

(2011) 11 GAU CK 0002
In the Gauhati High Court
Case No : Writ Appeal No. (Sh) 54 of 2010

Balwant Singh

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 02-11-2011

Acts Referred:

Assam Rifles Act, 1941 — Section 4(3), 4(3)

Citation : (2011) 5 GLT 640

Hon'ble Judges : Anima Hazarika, J and Hrishikesh Roy, J

Bench : Division Bench

Advocate : Advocates appeared for the Petitioner: Mr. R. Choudhury & Mr. B. K. Debroy, Advocate appeared for the Respondents: Mr. S.C. Shyam, CGC, Advocates appearing for Parties

Judgement

Hrishikesh Roy, J.—Heard Mr. R. Choudhury, learned counsel appearing for the petitioner. Also heard Mr. S. C. Shyam, the learned Central Government counsel representing the respondents.

2. This appeal is presented against the judgment and order dated 29.11.2010 in WP (C) No. (SH) 167/2009 whereby the learned Court dismissed the writ petition.

3. The petitioner was serving as a Havildar/GD in the Assam Rifles Organization and he had filed the writ petition to challenge the order dated 07.02.2009, whereby he was discharged for service and also the order dated 08.05.2009, whereby his prayer for reinstatement was rejected.

4. It appears from the impugned penalty that the delinquent was considered to be an incorrigible offender having secured 4 red ink entries on his service career and accordingly purporting to act under Clause 5 of the Record Branch Instruction No. 1/2004 (hereinafter referred to as "the ROI"), the delinquent was discharged from service.

5. Mr. R. Choudhury, learned counsel points out that the petitioner had a distinguished service career spanning over 17 years in the Assam Rifles

Organization and only during 23.07.2007 to 11.08.2008 within a span of one year, the then Commandant recorded four red ink entries and this has resulted in the order of discharge by the same Commanding Officer. That the petitioner had maintained high standard of discipline and turnout to the satisfaction of all his superior officers and was selected for participation in the Republic Day contingent for three consecutive years because of his discipline, fitness and devotion. His records in capturing militants and recovery of arms and ammunitions are very good and his selfless devotion to duty was demonstrated in several occasions, when the petitioner risked his life in performance of his assigned task. Notwithstanding such fine career, within a one year span for some unknown reasons, one Commanding Officer (C.O.) recorded four adverse red ink entries against the petitioner and he was then discharged from service. Accordingly the counsel alleges biasness against the Commanding Officer.

6. The provisions of Section 4 of the Assam Rifles Act, 1941 (hereinafter referred to as "the A.R. Act") and more particularly subsection 3 of Section 4 is read out by Mr. Choudhury to project that a Rifleman cannot be discharged except in accordance with the terms of the statement which he has signed under the A.R. Act and specifying the statement in the schedule, the learned counsel argues that discharge under Section 4 could not have been ordered against the delinquent on the stated grounds.

7. Referring to four specific violations which led to the discharge order, Mr. Choudhury contends that three of them related to intoxication and the 4th charge was of overstaying leave without sufficient cause. He submits that these violations are not on the heinous category and are not relatable to charges akin to lack of integrity, moral turpitude or indiscipline jeopardizing the security of the unit. Accordingly the Counsel contends that, the disciplinary authority should not have taken such a drastic view of the acts and a lesser punishment should have been inflicted.

8. Mr. S.C. Shyam, learned Central Government counsel, on the other hand, points out that despite earning red ink entries one after another, the delinquent did not amend his ways and, therefore, to ensure maintenance of discipline in the organization, the authorities had to discharge the delinquent.

9. The learned counsel submits that the career records of the delinquent was considered by the authorities and accordingly provisions were made for payment of pensionary benefits to the petitioner, notwithstanding what was recorded in the impugned order dated 08.05.2009.

10. The respondents also contend that the petitioner was given a show cause notice before the impugned action was taken when he had pleaded guilty to the charges and only after complying with the procedure prescribed under clause 5 of the RO1, the impugned discharge order was issued by the Commanding Officer.

11. We have given our anxious consideration to the argument advanced by the rival counsels. The reasoning's given by the learned Single Judge for passing the

impugned order have also been considered by us,

12. Since the source of the discharge order is under clause 5 of the RO1, same is extracted herein below for ready reference:

"5. Discharge/Disposal of Undesirable/Inefficient Personnel: Vide Chapter 8, Rule 24 of the Assam Rifles Manual confers powers on the Commandants of Assam Rifles Battalion to discharge any members of the Assam Rifles below the rank of Nb/Sub. This power may be exercised by a Commandant in case where a person has got four or more red ink entries. In case, it is necessary to send an individual on discharge under this provision, a notice will be served on the individual affording an opportunity to him to explain his case. Thereafter the complete case will be forwarded to Sector HQ along with the notice and reply received from the individual, for the approval of the Sector Commander. Thereafter the documents will be sent to the Directorate, Record Branch/UPAO for final settlement of his IRLA."

