

SEE RULE 102(1))**ARMED FORCES TRIBUNAL, KOLKATA BENCH****O.A. 73 OF 2014****THIS 12th DAY OF APRIL, 2016****CORAM****HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)****HON'BLE LT GEN GAUTAM MOORTHY, MEMBER
(ADMINISTRATIVE)****APPLICANT(S)**

Ashutosh Kumar
 Having enrolled in 11th Battalion of
 Bihar Regiment, Residing at
 Village Yajuar (Madhya)
 P.O. Yajuar (Madhya)
 P.S./Tehsil – Muzaffarpur,
 Dist. Muzaffarpur (Bihar) 843360

-versus-**RESPONDENT(S)**

1. The Union of India,
 service through Secretary,
 Ministry of Defence, South Block
 New Delhi, Pin -110 011.
2. The Chief of the Army Staff
 Army Headquarters, South Block
 Delhi Head Quarter,
 PO New Delhi – 110 011.
3. Mr. A.K.Mishra, Colonel,
 Commanding Officer, Unit : 11
 Bihar Regiment, Station :
 C/o 56 APO – 801503
4. Adjutant General, Army Head
 Quarter, South Block, Delhi
 Head Quarter, PO New Delhi.
5. Additional Director General
 (Discipline and Vigilance), Army
 Head Quarter, South Block,
 New Delhi – 110 011.
6. Record Office, Danapur
 Cantonment, Patna – 801503
 Bihar.

For the petitioner(s) : Mr. Palash Mukherjee, Advocate
 Ms. Amrita Pandey, Advocate

For the respondent(s) : Mr. B. K. Das, Advocate

ORDER**PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)**

Being aggrieved and dissatisfied with the discharge order dated 12.07.2013 as well as rejection of appeal dated 28.02.2014 this application has been has been filed by the applicant u/s 14 of the Armed Forces Tribunal Act, 2007 (in short AFT Act).

2. Facts, in brief, necessary for disposal of the application is that the applicant was enrolled in the Army on 08.03.2005 and served as Sepoy in the 11th Battalion of Bihar Regiment. He has incurred following punishments during his eight years and four months' service :

Sl. No.	Army Act Sec.	Offence	Date of offence	Punishment and date of award	Remarks
(i)	48	On 30.8.2009 at 2000 hrs. when detailed for post duty at Post; No.22 at Charkut while attached with HQ 8 Sector Rashtriya Rifles was found intoxicated.	30.8.2009	07 days pay fine on 9.9.09	Black Ink
(ii)	39(b)	At field, having been granted six days preparatory leave excluding Sunday & journey period w.e.f. 08.11.2010 to 16.11.2010 enroute while proceeding on permanent posting from 47 Rashtriya Rifles, failed with sufficient cause to rejoin on expiry of the said leave till he voluntarily rejoined unit on 13.12.2010 at 13-20 hrs.	17.11.2010	14 days Rigorous imprisonment on 07.03.2011	Black ink
(iii)	48	On 03.3.2011 at 2000 hrs. was found intoxicated while staying in the premises of Military Hospital Bareilly for treatment of his wife while on leave.	03.03.2011	14 days Rigorous imprisonment on 7.3.11	Red Ink
(iv)	39(a)	On 9.06.2011 while moving from Rear location to exercise area, absented himself without leave enroute w.e.f. 09.06.2011 at 2215 hrs. till he was apprehended outside Unit location on Ujne 2011 at 2300 hrs.	09.06.2011	07 days Pay fine on 04.07.2011	Black ink
(v)	63	On 26.11.2011 while on temporary duty at CLJW school entered out of bond area in civil location, contrary to the existing orders and apprehended.	26.11.2011	07 days rigorous imprisonment on 27.12.2011	Red ink
	48	On 26.11.2011 while on temporary duty at CLJW School, was found intoxicated.			

(vi)	48	On 07.07.2012 at 2230 hrs he was found intoxicated in unit line.	07.07.2012	21 days rigorous imprisonment	Red ink
	63	On 9.7.2012 at 1530 hrs. attempted to leave the military camp in a civil bus without permission of concerned authorities till he was forcibly made to debus and apprehended.	9.7.2012	28 days rigorous imprisonment	Red ink
	39(b)	At field having been granted 28 days CL w.e.f. 07.11.12 to 04.12.12, failed without sufficient cause to rejoin on expiry of the said leave till he voluntarily rejoined Adhoc Transit Camp, Kalka on 17.2.13 at 2030 hrs.		23.4.2013 (for all three charges)	
	63	On 16.2.13 at 2100 hrs. was found creating nuisance at public place in an intoxicated state at Chandigarh Rly Station in uniform and arguing with civil police while the individual was rejoining the unit after overstaying leave period.			

