REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL D.NO. 32135 OF 2013

Veerendra Kumar Dubey …Appellant

Versus

Chief of Army Staff & Ors. …Respondents

J U D G M E N T

T.S. THAKUR, J.

1. This appeal under Section 31 of the Armed Forces Tribunal Act, 2007, is directed against a judgment and order dated 14th December 2011 passed by the Armed Forces Tribunal, Regional Bench at Lucknow whereby the Tribunal has dismissed Transferred Application No.16 of 2011 filed by the appellant in the process affirming an order of discharge passed against the appellant by the competent authority under Rule 13(III)(v) of the Army Rules, 1954.

2. The appellant was enrolled as an Operator in the corps of Artillery of Indian Army on 27th September, 1980. Having served in that capacity for nearly 12 years, he received a show cause notice pointing out that he had been awarded four red ink entries for various offences set out in the notice and that the appellant had become a habitual offender thereby setting a bad example of indiscipline in the army. The notice, on that premise, called upon the appellant to show cause as to why he should not be discharged from service under Army Rule 13(III)(v) read with Army HQ letter No.A/15010/150/AG/PS-2(c) dated 28th December, 1988.

3. The appellant submitted a reply to the show cause notice which does not appear to have cut any ice with the competent authority resulting in his discharge by an order dated 14th December, 1992. Aggrieved, the appellant preferred an appeal before respondent No.2 which proved of no avail. The authority in the meantime issued a discharge order/certificate of service on 15th October, 1993 which the appellant challenged in MP No.1980 of 1994 before the High Court of Madhya Pradesh at Jabalpur. That petition was

dismissed by the High Court on 18th January, 2006 on the ground of lack of territorial jurisdiction aggrieved whereof the appellant filed Writ Appeal No.429 of 2006 which came to be transferred to the Armed Forces Tribunal, Regional Bench, Lucknow and renumbered as Transferred Application No.16 of 2011. The Tribunal by its order dated 14th December, 2011 has now dismissed the transferred petition giving rise to the present appeal.

4. The material facts are not in dispute. It is not in dispute that the appellant had within a period of 12 years of the service suffered as many as four red ink entries. All these entries were awarded to him on account of overstaying leave for a period ranging between 29 days to 66 days. The fourth red ink entry was earned on account of a severe reprimand awarded to him by the Commanding Officer in August, 1992. It is noteworthy that the first red ink entry was made on 25th July, 1982, the second on 28th December, 1985, the third on 13th September, 1991 and the last on 13th August, 1992. It is also not in dispute that the appellant had filed a reply to the show cause notice issued to him in which he had explained

the reasons for his overstaying the leave period in 1982 and attributed his failure to report back for duty to the medical condition of his wife. In regard to the second red ink entry he had offered an explanation based on his own illness and treatment in the district hospital. So also he had offered explanations for the other two red ink entries. These explanations notwithstanding the competent authority decided to discharge him from service without any enquiry whatsoever.

5. Before the Courts below and so also before us, the competence of the authority who discharged the appellant was not questioned by the appellant. What was all the same argued at considerable length by learned counsel for the appellant was that the availability of power to discharge was not enough. What was equally important is whether the power was exercised in a fair and reasonable manner keeping in view the guidelines which the Government had issued for such exercise. It was contended that the Government had prescribed the procedure for the removal of undesirable and inefficient JCOs, WO and ORs in terms of a

circular dated 28th December, 1988. The circular, it was contended, postulates not only the issue of a show cause notice to the individual concerned, but also a preliminary enquiry before recommending his discharge or dismissal. The individual concerned, it was argued, must have had an adequate opportunity to offer his explanation and to produce evidence in his defence. Not only that the enquiry ought to conclude that the allegations stood substantiated warranting termination of service of the delinquent. The fact that discharge from service, consequent upon an individual earning four red ink entries is not mandatory. This, according to the learned counsel, was evident from a plain reading of the procedure prescribed by the competent authority. It was also submitted that while considering the question of retention or discharge based on four red ink entries, the Commanding Officer was duty bound to consider not only the nature of the offences for which such entries had been awarded but also take into consideration the long service and the harsh conditions to which the individual had been exposed during his tenure. Discharge can under the

guidelines issued by the competent authority be ordered only where it is absolutely necessary to do so. The procedure prescribed by the competent authority for the exercise of the power of discharge under Rule 13 was, according to the learned counsel, observed but only in breach thereby rendering the discharge of the appellant illegal.