Clause 5 empowers the Commandant to discharge an Assam Rifles personnel below the rank of Naib Subedar in case he receives "four or more red ink entries". Considering the wordings it is apparent that, merely because a man receives four red ink entries, discharge is not automatic and discretion is given to the Commanding Officer to consider discharge. Obviously the severity and the nature of the misconduct will have to be weighed before recourse is taken to exercise power conferred by Clause 5 of the ROI.

13. Furthermore since Clause 24 of Chapter 8 pertaining to discipline in Assam Rifles organization is also referred to by the learned Central Government counsel, an examination of ambit of Clause 24 would be appropriate at this stage. A Commandant of the Assam Rifles is empowered to pass a dismissal order under Clause 24 but it is also provided that dismissal should not ordinarily be ordered until all other means of punishment have been tried. However for incorrigible offenders including confirmed drunkards, dismissal can be generally ordered. But this not about dismissal but of discharge and that also because, the delinquent got four red ink entries. Therefore, we feel that since specific power of punishment is conferred under Clause 5 of the R01 for red ink entries, the penalty in this case cannot appropriately be related to Clause 24 of the Assam Rifles Manual, which conspicuously doesn't speak of discharge.

14. Furthermore, while Section 4 of the A.R. Act permits discharge of personnel by the Commandant the said power is exercisable only under the circumstances mentioned in subsection 3 of Section 4. But the respondents haven't specified any violation of the "terms of statement" mentioned in this provision. Therefore, we are of the view that the punishment in the present case cannot be supported on the basis of the powers given to the Commandant under Section 4 of the A.P. Act.

15. After tracing out the source of the power for the penalty to Clause 5 of the RO1, we should now consider the nature and gravity of the four violation for

which, the red ink entries were recorded. To appreciate this aspect a comparison of red ink entries recorded against another Assam Rifles Personnel (Jose Nedum Joseph) whose case is referred to by the learned Government Counsel, may be in order. It is seen that in the case of Jose Nedum Joseph (who had filed WP (C) No. 2099/1999 where this Court altered the punishment of dismissal with an order of discharge and which decision was eventually upheld by the Apex Court), the violations related to cheating, indiscipline where the safety of the unit was compromised and insubordination. If we compare this with the four violation of the present delinquent, it becomes apparent that 3 charges of intoxication and 1 of overstaying can't be considered in the same class of serious offence more particularly when, the violation did not jeopardize the security of the Unit.

16. Furthermore, we find from Clause 5 of the ROI, that discharge is not automatic. Under Clause 5 when "four or more red ink entries" are recorded the power of discharge is available to be exercised. The use of the expression "four or more" and also the use of the word "may" in Clause 5 indicates that the discretion is given to the disciplinary authority to decide as to whether the person who is found to have received the red ink entries, ought to be discharged from service.

17. Considering the discretionary nature of power vested on the disciplinary authority under Clause 5 of the ROI and also the nature of the delinquent's 4 violations for which the red ink entries were given, we find that the punishment of discharge is disproportionate and it also shocks our judicial conscience. Furthermore it can't also be overlooked that all the four red ink entries were recorded by one particular C.O. within a span of one year in the petitioner's 17 years service career, which otherwise have remained free from such red ink entries, for 16 years of his service career.

18. Bearing in mind the long service career that the delinquent was left with in the Organization and considering the serious hardship that the family would suffer when the bread earner is discharged at the age of 35 years after 17 years of service and also taking into consideration the discretionary nature of the power under Clause 5 of the ROI and taking into account the nature of the 4 violations for which the red ink entries were given, we feel that a penalty which will not result in discontinuation of service, would better serve the cause of justice. In the context of her charges, we feel that the punishment is disproportionate and the disciplinary authority should have inflicted a lesser punishment to the delinquent, so that he could continue in service.

19. Consequently we feel inclined to interfere with the impugned order(s) of 07.07.2009 and 08.05.2009 and accordingly the same are set aside and quashed. The petitioner is ordered to be reinstated in service subject to assessment of his physical fitness. However, the respondents are at liberty to impose any lesser punishment balancing the interest of the organization and also of the delinquent. Accordingly, we interfere with the impugned judgment of 29.11.2010 and allow this Appeal without any order of cost.