
(1990) 05 AHC CK 0053

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 11551 of 1989

Chaukas Ram

APPELLANT

Vs

Sub Area Commander and Another

RESPONDENT

Date of Decision : 24-05-1990

Acts Referred:

Army Act, 1950 — Section 22
Army Rules, 1954 — Rule 13

Citation : (1992) 1 LLJ 634 : (1990) 3 UPLBEC 1876

Hon'ble Judges : R.A. Sharma, J;K.P. Singh, J

Bench : Division Bench

Advocate : Indra Raj Singh, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.A. Sharma, J.—Petitioner joined the Indian Army on April 27, 1968 as a soldier and in January, 1988 he was holding the rank of Havaldar in the Army Medical Corps. During his service, the petitioner claims to have been awarded several medals, i.e. Western Star, San-gram Medal, Independence Medal, Long Service Medal and Himalayan Medals. On January 26, 1988 at about 9.15 p.m. petitioner and two others were stabbed by one of his colleague, namely, Ram Pravesh Shah. Only the petitioner survived as other two succumbed to their injuries. Thereafter, Ram Pravesh Shah was Court Martialled and was ultimately convicted.

2. After more than a year, a notice dated April 13, 1989 was given to the petitioner calling upon him to show cause within seven days of the receipt of the notice as to why suitable administrative action be not taken against him for the alleged misconduct referred to in the notice. The petitioner submitted his reply and ultimately by an order dated June 13, 1989 the petitioner was compulsorily discharged under Rule 13 of Army Rules on the ground that his services were no longer required. Final order of discharge was passed on July 8, 1989. It is against these orders of discharge that this writ petition has been filed by the

petitioner.

3. Order of discharge has been challenged by the petitioner on the following grounds:

(i) That the petitioner was not given an opportunity of being heard against the contemplated discharge, and

(ii) Order of discharge could not have been passed without recording the satisfaction to the effect that trial of the petitioner by Court Martial is not expedient or practicable, and as such, condition precedent for taking action of discharge was not satisfied.

4. Section 22 of the Army Act, 1950 (hereinafter referred to as the Act) provides for retirement, release or discharge. This section is quoted below:

"Retirement, Release or Discharge - Any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed."

5. Rule 13 of the Rules framed under the Act has specified the authorities competent to retire, release or discharge an army personnel and has also laid down the manner in which these orders are to be passed. It is admitted by both the parties that the impugned order of discharge has been passed under Rule 13(3) (iii) (v) of the Army Rules. The said Rule is

Category

Grounds of discharge

Competent authority to authorise the discharge

Manner of discharge

III (V) All other classes of discharge

Brigade/ Sub Area Commander

The Brigade or Sub Area 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

6. The show cause notice dated April 13, 1989, which has been filed as Annexure I to the writ petition, does not refer to provisions of the Act or Rules under which it has been issued. It was issued to the petitioner on the ground that he as the Station Commander of the Ambulance Assistant Section, was habitual in indulging in acts of gross indiscipline and has encouraged his sub-ordinates to get intoxicated and thereby created ugly scenes resulting in the stabbing incident on January 26, 1988 in which the petitioner and two others were stabbed, and further while appearing as a witness before the Court Martial, he has deliberately suppressed certain facts and as such, was guilty of misconduct. By the last

clause of the notice the petitioner was called upon to show cause why suitable administrative action be not taken against him for the above misconduct. The last clause of the said notice is quoted below:

"4. In view of the above, you are directed to show cause why suitable administrative action should not be taken against you for the above misconduct. Your reply should reach this office within seven days on receipt of this show cause notice. In case no reply is received within the period it shall be deemed that you have nothing to say in this regard."

