

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL BENCH  
CIRCUIT BENCH SHIMLA**

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OA 381 of 2016

<b>Sanjeev Kumar</b>	<b>.....</b>	<b>Petitioner(s)</b>
<b>Vs</b>		
<b>Union of India and others</b>	<b>.....</b>	<b>Respondent(s)</b>

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For the Petitioner (s) :	Mr CD Singh Guleria, Advocate.
For the Respondent(s) :	Ms Renu Bala Sharma, Sr PC.

**CORAM:****HON'BLE MR JUSTICE BANSI LAL BHAT, MEMBER (J)  
HON'BLE LT GEN SANJIV CHACHRA, MEMBER (A)**

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**ORDER  
01.06.2017**

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The petitioner was discharged from the Military service under Army Rule, 1954, Section 13 (3) III (v) being an 'undesirable soldier' after being punished with five Red Ink Entries, has petitioned for reinstatement in service.

2. Brief facts of the case are that the petitioner was enrolled in the Army as Infantry Soldier on 27.01.2001 and discharged from service w.e.f. 27.06.2014. It is pleaded that during the tenure of his service of 13 years 4 months, he remained posted in field/hard living area continuously for 9 years and 6 months, whereas normally the soldier cannot be posted in such areas continuously for more than 3 to 4 years. In addition, he had been performing the duties of Batman/Sevadar. The petitioner further alleged that since he was performing additional job of Batman/Sevadar for such a long period, he requested his seniors to allocate him general duty of a soldier, which is stated to have annoyed the Commanding Officer.

3. The case of the petitioner is that from 27.01.2001 upto 22.07.2013 for more than 12 years of service, there was not a single red ink entry in his service record, however, during the span of next eight months, he is alleged to have committed the following offences and awarded punishments as under:-

Sr No	Date of offence	Offence charged with	Date of punishment	Punishment awarded.
(a)	23.07.2013	Charge-1: Army Act Section 39(a) – in that he, at field, on 23 Jul 13 absented himself without leave from unit line from 0020 hours to 0145 hours. Charge-II: Army Act Section 63- ‘An act prejudicial to good order and military discipline- in that he, at field, on 23 July 13, entered into out of bound area.	25 Jul 2013	28 days R.I under military custody and 14 days pay fine.
(b)	11.10.2013	Army Act Section 63 – ‘An act prejudicial to good order and military discipline, in that he, at field, on 11 Oct 13 at 2330 hours, neglected to obey security orders of battalion passed from time to time through Sainik Sammelan and battalion orders by using unauthorised mobile and unauthorised SIM No. 8723924845 and 9085923026.	01 Nov 2013	01 day R.I under military custody
(c)	13.03.2014	Charge-I: Army Act Section 63 – ‘An act prejudicial to good order and military discipline’, in that he, at field, on 13 Mar 2014 at 2115 hours improperly and without authority moved out of Company Operating Base	11 Apr 2014	28 days R.I under military custody and 14 days pay fine.

		in Diphu (Assam) in Counter Insurgency Area which was detrimental to security.  Charge-II: Army Act Section 48 – ‘Intoxication’, in that he, at field, on 12 Mar 2014 at 2130 hours was found in intoxicated state.		
(d)	14.03.2014	Army Act Section 63 – ‘An act prejudicial to good order and military discipline’, in that he, at field, on 14 Mar 14 at 1500 hours, neglected to obey security orders of battalion passed from time to time through Sainik Sammelan and battalion orders by using unauthorised mobile and unauthorised SIM No 8991751061039238196	12 May 2014	07 days R.I under military custody and 14 days pay fine.

It is pleaded by the petitioner that he never remained absent; never consumed any liquor; never used the unauthorized mobile/sim and never disobeyed any security orders because there was no opportunity for the same as the petitioner was under the Guard.

4. The petitioner has brought out that he was served show cause notice mentioning the above red ink entries and punishments and was asked to show cause as to why his service should not be terminated under the provisions of AR 13(III)(v), to which he submitted his reply on 22.06.2014. However, the petitioner has alleged that he was discharged by the CO w.e.f. 27.06.2014 without holding any enquiry. The petitioner alleged that the said CO did not like him and because of

his pre-determination, with malafide intention, awarded the above mentioned punishments one after the other. It is further pleaded that neither the charge-sheets were handed over nor the charges were explained to the petitioner; the petitioner never pleaded guilty and his signatures were taken on blank papers. The petitioner has alleged that he was never served with the discharge order passed after the show cause notice, but was only given discharge certificate. His representation/appeal, made the Chief of the Army Staff, was decided by his Commanding Office and not by the Chief of Army Staff. The action of the respondents is alleged to be illegal, unlawful, unconstitutional, irrational and against Article 14 of the Constitution of India and as such liable to be set aside in view of the verdict of Hon'ble the Supreme Court, rendered in **Civil Appeal D No.32135 of 2015, Veerendra Kumar Dubey Vs. Chief of Army Staff and others, decided on 16.10.2015 ( 2016(2) SCC 627).**

