
(2009) 09 UK CK 0002

In the Uttarakhand High Court

Case No : Special Appeal No. 122 of 2008

Ex. Rect. Rakesh Kumar (No. 15347148 P)

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 08-09-2009

Acts Referred:

Army Rules, 1954 — Rule 13, 13(1), 13(2), 13(3)
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2009) 3 UC 1932

Hon'ble Judges : Vinod Kumar Gupta, C.J.;Sudhanshu Dhulia, J

Bench : Division Bench

Advocate : Lalit Kumar, for the Appellant; S.S. Chauhan for Union of India, for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta, C.J.—This special appeal is directed against the judgment dated June, 2008 passed by the Learned Single Judge of this Court in W.P. No. 1229 (SS) of 2006 whereby the Learned Single Judge dismissed the writ petition filed by the Appellant/Petitioner.

2. This appeal can be disposed of on a very short ground based upon patent violation of the principles of natural justice and flagrant, total non-application of mind.

3. Shorn of all un-necessary details, with respect to acts of commission and omission, details whereof we do not consider necessary to recount here, the Appellant was served a show cause notice bearing No. 15347148/95/RK/CT dated 17th March, 2005 asking him to give reasons as to why he should not be discharged from army service in terms of Army Order No. 28/2001/ DV and Rule 13 of Army Rules, 1954. The text of the notice is reproduced hereunder:

1. You were enrolled in the Army on 22 May, 2003. During GIF phase you were admitted in MH Rorkee from 06 May 04 (2000h) to 18 may 2004 (1800h) for

PAIN ABDOMEN. However, on later investigation, it was revealed that you were discharged from MH Roorkee on 11 May 2004 and remained absent till 18 May 2004, by forging the discharge slip issued by MH Roorkee. During the above absence period, you were involved in criminal case against FIR No. 46 dated 16 May 2004 at police station Sadar Gohana, Distt Sonipat (Haryana) for which you have been remanded to police custody since 27 Jul 2004 till date.

2. Please give the reasons as to why you should not be discharged from service under AO 29/80 revised AO 28/2001/DV and Army Rule 13 (III) (IV) as an inefficient and undesirable soldier.

3. Your reply should reach this office by 31 Mar 2005 positively.

4. In para 3 of this notice the Appellant was asked to submit the reply by 31st March, 2005 positively.

5. Even while the Appellant was served the aforesaid notice dated 17th March, 2005, for reasons unexplained either in the body of the communication dated 5th April, 2005, or in the Counter Affidavit of the Respondents, or anywhere else, Respondents served a second, subsequent notice bearing No. 15347148/108.RK/CT dated 5th April, 2005 to the Appellant once again asking him to explain as to why he should not be discharged from Army Service in terms of the aforesaid Army Order No. 28/2001/DV and the aforesaid Rule 13 of Army Rules, 1954. The text of this notice is reproduced hereunder:

1. You were absent without leave from 21 Nov 03 to 01 Dec 03, a total absence of 11 days and you were awarded seven days pay fine for the offence on 15 Nov 2003.

2. Now it has come to my notice that during the GIF phase of your trg you were admitted in MH Roorkee from 06 May (2000 h) to 18 May 2004 (1800h). However, on later investigation it was revealed that you were discharged from MH Roorkee on 11 May 2004 and remained absent till 18 May 2004, by forging the discharge slip issued by MH Roorkee. During the above absence period, you were involved in criminal case vide FIR No. 46 dated 16 May 2004 at Police Station Sadar Gohana, Distt Sonapat (Haryana) u/s 363/366/376 of IPC (pertaining to abduction and punishment of rape). A non-bailable warrant has been issued against you by the Judicial Magistrate Gohana, Sonapat (Haryana) and you have been remanded to police custody from 27 Jul 04 till date. A total stay in prison of 253 days till date.

3. Please give the reasons as to why you should not be discharged from service as per AO 29/80 revised vide AO 28/2001/DV and Army Rule 13 (3) (iv) as an inefficient and undesirable soldier since you have not only forged the documents for personal gain but are also accused in a case of grievous nature, and incurred a loss of trg of 08 months and 13 days.

4. Your reply should reach this office by 16 Apr 2005 positively otherwise it will be presumed that you have nothing to say and an ex-parte decision will be taken

on the matter.

6. This time in para (4) of the said communication the Appellant was asked to send his explanation/reply by 16th April, 2005 positively failing which the Respondents were entitled to presume that the Appellant had nothing to say and accordingly an ex parte decision would be taken against the Petitioner.

7. Army Order No. 28/2001/DV reads thus:

1. Commanding Officers must have a positive outlook in dealing with indiscipline. If award of minor punishments does not have the desired corrective effect on a person, whose conduct is unsatisfactory, he should for the next offence be dealt with by court martial, Discharge of such persons in cases where the proper course would have been to initiate disciplinary action is not desirable.

2, Other Ranks will also not be discharged from service as a matter of course on account of their conviction, either before or after enrolment, by civil courts. Commanding Officers will use their discretion in deciding whether the offence is of so serious a nature, or the punishment awarded of so long a duration, as to merit discharge. The importance of the duration of the term of imprisonment served lies in the fact that a man is liable to make undesirable contacts in jail. It will seldom be advisable to retain in the Army a man who has recently been in jail, or a man who has at any time been in jail for more than six months. This also applies to the rejection of potential recruits.

3. AG 28/80 is hereby cancelled.

8. A bare look at the aforesaid Army Order, which is in the nature of an executive instruction; clearly suggests to us that discharge of a person from the army service is not governed by the aforesaid army order, which is not a substantive law on the subject. It is a mere procedural guideline advising the Commanding Officers to have a positive outlook in dealing with indiscipline, it further goes on advising the Commanding Officers that if minor punishments do not have the desired corrective effects on a person, for the next offence he should be dealt with by a Court Martial. It also advises the Commanding Officers that the discharge of such persons from service where the proper course would have been to initiate disciplinary action is not desirable. Therefore, it is quite clear that AO 28/2001/DV is not a substantive law as far as discharge from army service is concerned. It does not give any power to anyone to discharge anyone from army service.