7. Rule 13 of the Army Rules requires that, if the circumstances of the case permit, the person whose discharge is contemplated should be given an opportunity to show cause "against the contemplated discharge". It is not sufficient to give facts in the show cause notice constituting the misconduct, what is further required is that the authorities must mention in the notice that he is called upon to show cause against the contemplated discharge. The proposed action of discharge has to be expressly mentioned in the notice and the person concerned should not be left to guess about the action proposed against him. In the instant case by show cause notice the petitioner was called upon to show cause why suitable administrative action be not taken against him for the alleged misconduct. There are various administrative actions which could be taken against an army personnel for misconduct. Termination of service is one of the administrative actions liable to be taken against the army personnel under the Act and the Rules framed thereunder. There are various modes in which the service of the army personnel can be terminated, such as, dismissal, removal, retirement, release or discharge. Mention of "suitable administrative action" is vague and it is not possible to comprehend that proposed action against the petitioners is the discharge. It has to be remembered that representations are required to be made by the show cause notice against the proposed penalty or action, and if the notice does not specify the exact penalty or action, it is incapable of being effectively replied. Such a notice does not comply with the provisions of Rule 13, which requires a notice against the contemplated order of discharge.

8. Apart from the fact that no notice has been given to the petitioner against the contemplated discharge, resulting in non-compliance of Rule 13(3)(iii)(v) of the Army Rules, rules of natural justice also require that opportunity should be given against the proposed action and the person concerned must know from the notice, of the action to be taken against him. Supreme Court in the case of S.L. Kapoor Vs. Jagmohan and Others, has laid down as follows:

"In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. We do not suggest that the opportunity need be a double opportunity, that is one opportunity on the factual allegations and another on the proposed

penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him."

9. No notice against the contemplated discharge having been given to the petitioner, the impugned order of discharge has been passed in the violation of the procedure laid down by Rule 13 and also against the principles of natural justice. In *Capt. Virendra Kumar Vs. Union of India (UOI)*, , the Supreme Court has laid down that the procedural safe-guards for termination of service under Army Rules are of prime importance, the consequence of which is that order of termination of service becomes invalid for failure to observe the basic procedure laid down by Army Rules.

10. In this connection it may be mentioned that by a letter dated March 11, 1985 of the Army Head Quarters directions had been issued that the officials should not be harsh while taking an action of discharge consequent to the four red ink entries or in term of Rule 13 (3)(iii) (v), especially when the person concerned is about to complete pensionable service. It was further provided that before taking action, due consideration should be given to the long service and discharge should be ordered only when it is considered absolutely necessary in the interest of service. Para 2 of the aforesaid letter is quoted below:

"2. In this connection it is clarified that discharge from service consequent to four red ink entries is not a mandatory or legal requirement, while taking cognizance of four red ink entries and recommending discharge of order in term of Article 13(iii)(v) the Commanding Officer must consider the nature of offence for which each red ink entry has been awarded and not to be harsh with the individuals, especially when they are about to complete pensionable service. Before taking a decision in this regard, due consideration should be given to the long service, hard stations and difficult living conditions that he has been exposed to during his service. Each case of discharge consequently ordered only when it is considered absolutely necessary in the interest of service. As an additional safeguard, such discharge should be approved by the next high Commander."

11. The petitioner was to retire on completion of 22 years of service. On the date of discharge the petitioner has already completed the service of 21 years 1 month and 17 days. After about ten months from the date of order of discharge, petitioner would have retired on reaching the age of superannuation. Taking such a drastic action at the fag end of the service of an army personnel should be avoided as far as possible unless it is absolutely necessary. Instructions contained in the aforesaid letter of Army Head Quarters may not be statutory but they are salutary principles, which are required to be followed as far as possible. Following such salutary principles eliminates arbitrariness in the administrative action of the authorities. :

12. Regarding the second point, notices appended to Rule 13 provide that when

compulsory discharge is sought on the ground of misconduct then the competent authority should satisfy itself that trial by a Court Martial of such a person is inexpedient or impracticable. Notice further requires that the competent authority, if the circumstances of the case permit, should also give to the person concerned an opportunity to show cause against the order of discharge. Notes appended to Rule is quoted below:

"2. When compulsory discharge of a JCO or WO or OR is sought on grounds of misconduct the authority competent to sanction the same should satisfy itself that trial by Court Martial of such a person is inexpedient or impracticable for reasons other than probable failure to establish the charges and that further retention in service of the individual is undesirable.

