before issuing the show cause notice and passing the order of discharge. Therefore, in view of the law settled by the Hon'ble Apex Court on the point mentioned above, O.A. deserves to be allowed.

13. Accordingly, the O.A. is hereby **allowed**. The impugned order of discharge is hereby set aside. The applicant shall be reinstated in service. The applicant shall get only 20% of the salary of the period during which he remained out of service.

14. Since adverse entries still exist against the applicant therefore we consider it appropriate to make it clear that the respondents shall be at liberty to initiate the disciplinary action strictly following the procedure prescribed therefor.

15. Respondents are directed to give effect to this order within a period of six months from the date of receipt of a certified copy of this order.

No order as to costs.

**(Air Marshal BBP Sinha)**  
**Member (A)**

Dated: October 15, 2018

JPT

**(Justice SVS Rathore)**  
**Member (J)**