

(2012) 01 DEL CK 0342
In the Delhi High Court
Case No : WP (C) No. 205 of 2012

Ex. Sowar Azad Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-01-2012

Acts Referred:

Citation : (2012) 5 AD 419

Hon'ble Judges : J.R. Midha, J;Anil Kumar, J

Bench : Division Bench

Advocate : Pradeep Dahiya, for the Appellant; Sachin Datta, CGSC with Mr. Ahbimanyu Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner has challenged the judgment dated 23rd February, 2011 passed by Armed Forces Tribunal, Principal Bench in T.A No.33/2010 dismissing the petition of the petitioner and declining to quash and set aside the proceedings of the Summary Court Martial dated 27th August, 1993 directing the dismissal of the petitioner and refusing to grant his reinstatement with consequential benefits.

2. Brief facts to comprehend the controversies are that the petitioner was enrolled in the Indian Army on 1st September, 1978 and he served with the Jat Regiment and was later on transferred to the Armed Regiment in the year 1980. The petitioner had about 14 years of service before he was dismissed.

3. According to the petitioner he was granted annual leave for the year 1993 with effect from 3rd May, 1993 to 1st July, 1993. He contended that during his leave he fell sick and remained under treatment at Faridabad. According to the averments of the petitioner he had informed the duty clerk LD/SKT on 2nd July, 1993 at 1915 hours regarding his illness and had requested for an extension of leave which was also recorded by the duty clerk in the message book. The petitioner thereafter, reported for duty on 14th August, 1993. On 23rd August,

1993 the petitioner was informed that he would be tried by the Summary Court Martial on 26th August, 1993 for an offence u/s 39(B) of the Army Act.

4. The petitioner was served with the chargesheet and summary of evidence. The petitioner was also informed that he has a right to petition to the Central Government, Chief of Army Staff or any officer superior in Command to the officer who held the Summary Court Martial by letter dated 27th August, 1993.

5. Thereafter by letter dated 12th November, 1993 the wife of the petitioner was informed that the petitioner had been tried by the Summary Court Martial on 27th August, 1993 and that the punishment of dismissal from service had been awarded to the petitioner.

6. Pursuant to the order of dismissal the petitioner contended that he had submitted a petition dated 7th January, 1994 to the Lt. General, GOC-in-C Head Quarter, Northern Command, explaining the reasons for his overstay, However, no decision had been taken on his request. The petitioner had also made a prayer to review the punishment and allow him to complete the pensionable service.

7. According to the petitioner he had received a letter dated 17th May, 1994 asking him to sign the consent certificate that he would not claim pay and allowances in respect of or count service for any purpose during the period under dismissal. The petitioner averred that as the said letter was silent about the purpose, he did not sign the letter. The petitioner, therefore, wrote to the Commandant Incharge, Summary Court Martial on 24th May, 1994 to know in detail the purpose for which the consent certificate which was asked to be signed by him was required for. The petitioner received a letter in response dated 15th June, 1994 explaining the implications of the consent certificate, however, it was not clarified as to whether even after seeking discharge the petitioner would get pension or not. Therefore, the consent letter was not signed and submitted by the petitioner.

8. The petitioner contended that later on the petitioner had signed the consent certificate and informed the Commandant Incharge by letter dated 25th August, 1994 stating that he had done so on the assurance of the alleged courier Dfr Kuldeep Singh stating that the petitioner would get pension admissible after 15 years of service as the petitioner had already completed 14? years of service and an extension of ? year was within the jurisdiction of the Corps Commander. The petitioner also contended that he had written that in case he does not get the pension, the consent certificate should be treated as cancelled.