6. On behalf of the respondent it was contended by Mr. Maninder Singh, Additional Solicitor General that Rule 13 of the Army Rules did not provide for any specific procedure to be followed for discharge of undesirable persons or habitual offenders. The procedure prescribed for the exercise of the power of discharge in terms of the circular relied upon by the appellant was, according to the learned counsel, directory and did not create any right in the individual concerned to demand an enquiry in the matter. The procedure was in any case de *hors* the provisions of Rule 13 of the Army Rules, hence un-enforceable. Reliance in support was placed upon the decisions of this Court in ***Union of India and Ors. v. Corporal A.K. Bakshi and***

Anr. (1996) 3 SCC 65, ***Union of India and Ors. v. Rajesh Vyas (2008) 3 SCC 386***, and ***Union of India and Ors. v. Deepak Kumar Santra (2009) 7 SCC 370***. Reliance was also placed upon a recent decision of this Court in ***Union of India v. Balwant Singh (Civil Appeal No. 5616 of 2015)*** and a three-Judge Bench decision in ***Union of India and Ors. v. Harjeet Singh Sandhu (2001) 5 SCC 593*** apart from a Division Bench decision of the High Court of Delhi in ***Surinder Singh v. Union of India (2003) 1 SCT 697***.

7. Section 22 of the Army Act, 1950 provides that any person subject to the said Act may be retired, released or discharged by such authority and in such manner as may be prescribed. Section 23 envisages the issue of a certificate on termination of service to every junior commissioned officer, warrant officer, or enrolled person, who is dismissed, removed, discharged, retired or released from service. Section 191 of the Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. The rules may, *inter alia*, provide for

removal, retirement, or release upon discharge from service of persons subject to the rule. The Government has in exercise of that power framed Army Rules, 1953, Rule 13(III)(v) whereof applicable to the case at hand empowers the Brigade and Sub Area Commander to direct such discharge after giving to the person whose discharge is contemplated, an opportunity to show cause against the same provided the circumstances of the case permit the grant of such opportunity. Rule 13 (1), (2), (2A), (3)(III) and the Table below the same are extracted :

> **"13. Authorities empowered to authorise discharge** – *(1) Each of the authorities specified in column 3 of the Table below shall be the competent authority to discharge from service person subject to the Act specified in column 1 thereof on the grounds specified in column 2.*
>
> *(2) Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority Superior to it.*
>
> *(2A) Where the Central Government or the Chief of the Army Staff decides; that any person or class or persons subject to the Act should be discharged from service, either unconditionally or on the fulfilment of certain specified conditions, then, notwithstanding anything contained in this rule, the Commanding Officer shall also be the competent authority to discharge from service such person or any person belonging to such class in accordance with the said decision.*

(3) In this table "commanding officer" means the officer commanding the corps or department to which the person to be discharged belongs except that in the case of junior commissioned officers and warrant officers of the Special Medical Section of the Army Medical Corps, the "commanding officer" means the Director of the Medical Services, Army, and in the case of junior commissioned officer and warrant officers of Remounts, Veterinary and Farms, Corps, the "Commanding Officer" means the Director Remounts, Veterinary and Farms.

TABLE

Category	***Grounds of discharge***	***Competent authority to authorize discharge***	***Manner of discharge***
1	*2*	*3*	*4*
Junior Commissioned officers	*xxx xxx xxx*	*xxx*	
Warrant Officer	*xxx xxx xxx*	*xxx*	
Persons enrolled under the Act who have been attested	*III. (i) On fulfilling the conditions of his enrolment or having reached the stage at which discharge may be enforced.*	*Commanding Officer in the case of a person of the rank of havildar (or equivalent rank) where such person is to be discharged. Otherwise than at his own request and where the commanding officer below the rank of Lieutenant Colonel, the brigade or sub Area Commander, (SRO 116/65*	
	III. (ii) On	*Commanding*	*Applicable to*

