

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI  
22.

**T. A. No. 563 of 2009**  
**Writ Petition (Civil) No. 6577 of 1998**

**Ex. Nk. Birendra Kumar Singh**

**.....Petitioner**

**Versus**

**Union of India & Ors.**

**.....Respondents**

**For petitioner:** Mr. Vinod Kumar, Advocate.

**For respondents:** Mr. Anil Gautam proxy counsel for Mr. Ankur Chhibber,  
Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE A.K. MATHUR, CHAIRPERSON.**

**HON'BLE LT. GEN. S.S. DHILLON, MEMBER.**

**ORDER**  
**27.02.2012**

1. Petitioner by this petition has prayed that the order dated 29<sup>th</sup> November 1995 i.e. the order of sanction of discharge may be quashed and order dated 6<sup>th</sup> June 1996 of the Chief of Army Staff rejecting the Petitioner's petition dated 7<sup>th</sup> December 1995 may also be quashed and set aside and Petitioner may be reinstated forthwith into service with all consequential benefits.

2. This writ petition has been received on transfer from the Hon'ble Delhi High Court after the formation of this Tribunal.

3. The Petitioner was enrolled in Indian Army as a soldier on 11<sup>th</sup> January 1984 and he became Naik in 1992. On 25<sup>th</sup> November 1995 a show cause notice was given to him on account of earning more than four red ink entries

and he was asked to give a reply till 28<sup>th</sup> November 1995 but he did not file a reply and wanted to meet the issuing authority i.e. his CO and same was not granted and on 29<sup>th</sup> November 1995 he was discharged from service. He filed a writ petition in Hon'ble Patna High Court which was rejected because of lack of territorial jurisdiction. Thereafter he filed a writ petition in 1998 in Hon'ble Delhi High Court and when it was pending same was transferred to this Tribunal after its formation.

4. A reply has been filed by the Respondents and the Respondents have contested the matter and submitted that all the requirements under the law have been complied with.

5. The main grievance of the Petitioner is that he was served with a show cause notice on 25<sup>th</sup> November 1995 and he was asked to file a reply by 28<sup>th</sup> November 1995 but according to Petitioner he received this show cause notice on 27<sup>th</sup> November 1995 and, therefore, he did not get sufficient opportunity to reply. In this connection learned counsel for the Petitioner has invited our attention to a circular of the Army HQ dated 28<sup>th</sup> December 1988 in which a detailed procedure has been prescribed for removal of undesirable and inefficient JCO, Warrant Officer and Other Ranks and in that it is mentioned that a detailed procedure has been laid down as to how a person with more than four red ink entries should be dealt with by the Commanding Officer as given in Rule 13 of the Army Rule and it is pointed out that on earning four red ink entries a proper enquiry should be conducted and thereafter his papers should be forwarded to Commanding Officer and Commanding Officer on perusal of the same may give a show cause notice

dealing with the delinquencies and asking by a show cause notice and thereafter on receipt of the reply he is supposed to pass a detailed speaking order. In this connection, learned counsel for the Petitioner has emphasised that no such enquiry as contemplated in this Army order was held and he could not get sufficient opportunity to reply.

6. A reply has been filed by the Respondents and the Respondents have traversed all the grounds raised by the Petitioner and submitted that Petitioner earned five red ink entries during the tenure of 11 years and 9 months of service. One is under Section 63 of the Army Act in which he pleaded guilty and he was punished on 20<sup>th</sup> June 1984 by 14 days rigorous imprisonment. Thereafter he was charged under Section 40(a) of the Army Act that on 23<sup>rd</sup> January 1987 he assaulted his superior officer in this also he also pleaded guilty and he was awarded 28 days detention. Then again on 9<sup>th</sup> July 1987 he was found guilty under Section 40 (c) of the Army Act for using insubordinate language to his superior officer to which also he pleaded guilty and he was awarded 28 days' rigorous imprisonment in military custody. Then again on 8<sup>th</sup> September 1993 he was charged under Section 40 (b) of the Army Act for using threatening language to his superior officer and he pleaded guilty and given a severe reprimand. Then again he was charged under Section 63 of the Army Act on 23<sup>rd</sup> November 1995 for action prejudicial to the good order and military discipline and he was punished with severe reprimand. It is submitted that in view of these five red ink entries the papers were forwarded to the Brigade Commander and a show cause notice was given to the Petitioner and his reply was sought but he refused to accept the show cause notice. The original record was placed before us for our perusal and this

