

(2009) 06 CAL CK 0022
In the Calcutta High Court
Case No : Writ Petition No. 29976 (W) of 2008

Atiful Alam

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-06-2009

Acts Referred:

Constitution of India, 1950 — Article 226(2)

Citation : (2009) 123 FLR 404

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Md. Safiul Alam, R.N. Paul and Ashutosh Paul, for the Appellant; Uttam Majumdar, Sounak Banerjee, Debasish Kundu and Prasenjit Saha, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—The petitioner in this writ Petition dated December 1, 2008 is seeking the following principal reliefs:

(a) A writ of or in the nature of Mandamus directing the respondents to forthwith serve on the petitioner the Order Cancelling the Order of Discharge of your petitioner from service and to allow your petitioner to join Army duty as a Sepoy/ Driver at any unit of the Army except 9 MECH INF.

(b) A writ of or in the nature of Mandamus, directing the respondents to withdraw the alleged order of punishment awarded in absentia against the petitioner for his alleged desertion during the period of illegal discharge.

(e) A Writ of or in the nature of Mandamus, directing the respondents to pay to the petitioner all back wages and allowances for the period of his illegal discharge.

(d) A writ in the nature of Prohibition, restraining the respondents from compelling the petitioner to perform any duty other than Driver or not befitting

to his status as a Driver.

(e) A Writ in the nature of Certiorary asking the respondents to certify and cause transmission of all records of this case particularly all papers relating to the purported discharge of the petitioner from service, purported cancellation of the discharge order, alleged charges of desertion against the petitioner and punishment awarded therefore to this Hon'ble Court, so that on perusing the same conscionable justices may be rendered.

2. He was enrolled at Branch Recruiting Office, Kolkata on March 24, 2001. After completion of the military training, he was posted to 9 MECH INF with effect from August 2, 2002. A discharge order dated February 4, 2008, Annexure P3 at p.36, was issued stating that the Officer in-Charge Records of the MECH INF REGT, Ahmednagar in Maharashtra approved his discharge from service on extreme compassionate grounds. The discharge was approved with effect from February 29, 2008. Questioning the discharge order he moved this Court by filing W.P. No. 8320 (W) of 2008. By an order dated November 26, 2008 the writ Petition was disposed of.

3. The order dated November 26, 2008 is set out below:

Very strange indeed.

The present writ application is directed against an order dated 4th February, 2008 which is described as a discharge order No. 12 of 2008 being annexure P-4 at page-29.

Learned Counsel for the petitioner has, of course, in course of his submission referred to certain subsequent developments and how the authority concerned proceeded to declare the writ petitioner as "deserter".

Having regard to the nature of the relief sought for as reflected from prayer (a) and (b) to the writ application, I am afraid this Court cannot really get into the said controversy. This is particularly relevant in the context of a copy of an order dated 20th March, 2008 produced by learned counsel Mr. Chatterjee on behalf of the respondent. It is clearly mentioned that the order dated 4th February, 2008, i.e. discharge order No. 12 of 2008 has been cancelled.

Mr. Chatterjee, of course, has raised dispute regarding the maintainability of the present application on the ground of territorial jurisdiction.

To this, learned Counsel for the petitioner submits that the petitioner was appointed by the appropriate Respondent authority in Calcutta and thereafter he served in many places in different States. According to learned counsel for the petitioner, since his appointment letter was issued from the office of the respondent authority in Calcutta, there is no reason as to why the present writ application cannot be entertained by this Court.

Article 226(2) of the Constitution of India is as follows:--

(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

Cause of action, as is well settled, is a bundle of facts which are required to be taken into consideration.

But having regard to the stand taken by the respondent authority that the impugned order dated 4th February, 2008 has already been cancelled, I do not think there is any scope for proceeding with the instant writ application.

It may, however, be mentioned that this Court has not gone into the merits of " the allegation made in the writ application precisely for the reasons as mentioned earlier. Thus, the writ petitioner certainly will be at liberty to knock the door of the writ Court with fresh application.

In fact, after hearing the learned Counsel for both the parties, it appears that the complexion of the controversy has undergone radical change and the writ Court cannot operate in air.