	completion of a period of army service only, there being no vacancy in the Reserve	*Officer (in case of the persons unwilling to extend their Army Service)*	*person enrolled for both Army service and Reserve Service. (A person who has the right to extend his Army service and wishes to exercise that right cannot be discharge under this head)*
	III (iii) Having been found medically unfit for further service	*Commanding Officer*	*To be carried out only on the recommendation of an Invaliding Board*
	III (iv) At his own request before fulfilling the conditions of his enrolment	*Commanding Officer*	*The Commanding officer will exercise the power only when he is satisfied as to the desirability of sanctioning the application and the strength of the unit will not thereby be unduly reduced.*
	III (v) All other classes of discharge	*Brigade/Sub-Area Commander*	*The Brigade or Sub Area Commander before ordering the discharge shall, if the circumstances of the case permit give to the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge.*
Persons enrolled under the Act who have not been arrested	*xxx xxx xxx*	*xxx*	

8. A plain reading of the above makes it abundantly clear that the rule does not provide for anything beyond an opportunity to the individual concerned to show cause against his contemplated discharge before the competent authority passes any such order of discharge. That a show cause notice was issued to the petitioner in the present case before his discharge is not denied. On a strict interpretation of Rule 13(III)(V), therefore, one could perhaps say that the letter of the law has been complied with inasmuch as an opportunity has been afforded to the appellant to show cause against the contemplated discharge. The question, however, is whether that was enough having regard to the procedure which the Government has stipulated for the exercise of the power vested in the competent authority under Rule 13 of the Army Rules (supra). The Government has, as rightly mentioned by 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 to be found fit for discharge. Four red ink entries in that sense takes 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.

9. We may at this stage gainfully extract the relevant portion of the procedure prescribed for dismissal:

> *"Procedure for dismissal/discharge of Undesirable JCOs/WOs/OR:*
>
> *4. AR 13 and 17 provide that a JCO/WO/OR whose dismissal or discharge is contemplated will be given a show cause notice. As an exception to this, services of such a person may be terminated without giving him a show cause notice provided the competent authority is satisfied that it is not expedient or reasonably practicable to service such a notice. Such cases should be rare, e.g., where the interests of the security of the State so require. Where the service of a show cause notice is dispensed with, the reasons for doing so are required to be recorded. See proviso to AR 17.*
>
> *5. xxxxxxxxxxxxx*
>
> (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 of 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.*
>
> *(f) Final orders by the competent Authority. The authority competent to sanction the*

dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. If the competent authority considers that termination of the individual's service is not warranted but any of the actions referred to in (b) to (d) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactory, he will pass orders accordingly.

Note:-1. As far as possible, JCO, WO and OR awaiting dismissal orders will not be allowed to mix with other personnel.

2. Discharge from service consequent to four red ink 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. Such discharge should be approved by the next higher Commander."

10. A careful reading of the above would show that the competent authority has made it abundantly clear to officers competent to direct discharge that before discharging an individual, not only should there be a show cause notice but an enquiry into the allegations made against the individual concerned in which he ought to be given an opportunity of

putting up his defence and that the allegations must stand substantiated for a discharge to follow.

11. Para 5(f)(2) (supra) underscores the importance of the truism that termination of the individual's service is an extreme step which ought to be taken only if the facts of the case so demand. What is evident from the procedural mandate given to the authorities is to ensure that discharge is not ordered mechanically and that the process leading to the discharge of an individual is humanized by the requirement of an impartial enquiry into the matter and fair opportunity to the concerned especially when he is about to complete his pensionable service. Equally significant is the fact that the authority competent to discharge is required to take into consideration certain factors made relevant by the circular to prevent injustice, unfair treatment or arbitrary exercise of the powers vested in the Authority competent to discharge. For instance Note 2 to Rule 5 (supra) requires the competent authority to take into consideration the long service rendered by the individual, the hard stations he has been posted to and the difficult living conditions to which the

individual has been exposed during his tenure. It is only when the competent authority considers discharge to be absolutely essential after taking into consideration the factors aforementioned that discharge of the individual can be validly ordered.

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. Inasmuch 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. 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. 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 exercised. Any such unregulated and uncanalised power would in turn offend Article 14 of the Constitution.