In all cases of discharge under item I (iii) or III(v) competent authority sanctioning the same must, if the circumstances of the case permit, give the person concerned an opportunity to show cause against the order of discharge."

13. In the counter-affidavit filed on behalf of the respondents nothing was shown as to whether the authority concerned was satisfied that trial of the petitioner by Court Martial is inexpedient or impracticable. We accordingly adjourned the case on April 5, 1990, granting two weeks" time to the respondents to file a supplementary affidavit and to produce the relevant record for perusal and satisfaction of the Court. The Government has filed the supplementary affidavit. In paragraphs 6, 7, 8 and 9 of this affidavit, it has been averred that respondent No. 1 after satisfying himself that petitioner was actually involved in the crime and has concealed facts, came to the conclusion to take action against him under Rule 13(3)(x), as it was felt necessary that the retention of the petitioner in the army service was not desirable as he has participated in the crime and has concealed the truth regarding the incident. It is however, nowhere averred in the affidavit that authority concerned was satisfied that trial of the petitioner by Court Martial is inexpedient or impracticable. Government has also not produced the record before us so as to ascertain about the satisfaction about the inexpediency or impracticability of the trial of the petitioner by Court Martial. In the absence of any averment or proof about the authorities being satisfied about the inexpediency or impracticability of the trial of the petitioner by Court Martial, petitioner"s discharge cannot be sustained.

14. Learned Standing Counsel for the Union of India has argued that it is open to the authorities to choose the action against an army personnel and this Court cannot interfere against such an action under Article 226 of the Constitution of India. In this connection learned counsel has relied on Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, There is no doubt that army authorities are free to choose an action to be taken against an army personnel. But whatever action is taken against a personnel, it has to be passed by the proper authorities and in accordance with the procedure laid down by the Army Act and the Rules framed thereunder. In the case of Major Dharam Pal Kukrety, (supra), the question raised and decided was as to whether resort to Army Rule 14 is

permissible after findings of the Court Martial have been confirmed and the Supreme Court upheld the action of the Government by holding that the proper authorities can take action under Rule 14 even after the findings of the Court Martial have been confirmed. This case does not deal with the questions involved in the instant case.

15. Learned counsel for the respondents has further argued that as the petitioner has an alternative remedy, u/s 26 of the Act, of making a complaint to the concerned officials against the impugned order of discharge, writ petition is liable to be dismissed on the ground of alternative remedy. It is true that an aggrieved person can file a complaint u/s 26, but alternative remedy is not an absolute bar in the matter of entertaining writ petition. In the instant case both the parties have filed counter and rejoinder affidavits and the impugned orders of discharge have been passed in contravention of Rule 13 (3)(iii)(v) as well as principles of natural justice. The petitioner has already reached the age of superannuation during the pendency of the writ petition and relegating the petitioner to the alternative remedy of making a complaint u/s 26 of the Act will cause great hardship and inconvenience to him. Taking into consideration the facts and circumstances of this case, we are of the opinion that it is a fit case where this Court should interfere under Article 226 of the Constitution of India.

16. We accordingly allow the writ petition with costs and quash the impugned orders of discharge dated June 13, 1989 (Annexure III to the writ petition) and the final order of discharge dated July 8, 1989 (Annexure I to the supplementary affidavit). As the petitioner, during the pendency of the writ petition, has crossed the age of superannuation in the Army, we cannot order his reinstatement. We, however, direct that the petitioner will be paid his full pay and allowances for the period of three months from the date of receipt of a certified copy of this order. Petitioner's pension etc. will also be counted on the basis as if the petitioner was not discharged and has continued in service up to the date of superannuation.