5. The respondents have filed a detailed reply and alleged that the petitioner was a perpetual and habitual offender. In spite of being counseled after commission of each offence, there was no change in the attitude of the petitioner, therefore, his further retention in service was detrimental to the discipline and bad example to cause negative influence on the troops serving in the battalion. Consequently the petitioner was issued a show cause notice (Annexure A-7) on 20.06.2014, which was replied to by the petitioner on 22.06.2014 (Annexure A-8). After analyzing his case, the petitioner was discharged from service on 27.06.2014 as an undesirable soldier. Since, at the time of discharge, the service rendered by the petitioner

was less than 15 years, as such he was not granted any service pension. However, each and every procedure was followed while dealing with the case of the petitioner for discharge. During hearing of charges under Army Rule 22, the petitioner was given full opportunity to cross-examine the prosecution witnesses, but he declined for the same and pleaded guilty during each summary trial in the presence of two witnesses. It was further submitted that the petitioner had shown utter disregard to military discipline and had set an extremely bad example to other disciplined soldiers in the Unit. Certain norms and standards of behavior and high degree of discipline is expected from military personnel but the petitioner never cared for his future prospects and demonstrated no improvement in this regard. As per instructions contained in Army Headquarters Letter No. A/13210/159/AG/PS-2(c) dated 28 Dec 1988, personnel having four or more red ink entries may be discharged from service being 'undesirable soldier' in the larger interest of military discipline in the Unit as well as in the Army as a whole. Accordingly, as per the procedure, the petitioner was issued a 'show cause notice' by the competent authority (in this case an officer of rank of Brigadier) and asked explanation as to why his services should not be terminated from the Army under the aforesaid provisions. Whereas having admitted his guilt, the petitioner, however, requested to continue in service. Further according to the respondents, his reply was carefully considered by the Competent Authority who keeping in view his bad disciplinary record, his retention in service was not considered desirable. Thereafter, sanction to discharge the petitioner from service was accorded by the competent authority. Accordingly, while serving

with the Unit, he was discharged from service on 27.06.2014 under Item III(v) of Table annexed to Army Rule 13(3) being service 'no longer required' on account of 'undesirable' before fulfilling the conditions of his enrolment. At that time, he had completed 13 years 04 months and 29 days of service.

6. We have heard the learned counsel for the parties and also carefully gone through the record.

7. The main stay of the arguments addressed by the learned counsel for the petitioner is that the procedure for discharge was not followed as per AO 1988 therefore, the case of the petitioner is fully covered by the ratio of the judgment of the Supreme Court rendered in **Civil Appeal D No 32135 of 2015 'Veerendra Kumar Dubey v. Chief of Army Staff and others' (2016) 2 SCC 627**, decided on 16<sup>th</sup> October, 2015. Per Contra the respondents support the impugned order of discharge legally and factually sustainable.

8. To appreciate the rival contentions of the parties, we have also sent for the record of the petitioner, on which the matter was processed for discharge of the petitioner, which was produced and perused by us to come to a rightful conclusion.

9. The moot question for determination is whether procedure for removal of undesirable and inefficient JCOs, WOS and Ors laid down in terms of Circular No. A/13210/159/AG/PS-2(C) dated 28.12.1988 of the Adjutant General's Branch A, Army Headquarters has been followed in the case of applicant. The procedure for discharge of an individual who has proved himself undesirable and whose retention in the service is considered unadvisable is laid down in para 4 of the

Circular which envisages a show cause notice being given to the individual. Service of notice may be dispensed with if the competent authority is satisfied that it is not expedient or reasonable practicable to serve such a notice. However, such cases are very rare and generally limited to matters involving security of the state. Recording of reasons in such a case is imperative. The procedure to be followed for discharge of an individual contemplates holding of an impartial enquiry, not necessarily a Court Inquiry with adequate opportunity provided to individual to offer explanation, put up his defence and adduce evidence in defence. It is further provided that the allegations against individual have to be substantiated and that the extreme step of discharge of individual shall be warranted on merits of the case. The circular makes it amply clear that the discharge from service consequent to four red-ink entries is not mandatory or legal requirement. Commanding Officer is required to consider the nature of offences for which each red-ink entry has been awarded. He cannot be harsh to the individuals, more particularly when they are about complete pensionable service. The Commanding Officer should have due regard to long service, hard stations and difficult living conditions to which the individual has been exposed during his service. Discharge should be ordered only when it is absolutely necessary in the interest of justice. The circular incorporates the safeguards governing exercise of power of discharge vested in the competent authority and ensures that the discharge is ordered only as a last resort. The order of discharge dehors the nature of offence for which the individual has been convicted, circumstances in which such offence has been committed and the hardship faced, would not be

justifiable. A duty is cast upon the competent authority to ensure that no harsh treatment is meted out to the individual and that the order of discharge is passed only when it is absolutely necessary in the interest of justice. A compassionate and human view lies at the core of the circular and a blood thirsty approach emanating from mere four red-ink entries against individual is discouraged.

