

(1996) 10 DEL CK 0070

In the Delhi High Court

Case No : CW 239/93

Ex. Sep. Sital Singh

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-10-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1996) 64 DLT 289 : (1996) 39 DRJ 405 : (1997) 1 LLJ 276

Hon'ble Judges : Devinder Gupta, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : V.P. Sharma, for the Appellant; Jyoti Singh, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—Petitioner, a Sepoy in Indian Army has in this petition filed under Article 226 of the Constitution of India challenged the order of his discharged passed on 30.10.1990.

2. The challenge to the impugned order of discharge is on numerous grounds. The three grounds which were urged during the course of hearing are: (a) that the order has not been passed by a Brigade/Sub Area Commander of 631 Bn. EME on whose strength the petitioner was on the relevant date but by the General Officer Commanding, 31 Armed Division who had no jurisdiction to pass such order in the case of the petitioner; (b) the discharge under Army Rule 13(3) (iii)(v) can be ordered on grounds other than misconduct and since the impugned order of discharge is based on alleged misconduct, it was incumbent for the respondents to have tried the petitioner in accordance with the provisions of the Army Act by affording due opportunity of being heard and leading his defense; and (c) thirdly that the impugned order of discharge is against the mandatory provisions of the Army Act and the Rules and the same is not based upon any material available on record.

3. We have heard counsel for the parties and been taken through the record

which was made available for our perusal.

4. The admitted facts are that the petitioner was enrolled in the army on 25.11.1986 as Sepoy. He was posted to 631 EME Bn. w.e.f. 3.11.1988. While on the posted strength of 128 Armed Workshop of 631 EME Bn. he was detailed to undergo Hindi Typewriting Course at Education Branch of Headquarters 31 Armed Division w.e.f. 29.8.1990.

5. It is alleged by the respondents that on 1.10.1990 at about 6.30 P.M. a message was received at the Headquarters, 631 EME Bn. from Headquarters 31 Armed Division that the petitioner had misbehaved with one Miss Anita Joshi daughter of Lt. Col. B.D. Joshi (Retired).. The petitioner was stated to have caught hold of the right arm of Anita Joshi when she was in Library. Respondents' version is that on investigation about the incident in which the petitioner denied his involvement and stated that he did not catch hold of the girl's hand but had only enquired as to what she required from the Library; a prima facie case was established against the petitioner. On 2.10.1990 the petitioner was placed under close arrest. On 8.10.1990 an enquiry was ordered to investigate into the circumstances under which the petitioner was alleged to have caught hold the hand of Anita Joshi. It is stated that as per opinion of the Investigating Officer the petitioner was found guilty of misconduct, unbecoming of a soldier and consequently a show cause notice dated 14.10.1990 was issued to the petitioner by the Competent Authority to show cause as to why administrative action for his discharge from service be not taken. The reply from the petitioner was found not to be satisfactory. On 30.10.1990 the impugned order was passed.

6. Sub-section (3) of Section 20 of the Army Act empowers an officer, having power, not less than a Brigade or equivalent Commander or any prescribed officer, to dismiss or remove from service any person serving under his Command other than an officer or a Junior Commissioned Officer. The petitioner being a Sepoy, thus, could have been dismissed or removed from service by an officer having power not less than a Brigade or equivalent Commander of his Command. Rule 13 of the Army Rules enumerates the authorities competent to make an order of discharge from service. Sub-rule (2) thereof says that any power conferred by the Rule on any of the authorities can also be exercised by any other authority superior to it. It is the respondents' case that the petitioner's discharge was sanctioned by the General Officer Commanding, Headquarter, 31 Armed Division, being competent authority, holding the rank of Major General, who is superior to Brigade/Sub Area Commander and the same was permissible under the Rules. In view of sub-rule (2) of Rule 13, which authorises any other authority, superior to the one empowered under the rules to make an order of discharge, the submission made on behalf of the petitioner that the order passed is without jurisdiction in as much as it could have been passed only by Brigade/Sub Area Commander of 631 EME Bn. and not by the Commander of 31 Armed Division has no force. The General Officer

Commanding, Headquarter, 31 Armed Division, being a superior officer to that of Brigade or Sub Area Commander, by virtue of Rule 13(2) of the Army Rules read with Section 20(3) of the Act had jurisdiction to pass the impugned order of discharge.