9. The petitioner made various representations and reminders were also sent regarding the said matter, however no response was received from the respondents. Since the relief claimed by the petitioner was not granted, feeling aggrieved by the Summary Court Martial proceedings, he filed a writ petition being W.P(C) No.3873/1998 dated 27th May, 1998 which was transferred to Armed Forces Tribunal and was registered as T.A No.33/2010 which was

thereafter dismissed by order dated 23rd February, 2011 which is impugned by the petitioner in the present petition. The Armed Forces Tribunal while dismissing the petition noticed the plea of the petitioner that he had been requesting time and again to post him near his hometown as he had to take care of his wife who was not having a child at the relevant time and that when he was blessed with a child, he had to take care of that child and for emotional reasons he had overstayed on leave. The Armed Forces Tribunal also considered the plea of the petitioner that he had sought retirement and availed the pensionary benefits but he had instead been dismissed from service and that the punishment of dismissal does not commensurate to the violation for which he was held guilty, i.e. overstaying the leave.

10. The petition was contested by the respondents disclosing that

the petitioner is a habitual defaulter and that he overstayed on a number of occasions. It was disclosed that in 1990 he had overstayed for 46 days; in the year 1991 he had overstayed for 102 days and that in the year 1993 he had overstayed for 44 days. For these incidents of overstaying he was held guilty and punished for the offence u/s 39(B) of the Army Act. The Armed Forces Tribunal also noticed that the appellant himself pleaded guilty. Sufficient opportunity under Army Rule 115(2) was afforded to him, inspite of which no justifiable reason was given by him for overstaying and being absent without permission in the year 1993. The statements of Bishan Dass as PW-1, SDM Sahni Ram as PW-2 and the fact that the petitioner had pleaded guilty were also taken into consideration. On account of the petitioner being a habitual defaulter the Tribunal had held that the punishment of dismissal from service cannot be held to be disproportionate to the offence, in the facts and circumstances.

11. The Tribunal repelled the plea of overstaying on account of the allegation that he had to take care of his newly born child relying on the principle enunciated in *Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others*, wherein it was held that sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably failed to establish a legal right. Therefore the Tribunal held that emotions have no relevance and significance to justify the absence of the petitioner. The plea of the petitioner that since his wife was engaged in a job and, therefore, he could not ask for family accommodations at the place where he was posted and that in these circumstances there was compulsion to stay with his wife, was also held to be irrelevant and not sufficient for setting aside the decision of Summary Court Martial. The fact that the petitioner was short of 2 years and 7 months to become entitled for pensionary benefits was also construed against him since on looking at his past conduct it was revealed that he is a habitual offender, and therefore the Tribunal had held that there was no justifiable ground to mitigate the punishment.

12. The orders of the Summary Court Martial and the Armed Forces Tribunal have been challenged by the petitioner on the ground that he had completed 14

years, 11 months and 25 days of service at the time of dismissal and that the petitioner was just 5 days short of 15 years service to make him eligible to get the pension; that the respondent No. 2, Commander should have sympathetically considered and conceded the request of petitioner for home posting; and that the respondent No. 2 ought to have described in detail the purpose of the consent certificate and should have also clearly mentioned as to whether after signing the same the petitioner would get pension or not. According to the petitioner had this been done the dismissal of the petitioner could have been converted into discharge as had been offered by respondent No. 2. The petitioner also contended that since the dismissal was sought to be converted into discharge it means that the dismissal was not justified and, that therefore, the punishment of dismissal imposed on the petitioner is liable to be quashed.

13. The learned counsel for the respondents who appears on advance notice has contended that the judicial review of the decision of an authority or a lower Tribunal is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the charged officer had received a fair treatment and not to conclude that the conclusion which the authority had reached is necessarily correct in the eyes of the Court. Relying on *B.C. Chaturvedi Vs. Union of India and others*, , it was further contended that when an inquiry is conducted on the charges of misconduct, the Tribunal is to determine whether the inquiry was held by a competent officer and whether the rules of natural justice had been complied with. What also has to be seen is whether the findings or conclusions are based on some evidence and also that the authority entrusted with the power to hold the inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. The finding must be based on some evidence as neither the technical rules of Evidence Act nor that of proof of fact or evidence as defined therein, apply to disciplinary proceedings. The Court in its power of judicial review does not act as an appellate authority to re-appreciate the evidence nor does it arrive at its own independent findings on the evidence. However, the Court may interfere where the authority held that the proceedings against the delinquent officer in a manner is inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of inquiry or where the conclusions or findings reached by the disciplinary authority is based on no evidence.