On earning five red ink entries by the applicant, Commander HQ 36 Sector issued show cause notice vide letter No. 5017/1/A dated 21.5.2013 (annexure R/10). The same was replied to by the applicant on 27.5.2013 and was forwarded to HQ 36 Sector (annexure-R/12) on the same date. Thereafter, the applicant was discharged on 09.06.2013 under Army Rule 13(3)III(v) being undesirable soldier having earned five red ink entries. Accordingly, applicant's parent unit i.e. 11 Bihar regiment published Part II order and the same was forwarded to Records, Bihar Regiment. Applicant filed this application against the order of discharge issued by the Integrated HQ of Ministry of Defence letter dated 11.2.2014 and the same was suitably replied vide letter dated 28.2.2014 (annexure R/16).

3. According to the applicant, four or five red ink entries cannot be the sole ground for discharge from service, in other words discharge is not mandatory. Nowhere in the Integrated Headquarters MOD letter dated 28.12.1988 mentioned that officials

awarded four or five red ink entries be discharged from service. Army Rule 13(3)III(V) provides for issuance of show-cause notice followed by an impartial inquiry into the charges with reasonable and adequate opportunity to the delinquent for putting his defence adducing evidence thereof, but in this case no impartial inquiry was held and no opportunity was given for putting his defence. According to the applicant as show-cause notice is an integral part of the Army Rule, impartial inquiry with reasonable opportunity of defence is also an integral part of the said Army Rule, which was denied to him. Whereas according to the respondents, an inquiry was held against the applicant in terms of integrated HQ Ministry of Defence letter dated A/13210/159/AGPS-2(C) dated 28.12.1988. Show cause notice was issued and thereafter the applicant was discharged being undesirable soldier having earned five red ink entries and the applicant's application is devoid of merit.

4. We have heard the Id. counsel for the parties and perused records.

5. Before advertng to the facts it would be appropriate to reproduce the relevant portion of the procedure prescribed in Army Rule 13 (1), (2), (2A), (3)III(V) for disposal of the case.

"13. Authorities empowered to authorize 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 groundsspecified 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
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.

6. Admittedly applicant's discharge was under Army Rule 13(3)III(v). A plain reading of the aforementioned Rule makes it abundantly clear that an opportunity to show cause against the discharge is sine-qua-non. A conjoint reading of Army Rule 13(3)III(v) and Guide Lines of the Integrated HQ MOD letter dated 28.12.1988 would further reveal that an impartial inquiry into the allegation against such person is necessary in which he is entitled to adequate opportunity of putting up his defence as well as adducing evidence in support thereof. This implies that earning of red ink entries is not some kind of "laxman rekah" crossing of which itself render an individual undesirable of retention in the force, but award of red ink entries simply pushes him into a grey area where he can

be considered for discharge following the above rules and guidelines.

Hon'ble Apex Court in the case of Veerendra Kumar Dubey Vs. Chief of Army Staff [2015 SCC on line SC 973] elaborately dealt with this issue and has observed in Para 12 as under :

"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."

7. Reverting to the facts of the case, we find though an administrative inquiry has been held against the applicant, but neither opportunity of hearing as well as opportunity of adducing evidence was given to the applicant nor applicant's reply to the show-cause notice was considered in accordance with the Integrated HQ Ministry of Defence letter No A/13210/159/AGPS-2(C) dated 28.12.1988. Therefore, applicant's discharge order passed without following the procedure prescribed under Army Rule 13(3)III(V) and the guidelines of Integrated HQ Ministry of Defence letter dated 28.12.1988 is liable to be set aside.

8. In the result, the application succeeds and is hereby allowed. The order of discharge passed against the applicant is hereby set aside. Respondents are directed to reinstate the applicant in service, but without back wages. The entire exercise shall be completed by the respondents within two months from the date of receipt of the copy of this order. No order as to costs.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice N. K. Agarwal)
Member (Judicial)