
(2005) 02 AHC CK 0082
In the Allahabad High Court
Case No : C.M.W.P. No. 25118 of 1996

Ali Javed

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-02-2005

Acts Referred:

Army Act, 1950 — Section 125, 20(4), 29, 39, 80

Citation : (2005) 5 AWC 4577 : (2005) 2 ESC 892

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Advocate : B.K. Chaturvedi, for the Appellant; U.N. Sharma, S.K. Rai and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Shishir Kumar, J.—By means of the present writ petition, the petitioner has approached this Court for issuing a writ of certiorari quashing the Order of discharge dated 16.9.1995 under Rule 13 (III) (v) of the Army Rules.

2. The fact arising out of the present writ petition is that the petitioner joined the Indian Army as Sipahi on 22.6.1984 and after completion of 11 years, two months and two days, has been discharged from service on 16.9.1995. The petitioner's case is that petitioner has got a clean service record and has participated in the operation of Sri Lanka and he is a disciplined soldier and, therefore, the Order of discharge under the aforesaid Rule is illegal and is liable to be set aside. The case of the petitioner is that the petitioner was given only five days leave to attend his seriously ill wife from Pathankot to Fatehpur which was insufficient and a telegram was sent by the petitioner for its extension and no reply was given by the authorities and, as such, the respondents have taken the aforesaid days as absent without leave and for the aforesaid act, the petitioner was given a punishment of 42 days' RI in the military guard room from where he was released. While the petitioner was inside the detention cell, he was asked whether he wish to continue on service or not and on his

affirmation, an application was taken from the petitioner inside the cell for continuing in service on 8.8.1995 in Pathankot and suddenly, the petitioner was discharged from service. The punishment awarded to the petitioner who has rendered such a long service for more than 11 years, is having the responsibility of the family and is entitled to complete 15 years of service for the purposes of pension. It has also been stated that as required under the Army Rule 13 (III) (iv), as the requirement of the aforesaid Rule has not been completed which is mandatory in nature as no show cause notice was given to the petitioner before passing the Order of discharge, therefore, the Order of discharge against the petitioner is unjust, unreasonable and against the mandatory provision of law. The further case of the petitioner is that if there was something against the petitioner, the petitioner could have been tried by the Court Martial without observing the said procedure, no Order of discharge can be passed.

3. The notices were issued to the respondents and a counter affidavit has been filed. The allegation made in the writ petition and the argument raised on behalf of the petitioner has been denied by the respondents alleging that a show cause notice was given to the petitioner on 12th August, 1995 as the petitioner was habitual offender and was unlikely to become a good soldier and the petitioner has been awarded four red ink entries, hence the further retention of the petitioner in service is not considered desirable. It has also been submitted on behalf of the respondents that the petitioner has also submitted a reply to the show cause notice. The said reply of the show cause notice has been annexed by the respondents in the supplementary counter affidavit as Annexure-2. The respondents have clearly stated in paragraph 5 of the supplementary counter affidavit that the petitioner was awarded punishment u/s 80 of the Army Act four times. The punishment, which was awarded to the petitioner is being reproduced below :

----- Punishment awarded -----	Date of award u/s -----
9.7.1986 Section 39(b) of the Army Act 28 days RI and 14 days detention in military custody.	28.1.1992 Section 39(b) of the Army Act 7 days RI
22.6.1992 Section 29(b) of the Army Act 28 days RI	1.8.1995 u/s 39(b) of 28 days RI and 14 days the Army Act detention In military custody.

----- 4. It has also been stated that the petitioner was provided opportunities by the unit concerned to Improve himself but the petitioner had shown utter disregard to the military discipline and failed to improve himself and, as such, the petitioner was discharged finally from the term service on 17th September, 1995 under Rule 13 (III) (v) of the Army Rules before completion of his terms of engagements being undesirable in accordance with the Army Head Quarters letter No. A/13210/159/ RG-PS2(C) dated 28.12.1988. Since the discharge of the petitioner was duly sanctioned under the provision of the Army Rules, being an unreasonable soldier, he is not eligible for reinstatement into Army service. It has also been specifically denied by the respondents that no representation or application was received

from the petitioner as submitted by the petitioner.

5. I have heard learned Counsel for the petitioner and Sri S.K. Rai as counsel for the respondents and have perused the records.

6. The argument raised on behalf of the petitioner regarding that if some punishment is awarded to the petitioner, there was no occasion to initiate an administrative action against the petitioner under Rule 13 (III) (v) of the Army Rules. It was incumbent on the part of the respondents to make an enquiry and to hold a trial for the purposes of initiation of action against the petitioner as no opportunity to the petitioner was given, therefore, the Order is bad. Rule 13 (III) (v) is being quoted below :

----- Grounds of
discharge Competent authority to Manner of discharge authorize discharge
----- (v) All other
classes of discharge. Brigade/Sub-area The Brigade or Sub-area Commander
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.