14. This Court has heard the learned counsel for the parties in detail. The plea of the learned counsel for the petitioner that the petitioner was short of 5 days for the 15 years of service is not borne out from the record. The Tribunal had held that the petitioner was short of 2 years and 7 months of his service to become entitled for pensionary benefits. This fact in itself will not be sufficient to set aside the order of dismissal passed by the respondents as it is evident from the record that the petitioner is a habitual offender and that he had overstayed on leave on many previous occasions and therefore, he has not been punished with dismissal on account of a solitary incident of overstaying on leave. In a disciplined force, the petitioner cannot be allowed to contend that he had sought

transfer to a place near the place of his residence or that since his wife was working, therefore, he could not take an accommodation at the place of his posting and that he had to look after his newly born child. The plea raised by the petitioner regarding his joining the duty on 14th August, 1993, overstaying his leave granted from 3rd May, 1993 to 1st July, 1993, is that he had fallen sick. The learned counsel for the petitioner is unable to show any document on behalf of the petitioner justifying the plea raised by the petitioner about his sickness which had allegedly made him so immobile that he could not go and join the duty after the expiry of the leave granted to him. There is no description of his alleged sickness given in any of the representations or in the petitions filed before the Armed Forces Tribunal and in the present writ petition. No evidence regarding the alleged sickness was even led by the petitioner before the Summary Court Martial as well. Even in the petition dated 7th January, 1994 against the Summary Court Martial held on 27th August, 1993, it has not been disclosed as to what was the illness of the petitioner which prevented him from joining the duty. The petitioner has not disclosed as to who had advised him complete rest or where the petitioner had got himself treated. The learned counsel for the petitioner has also not been able to satisfactorily explain as to how the alleged intimation to duty clerk LD/SKT on 2nd July, 1993 at 1915 hours was sufficient to allow the petitioner to overstay after the expiry of his leave. From the pleas raised by the petitioner it is apparent that he has taken contradictory stands which have also been noticed by the Tribunal while dismissing his petition being T.A No.33/2010 and in the circumstances, the petitioner is unable to show any illegality, irregularity, perversity or any jurisdictional error in the order of the Tribunal dated 23rd February, 2011.

15. The plea of the learned counsel for the petitioner that the punishment of dismissal had been converted to one of discharge u/s 164(2) by the concerned authorities and, therefore, the order of dismissal could not be passed also cannot be accepted and is not borne out from the record produced before this Court. The petitioner has relied on the letter dated 15th June, 1994. By the said communication the petitioner was only advised that the Commander of the 16 Corps is the competent authority under the Army Act, 1950 to consider his request to convert his order of dismissal to that of discharge u/s 164 (2) of the Army Act, 1950. The petitioner was also advised that it was obligatory on the part of the petitioner to submit a consent certificate before the Corp. Commander to consider his request to convert his punishment of dismissal to that of discharge in accordance with law. The petitioner was even sent a consent certificate through the Commander, however, the same was not signed by the petitioner on the ground that he was not explained whether the petitioner would be entitled to the pension or not after signing the consent certificate. Later on it appears that the petitioner signed the consent certificate, however, with a reservation that in case the petitioner was not entitled to pension the certificate should be treated as cancelled. The learned counsel for the petitioner is unable to show any rule under which such a conditional consent certificate could be

submitted by the petitioner, seeking the conversion of the order of punishment from dismissal to discharge.

16. In the totality of facts and circumstances, the petitioner has failed to make out such illegality, irregularity, perversity or jurisdictional error in the order of the Tribunal dated 23rd February, 2011 in T.A No.33/2010 titled as "Ex. Sower Azad Singh v. Union of India" which could entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit and is, therefore, dismissed.