7. The show cause notice (annexure R-I) dated 14.10.1990 served upon the petitioner stated that the enquiry, which was ordered on 8.10.1990, revealed that the petitioner had committed misconduct of a very serious nature, unbecoming of a soldier in having caught hold the hand of Anita Joshi and it was for that reason that the petitioner was called upon to show cause as to why administrative action of his discharge from service be not taken. The same reads:

"SHOW CAUSE NOTICE

1. An inquiry was ordered vide 31 Armed Div letter No 3302/430/A2 dated 08 Oct 90 to investigate into the circumstances under which you caught hold the hand of Miss Anita Joshi. The inquiry has revealed that you have committed a misconduct of a very serious nature, unbecoming of a soldier.

2. The proceedings of the inquiry were placed before the GOC 31 Armed Div who finds you guilty of catching the hand of Miss Anita Joshi, D/O Lt. Col. (Retd) BD Joshi at 31 Armed Div Library at about 1630 hrs on 01 Oct 90. Thus you have committed a misconduct of a serious nature, unbecoming of a soldier.

3. The GOC 31 Armed Div has directed me to call upon you to show cause as to why, administrative action in the form of discharge from service, should not be taken against you, for your above "mentioned misconduct.

4. Your reply to the show cause notice should reach this HQ within seven days of the receipt of the letter failing which it shall be presumed that you have nothing to urge in your defense and anticipated action will be proceeded with."

8. In response to the aforementioned show cause notice the petitioner on 20.10.1990 submitted a very brief reply not only refuting the alleged misconduct in having caught hold the hand of Anita Joshi but also claimed that he deserved to be given a chance to prove his defense and that he had sufficient evidence to disprove the misconduct. It was also stated by him that it should not be presumed that he had nothing in his defense. Considering the show cause notice and the reply the Competent Authority approved the discharge.

9. During the course of arguments we asked learned counsel for the respondents to point out any provision in the Army Act, which would make the alleged misconduct to be an offence punishable as such in the Act. It was pointed out that the misconduct of the catching hold of the hand of a girl would fall under the category "Civil Offences" defined u/s 69 of the Army Act for which a person would be liable to be tried and on proof can be imposed sentence of imprisonment assigned for the said offence by the law in force in India. In this case would be an offence u/s 354 of the Indian Penal Code, for which the imprisonment is for a term which may extend to 7 years or less imprisonment as

is provided in the Army Act. It is stated that had the petitioner been tried by a Court Martial for the alleged misconduct, all the provisions from the stage of hearing of charge till trial by Court Martial as contained in Chapter V of the Army Rules would have applied. At the stage of hearing of charge the petitioner would have been afforded an opportunity to cross-examine any witnesses against him and lead evidence in his defense besides making his statement. Hearing of charge would have been in presence of the petitioner, as provided in Rule 22 of the Army Rules.

10. Instead of resorting to the said procedure and trying the petitioner for the alleged misconduct by a Court Martial, the respondents straightaway proceeded to deal with the petitioner administratively. It was done on the basis of the result of the so-called enquiry, which was ordered on 8.10.1990. It is not denied that it was not an enquiry conducted, as envisaged under the provisions of the Act. It was a discrete inquiry in which eight witnesses, including the petitioner were questioned by Col. S.K. Gupta without affording an opportunity to cross-examine the witnesses. The questioning of eight witnesses was also not conducted in presence of the petitioner. Admittedly the petitioner in his questioning by the Enquiry Officer, denied having caught hold of the hand of Anita Joshi, daughter of Lt. Col. BD Joshi (Retd.). His version had been that on the relevant date he had gone to the Library. The JCO, In charge of the Library, had urgently to go somewhere and requested the petitioner to remain seated in the Library for a short while. Nobody else was present in the Library. Anita Joshi came to the Library. She wanted to return one book and wanted some other book to be taken out from the Library. The petitioner not being aware of that book asked Anita Joshi to wait till the concerned JCO comes back. Meanwhile she is stated to have started shuffling the books of her own. The petitioner objected asking Anita Joshi to wait outside. She appears to have felt offended due to this action of the petitioner. She left the Library. It is the admitted position that this occurrence was not witnessed by anyone else. In the Library except the petitioner and Anita Joshi none else was present. JCO had not returned back. Anita Joshi had left the Library when JCO came back.