----- 7. From the
perusal of the aforesaid Rule, it is clear that the power has been conferred to the
Army authorities to take an administrative action against a person, who is
serving in the army, as the petitioner was a habitual offender and he was warned
and he was punished four times and found absent without leave as provided u/s
39 of the Army Act. The contention of the petitioner to this effect that no
administrative action should have been taken against the petitioner as no Court
martial was held, therefore, the punishment is bad and cannot be accepted as in
view of the provisions of Section 125 of the Army Act, it is the army authorities
to choose the forum. In the Army Act, there are two modes of punishment, which
is to be awarded to the army personnel, one by a Court Martial as provided
under the Act, and other is administrative action provided under the Army Act
and the procedure has been given under Rule 13 (III) (v) of the Rules. The
petitioner has placed reliance upon a judgment of the Supreme Court in Union of
India and others Vs. Giriraj Sharma, and has submitted that in view of the
aforesaid Judgment the punishment of dismissal merely on the ground of over-
staying leave period is harsh and inappropriate. The Court has perused the said
judgment and the fact of this case and the case in hand is clearly distinguishable
as the case before the Hon"ble Supreme Court, mentioned above was regarding
a civilian employee, who was an electrician, sought leave for 10 days on 10th
December, 1982. The leave was granted while he was on leave. He sent a
telegram for extension of leave by 12 days. The said request was rejected.
However, the respondents joined duty on 22nd December, 1982 thereby over-
staying the period of leave by 12 days; for this act the services were terminated.
In that case, the Supreme Court has said that the Order of High Court quashing
the Order of dismissal from service cannot be interfered because the Apex Court

has taken into consideration that the application was received but the same was rejected.

8. There is no dispute to this fact that the case in hand is a case of military personnel and the discipline in the military service has to be maintained for the purposes of security of the country. In the case in *Vidya Parkash Vs. Union of India (UOI) and Others*, , the question raised before the Apex Court was in Order to awarding four red ink entries and if a person is absent without leave, whether the punishment of dismissal is disproportionate or not. In the aforesaid case the Supreme Court has held that if a person is punished for an offence of absence from duty on four occasions and there was red ink entry, then the punishment awarded by the Court Martial for dismissal of service cannot be said to disproportionate to the charge levelled against the person concerned. In the case in *Union of India and others Vs. Corporal A.K. Bakshi and another*, , the Hon"ble Apex Court, while considering the similar provisions of Air Force, which is, similar to Air Force Rule 15 (2) (g) (ii) and 18 was under consideration. The similar provision is in the Army Act and Rules. It has been held by the Apex Court that policy of discharge of habitual offender as prescribed in the policy directive dated 14.3.1988 discharging a person in accordance with procedure laid down does not amount to removal by way of punishment. It is a discharge under Rule 15(2)(g) {ii}. It is important to mention here that similar policy for removal for undesirable and inefficient soldiers has been framed by the Army authorities dated 28th December, 1988. The relevant part is being quoted below :

"JCOs, WOs and OR who have proved inefficient:

3. (a) Before recommending or sanctioning discharge, the following points must be considered--

(i) if lack of training is the cause of his inefficiency, arrangements will be made for his further training,

(ii) if an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) Should it be decided to transfer a JCO, he may be transferred in his acting/substantive rank according to the merits of the case and will not be recommended for further promotion and/or increment of pay until he proves his fitness for promotion and/or increment of pay in his new unit.

(c) Prior to transfer, if such a course is warranted on the merits of the case, a WO or an NCO may be reduced to one rank lower than his substantive rank under Army Act Section 20(4).

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 reasonable practice to serve such a notice. Such cases should be rare, e.g., where the interests of the security of the State so require. Where the serving of a show cause notice is dispensed with, the reason for doing so are required to be recorded. See provision to AR 17.

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 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.

(b) Forwarding of Recommendations. The recommendation for dismissal or discharge will be forwarded, through normal channels, to the authority competent to authorise the dismissal or discharge, as the case may be, along with a copy of the proceedings of the enquiry referred to in (a) above.

(c) Action by Intermediate Authorities. Intermediate authorities through whom the recommendations pass will consider the case in the light of what is stated in (a) above and make their own recommendations as to the disposal of the case.

(d) Action by Competent Authority. The authority competent to authorise the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is warranted he should direct that show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings or the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.

(e) Action on receipt of the reply to the show cause notice. The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorise his dismissal/discharge together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal 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 individuals service is not warranted but any of the actions referred to in (b) to (j) 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 notices entirely satisfactory, he will pass Orders accordingly.

9. The Apex Court has further held that in the said circumstances, discharge from service cannot be said to be by way of punishment. The Division Bench of this Court in the case in *Sugriv Singh Desuriya v. Central Government*, 2002 (2) ESC 207 (All), has also taken the same view and has held that policy of discharging of habitual offender cannot be said to be ultra vires and if a person has been awarded four red ink entries punishment cannot be said to be illegal. It has also been held that the person concerned was given adequate opportunity of placing his defence in accordance with Rules and procedure provided, therefore, it cannot be held that the punishment which has been awarded is not correct.

10. After considering all the facts and the decisions, I am of the view that the Order of discharge cannot be said to be illegal and the petition is having no merit and is hereby dismissed.

No Order as to costs.