This disposes of W.P. No. 8320 (W) of 2008.

There will, however, be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be given to the parties expeditiously.

4. In W.P. No. 8320 (W) of 2008 the respondents therein filed an opposition. It was stated in the opposition that the discharge order dated February 4, 2008 had been cancelled. It seems that in view of the observation- "Thus the writ petitioner certainly will be at liberty to knock the door of the writ Court with fresh application" - the petitioner has taken out this writ Petition seeking the reliefs quoted hereinbefore. The question of territorial jurisdiction of this Court to entertain this writ Petition is quite relevant. The question was raised in the previous writ Petition and, it seems to me, by necessary implication it was answered in the affirmative. The respondents accepted the judgment. Hence I do not think today I can decide the question in this writ Petition for filing which liberty was given by the order made in the previous case. Under the circumstances, I propose to decide this writ Petition on merits.

5. Case of the respondents who have filed an opposition dated January 30, 2009 is this. On February 19, 2008 the petitioner took casual leave from 9 MECH INF REGT for completing the discharge documents. His leave was upto February 26, 2008. After expiration of leave period he did not join office. Under the circumstances, on February 27, 2008 he was declared a deserter. Previously also he was declared a deserter with effect from November 16, 2007. Then he

voluntarily surrendered at the headquarters. Under the circumstances, he was collected by his unit for finalisation of disciplinary proceedings. On January 16, 2008 a tentative charge-sheet was issued. He was found guilty of offences and sentenced to fourteen days" rigorous imprisonment on January 21, 2008. Then he requested for discharge on compassionate ground, and that was allowed. The order dated March 20, 2008 was issued, since he had been declared deserter with effect from February 27, 2008. His unit has issued apprehension roll to apprehend him and hand him over to the army for taking necessary disciplinary action. By filing a reply the petitioner has denied and disputed the correctness of the facts stated in the opposition.

6. The question is what is the scope of this writ Petition. As will appear from prayer (b), the petitioner is seeking a mandamus commanding the respondents to withdraw the order of punishment made behind his back. It is evident that this is a speculative prayer. No order of punishment issued by the respondents has been produced with the writ Petition. It is not the case of the respondents that they have already issued an order of punishment. What they have said is that an apprehension roll has been issued requesting the police to apprehend the petitioner and hand him over to the army so that disciplinary proceedings against him may be initiated and concluded. Under the circumstances, I do not see how the petitioner can seek a mandamus commanding the respondents to withdraw any order of punishment made behind his back.

7. Today there is no question of issuing a mandamus commanding the respondents to pay the petitioner back wages. According to the petitioner, the respondents did not permit him to discharge his duties. According to the respondents, the petitioner was declared a deserter on February 27, 2008. Hence the truth is to be ascertained only by holding a proper enquiry. There is no reason for the writ Court to make an enquiry. In the face of the allegation made by the respondents, the petitioner is bound to face the disciplinary proceedings. It is to be noted that Counsel for the respondents has categorically said that nobody ever prevented the petitioner from joining office after expiration of the period of leave, and discharging his duties. So long as it is not ascertained whether the petitioner absented himself from duties or was prevented by someone from joining office and discharging duties, it is not possible to make any order regarding his entitlement to back wages. He is free to join office.

8. In prayer (d) he has prayed for an order restraining the respondents from compelling him to perform any duty other than the duty of a driver. In my opinion, the prayer is misconceived. Unless it is established that without any sanction of law the respondents have been compelling him to discharge any duty other than the duty he is supposed to discharge, there is no question of making such an order as sought in prayer (d). In any case, it is for his employer to decide what duty he will be required to discharge.

9. On the facts, I find absolutely no reason to interfere with the decision of the respondents declaring the petitioner as a deserter. It is to be decided in an

appropriate proceeding whether he was lawfully declared a deserter, and the proceeding is to be initiated only by the respondents in accordance with law. Needless to say that the petitioner will get all opportunity to defend himself and to establish his case.

10. The writ Petition is, accordingly, dismissed. There shall be no order for costs.

11. Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.