show cause notice was sought to be served on the Petitioner in presence of two persons but he declined to accept it. This also bears the signature of two persons but he declined to accept it. This also bears the signatures of two independent persons and the same papers were submitted before the Commanding Officer who has also recorded that Petitioner declined to accept the show cause notice handed over by the Company Commander Maj. T.J.S. Chandok in presence of the two independent witnesses and same is also endorsed by the Brigade Commander. Therefore the Petitioner was given a show cause notice on 25<sup>th</sup> November 1995 and it was sought to be served on 25<sup>th</sup> November 1995 but he declined to accept it. Learned counsel for the Petitioner submitted that the show cause notice on 25<sup>th</sup> November 1995 even if he had accepted then the period of three days was too short for him as per the circular dated 28<sup>th</sup> December 1988 to reply. The Petitioner should be given a sufficient opportunity to defend himself. However, learned counsel for the Respondents have invited our attention to the decision of the Hon'ble Supreme Court in **Union of India v. Deepak Kumar Santra** 2009 7 SCC 370 in which their Lordships has said that once the Army Rule provides that the Commanding Officer is competent to discharge a person then in that case any circular issued by the authorities will be of no significance. In the case of **Union of India v. Deepak Kumar Santra 2009 (7) SCC 370** the question involved was that incumbent was supposed to pass a clerk's proficiency aptitude test in which he failed twice and, therefore, he was sought to be discharged from service under Rule 13 of the Army Rule. Learned Single Judge dismissed the writ petition holding that since the Petitioner is not going to become an efficient soldier therefore discharge was just and proper. The Division Bench reversed the decision of the learned Single Judge on the basis

of the procedure laid down that how such person has to be dealt with and ultimately matter went to the Hon'ble Supreme Court and the Hon'ble Supreme Court held that in view of Rule 13(3) of the Army Rules no circular or authority could over ride this Rule and once it is held that a person is not going to become an efficient soldier, the Commanding Officer is fully competent to discharge him. Learned counsel has also invited our attention to the decision of the Division Bench of the Hon'ble Delhi High Court in the case of **Sepoy Islam Khan v. Union of India & Ors. (W.P.(C) 5023 of 2011 decided on 12<sup>th</sup> September 2011)**. There also in case of four red ink entries, their lordships relying upon the decision of the Hon'ble Supreme Court in **Union of India v. Deepak Kumar Santra 2009 (7) SCC 370** has taken a view that the circular will have no significance once the power to discharge has been given to the Commanding Officer and on the basis of the four red ink entries, he is fully competent to discharge the person. Similarly our attention was invited to the decision of the Division Bench of the Hon'ble Delhi High Court in the case of **Pratap Singh v. Chief of Army Staff & Ors. (LPA No. 136 of 2003)**. Both these cases decided by the Division Bench of the Hon'ble Delhi High Court have taken into consideration the earlier judgment of the Hon'ble Delhi High Court in case of **Surender Singh Sihag v. Union of India & Ors. 100 (2002) DLT 705** and they have held that in view of the decision of the Hon'ble Supreme Court in **Union of India v. Deepak Kumar Santra**, the decision in **Surender Singh Sihag v. Union of India & Ors.** does not hold a good law. In view of the subsequent decision of the Division Bench of the Hon'ble Delhi High Court, the other judgments cited by learned counsel for the Petitioner have no legs to stand and therefore there is no need to refer them.

7. In the present case in view of the fact that incumbent has earned five red ink entries and the Commanding Officer under Rule 13(3) of the Army Rules is fully competent to discharge a person, the Petitioner has been rightly discharged from service and hence we do not find any merit in this petition and same is dismissed with no order as to costs.

**A.K. MATHUR**  
**(Chairperson)**

**S.S. DHILLON**  
**(Member)**

**New Delhi**  
**February 27, 2012**  
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