9. For substantive law on the subject of discharge, we have to turn to Rule 13 of Army Rules, 1954, which specifically lays down that the authorities specified in Column -3 of the table below Rule 13 shall be the competent authorities to discharge from service persons subject to the Army Act specified in Column -1 thereof on the grounds specified in Column-2. For ready reference Sub Rule (1) and Sub Rule (2) of Rule 13 are reproduced hereunder, which read thus:

13. Authorities empowered to authorise discharge.-(1) Each of the authorities

specified in column 3 of the Table below, shall be the competent authority to discharge from service persons subject to the Act specified in column 1 thereof on the grounds specified in column 2.

(2) Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority superior to it.

10. Last entry in the table below Rule 13 is the entry which relates to the Petitioner. It reads thus:

Recruits who are considered likely to become efficient soldiers will be dealt with under this item.

11. Undoubtedly Commanding Officer of the Appellant and if read with Sub Rule (2) (supra), even the Commandant of No. 1 Training Battalion Bengal Engineers Group and Centre, Roorkee were/are the competent authorities to discharge the Appellant from service. We therefore have no hesitation in holding that the Commandant of the No. 1 Training Battalion Bengal Engineers Group and Centre, Roorkee, who has passed the discharge order was a competent authority to discharge the Petitioner from service because he was the superior officer to the Commanding Officer. However, the discharge order is patently illegal and totally unconstitutional for the following reasons:

12. The first show cause notice dated 17th March, 2009 had become redundant because for reasons unexplained the Respondents chose to issue second, subsequent show cause notice dated 5th April, 2005 and gave time till 16th April, 2005 to the Appellant to submit his reply. Our attention has been drawn to note-sheet which starts on 28th March, 2005 under the signatures of Captain Dipender Paul, Adjutant whereby he makes a recommendation to the Commanding Officer to discharge the Appellant from service, it is very important to notice that the process for discharge of the Appellant from service began on 28th March, 2005 by the aforesaid recommendation of the Adjutant in the aforesaid noting dated 28th March, 2005. The Commanding Officer on 5th April, 2005 agreed with the aforesaid noting and himself also recommended that the Appellant indeed be discharged from service. Ultimately the Commandant on 7th April, 2005 finally approved the discharge of the Appellant from service. Viewed thus, it seems absolutely clear and totally unambiguous that even though notice had been issued to the Appellant on 5th April, 2005 and the Appellant had been given time till 16th April, 2005 to submit his reply, the discharge process had started even before the issuance of the notice dated 5th April, 2005 (notice dated 17th March, 2005 had become redundant because it had been superseded by the subsequent notice dated 5th April, 2005). Even if notice dated 17th March, 2005, by a wild stretch of imagination could be termed to be alive this notice also had given the Appellant time till 31st March, 2005 to submit his reply.

13. The fact remains that when the order of discharge was passed the Appellant actually had not submitted any reply to either of the aforesaid two notices. The Respondents are wrongly terming the communication dated 05.05.2005 as the

Appellant's reply to either of the aforesaid notices. We have clearly perused the communication dated 05.05.2005 and find that it is not a reply of the Appellant to any of the aforesaid two notices. This communication merely deals with some issue relating to the Appellant's identity card and some pending litigation in which he was involved and the possibility of an amicable settlement between the parties in that litigation.

14. The aforesaid is just one aspect of the matter.

15. Column No. 4 of the table below Rule 13 clearly stipulates that only such recruits can be discharged who are unlikely to become "efficient" soldiers. In the noting dated 28th March, 2005 even though the Adjutant does not make any recommendation that the Appellant was unlikely to become an "efficient" soldier, in the noting dated 5th April, 2005 the Commanding Officer gave an indication that the Petitioner was unlikely to become a "good soldier". The expression "efficient" is distinct and different from the expression "good". Somebody may or may not be a "good soldier" but he may or may not be an "efficient soldier". "Good Soldier" cannot be confused or mixed up with "efficient soldier". Conversely, some one may be an "efficient soldier" yet he may not be a "good soldier". Efficiency and goodness are two distinct, independent, different attributes and characteristics of human beings. Column-4 of the table below Rule-13 permits only a non-efficient soldier to be discharged from the service. It does not permit recruits to be discharged from service who are not likely to become "good" soldiers.

16. On both the aforesaid counts the impugned discharge order has to be set aside and quashed. As far as the first count is concerned, it has to be quashed and set aside because it suffers from non-application of mind, pre-meditated state of mind and the process of discharge having begun even prior to the issuance of the notice dated 5th April, 2005 and it having culminated much before the time for submission of reply by the Appellant had expired. On the second count also it is a bad order because the ground of the discharge was that the Appellant was unlikely to become a "good soldier" whereas the permissible ground under Rule 13 is that the Appellant was unlikely to become an "efficient soldier" in the context of which the discharge power has been given under Rule 13.

17. A careful perusal of the impugned judgment dated 27th June, 2008 passed by the Learned Single Judge clearly shows that the Learned Single Judge did not either deal with or dwell upon any of the aforesaid two aspects of the case and dismissed the writ petition without considering these aspects. The judgment, therefore, can be termed to be erroneous because of the non-consideration of the aforesaid two vital aspects of the case.

18. Special Appeal is accordingly allowed. Impugned order is set aside with all the consequences. The Appellant is awarded costs of Rs. 10,000/- to be paid to him by the Respondents, in four weeks from today.