10. Rule 13 (iii) (v) of the Army Rules empowers the competent authority to direct discharge of individual after giving to the individual whose discharge is contemplated an opportunity to show cause against same provided the circumstances of the case permit such a course to be adopted. The Hon'ble Apex Court had an opportunity to delve on the subject and interpret the aforesaid rule in **Veerendra Kumar Dubey's** case (supra). It is noticed that the government 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. Mere award of four red-ink entries to an individual does not make his discharge mandatory. Four red-ink entries is not a Lakshman 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 further held that it is axiomatic that the Commanding Officer is, even after the award of such entries, required to consider the nature of the offences for which such entries have been



awarded and other aspects made relevant in the procedure prescribed. It would follow that before discharging an individual not only should there be a show cause notice but an inquiry into the allegations made against 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. The administrative instruction regulate the exercise of power by competent authority qua an individual who qualifies for consideration on any such administratively prescribed norm. The instruction are aimed at ensuring a non-discriminatory, fair and arbitrary application of the statutory rule. It further held that the circular dated 28.12.1988 provides safeguards against an unfair and improper use of power vested in the authority.

11. In case **Rifleman Tilak Raj Versus Union of India and others, 2009 (2) JKJ 720 (HC)** the Hon'ble High Court of J & K while interpreting Circular dated 28.12.1988 (supra) observed that the procedure clearly provides that before recommending discharge of an individual the authority concerned will ensure that the preliminary enquiry be conducted and adequate opportunity for putting up his defence or explanation and adducing evidence in defence be given to the individual. It further observed that discharge from service consequent to four red-ink entries is not mandatory. The Commanding Officer must consider the nature of offence for which each red-ink entry has been awarded and not to be harsh to the individual.

12. In **Krishan Dutt Vs Union of India and others, 2014 (1) JKJ 537 (HC)** the Hon'ble High Court observed that Brigade/ Sub Area Commander in terms of Army Rule 13 (3) item (iii) (v) have been given power to discharge an individual who is undesirable for retention in the army because of misconduct proved against him on more than one occasion resulting in red-ink entries in his service record. It would be profitable to quote the following passage from the judgment:-

“7. X x x x x . Cases may rise, where army personnel, notwithstanding penalty imposed, continues to indulge in misconduct and is visited with penalty again and again. In case he goes on repeating misconduct, the imposition of penalty may not be an answer to his misconduct and in tune with over all discipline of the Army. Such person does not deserve to be part of a disciplined force. Right course in such situation is to get rid-off of the habitually erring personnel and discharge him from Army.”

13. It is indisputable that discharge of an army personnel from army service has catastrophic consequences for him and his dependents. Such power has, therefore, to be exercised with circumspection. The most relevant factor would be nature of offence proved against the individual. Conviction for a minor offence may not justify the discharge because of red ink entries. Length of service is of vital importance. Longer the service and closer to superannuation would render it inadvisable to order discharge of the individual. Period between the last red ink entry and order of discharge would also be relevant consideration. Only incorrigible characters should be weeded out who persists on misconduct. An individual who improves

in his conduct can be spared the discharge on the ground of red ink entries.

14. Adverting to the facts of the instant case it be seen that the applicant has been awarded one black and four red ink entries for various offences during his service. Though the applicant has not denied the factum of having been awarded four red-ink entries, the fact remains that none of the convictions to his credit have been recorded for any serious offence(s). The applicant has assailed his discharge on the ground that the procedural safe-guards have been observed in breach and the order of discharge is illegal. It is not disputed that the applicant has served for more than 13 years and for most part of his service career, his record remained unblemished. It emanates from the record that the applicant was served show cause notice, which was replied to by him admitting his conviction and sentence culminating in recording of his four red ink entries in his service record. However, no impartial inquiry, much less regular Court of Inquiry into the allegations against the applicant, was conducted, and no opportunity of putting up his defence and adducing defence evidence has been provided to the applicant. There is no finding recorded by the competent authority that it has considered the nature of offences for which such red-ink entries have been awarded. There is nothing in the impugned order to suggest that the competent authority considered it absolutely necessary to dispense with the services of the applicant in the wake of gravity of charges and seriousness of misconduct. Viewed thus, the impugned order of discharge cannot be supported.

15. Consequently, the original application is allowed: the impugned order is squashed and set aside and the applicant is held entitled to service pension since, by now, the applicant must have attained the age of superannuation and his reinstatement cannot be ordered. The respondents are directed to sanction service pension in favour of the petitioner from the date, it fell due. Order in this regard shall be passed within three months from the date this order is served upon the respondents.

**(Sanjiv Chachra)**  
**Member (A)**

**(Bansi Lal Bhat)**  
**Member (J)**

01.06.2017  
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