11. We perused the entire file, which was shown to us. Statement of Anita Joshi was not available on record. It was frankly admitted by the learned counsel for the respondents that she was not at all questioned. Eight witnesses, including the petitioner, were questioned and that also after 8.10.1990 when the petitioner was under close arrest. Anita Joshi was neither examined nor questioned by the Enquiry Officer at any other point either prior or subsequent to 8.10.1990. In the reply filed by the respondents on the affidavit of Major N. Ramaswamy, 631 Bn. EME, it is stated:

"On investigation about the incident in great details, the individual totally denied his involvement. He replied that he did not catch the girl's hand and only enquired as to what she required from the Library. Since the statement of the victim and corroborated the other witnesses, established a prima facie case, on

2nd October, 1990, he was placed under close arrest."

12. The above underlined version stated in reply apparently is incorrect and is not supported by the record made available to us. Admittedly no investigation had taken place prior to 8.10.1990 in as much as no statements were recorded prior to 8.10.1990. The affidavit further says:

"As per the opinion of the investigating officer, IC02315 Col. S.K. Gupta, Commanding Officer, 531 ASC Bn., petitioner was found guilty of misconduct, unbecoming of a soldier wherein he caught hold of right arm of Miss Anita Joshi at about 16.30 hours on 1st October, 1990 in Headquarters 31 Armed Division Library when he found her alone in the Library. In view of this a show-cause notice No.3302/430/A2 dated 14.10.1990 was issued to Petitioner by the competent authority which was served upon the petitioner. The reply to the above show-cause notice was also submitted by the Petitioner vide his letter No. 14600906 dated 20.10.1990. The petitioner replied that he did not catch the hand of Miss Anita Joshi."

13. In case Anita Joshi was not examined and no other person was present in the Library when the alleged incident took place, evidence of the other witnesses would be merely hearsay and would be inadmissible. The same could not have been made the basis by the investigating officer to give any opinion about the conduct of the petitioner, especially when the petitioner had denied the alleged act of misconduct. Even in his reply to show cause notice he specifically defied the alleged misconduct and stated by him that he deserved to be given a chance to prove his defense. It is the case of the respondents that after receipt of reply to show cause notice the Competent Authority merely perused the report of Col. Gupta and passed the impugned order. No further proceedings took place.

14. In view of the above position the following version in the reply affidavit is also incorrect.

"Since the reply of the Petitioner was not satisfactory and he did not produce any witness, his discharge was sanctioned by General-Officer-Commanding, 31 Armed Division, in exercise of power conferred under Army Rule 13(3)(1)(v). Subsequently he was discharged from the service with effect from 30th October, 1990 under Army Rule 13(3)(III)(v)."

15. The record does not show that any opportunity was afforded to the petitioner to produce any evidence in his defense.

16. It is a case of total non-application of mind by the respondents. Assuming that the petitioner could have been discharged by an administrative action, only on serving a show cause notice but the very foundation for the show cause notice is shaky. It proceeds on the assumption that during enquiry it stood established that the petitioner caught hold the hand of Anita Joshi, which act of the petitioner alone was considered to be a misconduct of very serious nature, unbecoming of a soldier. The petitioner had specifically denied having caught

hold the hand of Anita Joshi. At no stage Anita Joshi was examined. On record, her statement is not available. No opportunity was afforded to the petitioner to cross-examine the witnesses. Petitioner was also not asked to lead any evidence. No regular trial took place. Even during the course of a Court of Inquiry, had it been ordered and held for the purpose of collecting evidence under Chapter VI of the Army Rules, the petitioner whose character or military reputation was likely to be affected, would have been entitled full opportunity of remaining present throughout the enquiry, making his statement and leading his evidence and also to cross-examining any witnesses .

17. During the so-called enquiry, conducted by Col. Gupta, the petitioner was not afforded an opportunity to cross-examine the witnesses or to lead evidence in defense. In these circumstances the issuance of show cause notice is without any basis. The Competent Authority before issuing show cause notice had to form an opinion based on material available on record. No reasonable person, on the basis of material on record could have formed the impugned opinion that the petitioner had indulged in any misconduct of serious nature unbecoming of a soldier. Resultantly it has to be held that the impugned action is arbitrary and capricious, without any evidence, which renders not only the show cause notice but all subsequent proceedings bad in law for which the impugned order is liable to be quashed and set aside.

18. In view of the conclusions which we have arrayed on merits of the case, it is not necessary for us to advert to the other legal submissions made on behalf of the petitioner that the impugned order otherwise is not legally sustainable.

19. As a result of the above, writ petition is allowed with costs quantified at Rs. 3,000/-. The impugned order is quashed and set aside. The petitioner is ordered to be reinstated forthwith with continuity in service and all other consequential benefits, including pay and allowances. Arrears, if any, will be worked out and paid within a period of three months from today.