13. Coming then to the case at hand, we find that no enquiry whatsoever was conducted by the Commanding Officer at any stage against the appellant as required under para 5(a) of the procedure extracted above. More importantly, there is nothing on record to suggest that the authority competent had taken into consideration the long service rendered by the appellant, the difficult living conditions and the hard stations at which he had served. There is nothing on record to suggest that the nature of the misconduct leading to the award of red ink entries was so unacceptable that the competent authority had no option but to direct his discharge to prevent indiscipline in the force. We must, in fairness, mention that Mr. Maninder Singh, ASG,

did not dispute the fact that any number of other personnel are still in service no matter they have earned four red ink entries on account of overstaying leave. If that be so, the only safeguard against arbitrary exercise of power by the authority would be to ensure that there is an enquiry howsoever summary and a finding about the defence set-up by the individual besides consideration of the factors made relevant under the note to para 5(f) of the procedure. It is common ground that a red ink entry may be earned by an individual for overstaying leave for one week or for six months. In either case the entry is a red ink entry and would qualify for consideration in the matter of discharge. If two persons who suffer such entries are treated similarly notwithstanding the gravity of the offence being different, it would be unfair and unjust for unequals cannot be treated as equals. More importantly, a person who has suffered four such entries on a graver misconduct may escape discharge which another individual who has earned such entries for relatively lesser offences may be asked to go home prematurely. The unfairness in any such situation makes it

necessary to bring in safeguards to prevent miscarriage of justice. That is precisely what the procedural safeguards purport to do in the present case.

14. Reliance upon the decisions of this Court in the cases referred to earlier is, in our opinion, of no help to the respondent for the same have not adverted to the procedure prescribed for the exercise of the power of discharge. In ***Union of India v. Corporal A.K. Bakshi & Anr.*** (supra) the question before this Court was whether an order of discharge passed in pursuance of the Policy for Discharge of Habitual Offenders could be considered a discharge simplicitor as envisaged in 15(2)(g)(ii) or if it would tantamount to termination of service by way of punishment under Rule 18 of the said Rules. The Court came to the conclusion that it was a discharge simplicitor and as such it could not be held as termination of service by way of a punishment for misconduct. This was clearly not a case where the procedure for discharge was not followed. The Court had, in that case, unequivocally held that there was no dispute between the parties that the procedure had been

duly followed. Similarly, the decision of this Court in ***Union of India v. Rajesh Vyas*** (supra) is also distinguishable. In that case, the discharge order was challenged on the ground that it was passed without regard to the response to the show cause notice filed by the discharge order. Upon a perusal of the material, this Court held that the case was not one wherein the discharge order was passed without application of mind and that there was evidence to show that power was exercised upon consideration of all relevant records. The decision of this Court in ***Union of India and Ors. v. Dipak Kumar Santra*** (supra) is also of no relevance to the case at hand as that case dealt with a recruit who had failed twice in clerks' proficiency and aptitude test and was discharged under Rule 13(3) of the Army Rules. Without adverting to the procedure prescribed for such removal, the discharge was maintained by this Court opining that the discharging authority was empowered to do so under Rule 13(3) of the Army Rules. Reliance upon the recent judgment of this Court in ***Union of India & Ors. v. Balwant Singh*** *[Civil Appeal No. 5616 of 2015]* is also

misplaced. The grievance of the respondent in that case, primarily, rested upon the alleged excessive punishment meted out for the red ink entries suffered by him. The respondent also claimed to have been discriminated due to discharge from the Armed Forces. That was also not a case where discharge order was challenged as bad in law on the basis of irregularities nor was it a case where the authority was said to have failed to follow the necessary procedure. The decision of the High Court of Delhi in ***Surinder Singh v. Union of India (2003) 1 SCT 697***, to the extent the same toes a line of reasoning different from the one adopted by us does not lay down the correct proposition and must, therefore, be confined to the facts of that case only.

15. In the result this appeal succeeds and is hereby allowed. The order of discharge passed against the appellant is hereby set aside. Since the appellant has already crossed the age of superannuation, interest of justice will be sufficiently served if we direct that the appellant shall be treated to have been in service till the time he would have completed the qualifying service for grant of pension. No

back wages shall, however, be admissible. Benefit of continuity of service for all other purpose shall, however, be granted to the appellant including pension. Monetary benefits payable to the appellant shall be released expeditiously but not later than four months from the date of this order. No costs.

.....J.
(T.S. THAKUR)

.....J.
(V. GOPALA GOWDA)

.....J.
(R. BANUMATHI)

New Delhi
October 16, 2015