

(2015) 03 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : LPASW No. 179 of 2002

Naseer Naik

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 16-03-2015

Acts Referred:

Citation : (2015) 4 JKJ 542 : (2015) LabIC 4116

Hon'ble Judges : N. Paul Vasantha Kumar, CJ;Bansi Lal Bhat, J

Bench : Division Bench

Advocate : Alok Shukla, OIC Legal Cell, for the Appellant

Judgement

N. Paul Vasantha Kumar, C.J.

1. This appeal is directed against the order made in SWP No. 2727/2001 dated 08.04.2002 wherein the appellant challenged the order of

dismissal dated 07.02.1999 which was passed under Section 39(a) of the Army Act, 1950 for absenting himself without leave for a period of 145

days. The learned single Judge dismissed the writ petition holding that the appellant pleaded guilty to the charge alleged and, therefore, the order of

dismissal was declared as valid. The brief facts necessary for disposal of this appeal are as follows:--

(a) The appellant was enrolled in the Army as a Sepoy on 14.01.1995 in 10 Jammu & Kashmir Light Infantry (JAKLI) and at that time he was

declared medically and physically fit. He was assigned No. 9096734K. After successfully completing the training he was posted at Manipur with

10 JAKLI and served there for about one and half year. In August 1997 the appellant was transferred to 25 Rashtriya Rifles (RR), Bhandarwah for

intercept duties. In January, 1998 he was transferred to Chanderkote for

performing the duties of guard of GOC and after serving for some time he suffered from right side facial paralysis and he reported to Medical Inspection Room Chanderkot.

(b) The appellant was admitted in Command Hospital, Udhampur for about 15 days and thereafter he was discharged with instructions to attend

the hospital for further medical checkup after two and a half months that was on 13.07.1998. The appellant rejoined his Unit i.e. 25 RR

Bhaderwah and he was given posting at Gejotte Post. The distance between Gejotte Post and Headquarter 25 RR at Bhaderwah was about 35

Kilometers and for reaching the said post one has to travel on foot to reach Gejotte. The appellant requested the Company Havaladar Major to

recall him back for his medical checkup on 13.07.1998. A direction was issued to the appellant for reporting at Headquarter 25 RR Bhaderwah

for reporting at Command Hospital Udhampur for revival of his medical fitness. He was given a movement order on 18.07.1998 and was sent in

an army vehicle of 25 RR. He reported in Command Hospital, Udhampur on 18.07.1998, however, he was not allowed to enter the gate by the

regimental police of the hospital by stating that he was to report on 13.07.1998. On 19.07.1998 he reported back HQ 25 RR at Bhaderwah and

requested the CHM to give the reasons for sending him for medical checkup on 18.07.1998 instead of 13.07.1998. The Nursing Assistant told the

appellant that his medical papers were not available. The CHM again directed the appellant to report back at Command Hospital, Udhampur. The

appellant again reported at Command Hospital, Udhampur on 20.07.1998 but again he was not allowed to enter the gate, the appellant again

requested for issuing a fresh movement order which was not granted. Against the appellant reported back 25 RR at Bhaderwah and he was

directed to report back to 10 JAKLI Record and Regimental Centre Rangrath (Srinagar) without issuing any movement order.

(c) Though the appellant reported 10 JAKLI but he was not allowed to enter the gate without proper movement order. The appellant was made to

run from pillar to post without any fault on his part, therefore, he again reported to 25 RR on 09.10.1998 which was duly entered in the register.

The appellant was given quarter guard from 09.10.1998 upto 12.10.1998. The appellant was informed that his papers have been completed and

he should report to the Regimental Centre JAKLI Centre Rangrath (Srinagar) and he requested to issue the movement order and at that time he

was told that he had to report at Srinagar. Though the appellant reported, he was not allowed to enter the gate because no movement order was

issued. Thereafter the appellant was advised to report 10 JAKLI which is his parent Unit at Kapurthala.

(d) Due to the said ill treatment given to the appellant he became frustrated. The presence of the appellant was marked in the attendance register of

BHM 25 RR on 09.10.1998 and on 07.02.1999 the appellant was told that he has been discharged from service by giving two sets of documents,

one set of documents was the warning for trial dated 24.01.1999 along with charge-sheet dated 23.01.1999. The certificate dated 14.12.1998

recording summary of evidence was also given. Another set of document was also given on 07.02.1999 with a warning letter for trial dated

31.01.1999 and a copy of the charge-sheet dated 31.01.1999 containing the unsigned copies of summary of evidence of four witnesses. The

appellant requested to provide him the order of discharge/dismissal which was not given and he was informed that dismissal order will be sent

through post. Thereafter he was directed to send two passport size photographs and after a long delay the order was issued on 30.09.1999.

(e) The said order was challenged by stating that appellant having been frustrated, he could not report for duty for 145 days. The witnesses were

not examined in presence of the appellant and without serving the charge-sheet, no evidence was recorded after 23.01.1999 when the first charge-

sheet was alleged to have been signed on 31.01.1999. This is the violation of Rule 118 of Army Rules which states the procedures for conducting

the Court Martial proceedings after the delinquent pleaded not guilty. By pointing out that serious violation has been committed the appellant

prayed for setting aside the order of dismissal.

(f) Respondents filed their objections before the writ Court contending that while carrying out duties with GOC's guard the appellant complained of

a medical problem and reported to M.I. room at Chanderkote. He was referred to Command Hospital, Udhampur and was admitted for treatment

on 29.11.1997. After granting sick leave he was asked to report back to the hospital for review. The appellant was placed in Lower Medical

Category BEE (Temporary) for six months and instructed to report back to the hospital for review on completion of six months i.e. on.

13.07.1998. He was dispatched to Command Hospital for review on 13.07.1998, however, instead of reporting to the hospital he became absent

and reported back to the Unit voluntarily on 04.12.1998, thereby absented for 145 days. The preliminary investigation and recording the evidence

was made by Summary Court Martial on 07.02.1999 and he was awarded the punishment of dismissal under Section 39(a) of the Army Act.

Insofar as the allegations that the provisions of the Army Act and the Rules have not been followed while passing the order of dismissal, it is stated

in the counter affidavit that the said allegations are vague as the appellant failed to report for duty which was admitted during the summary of

evidence in presence of an independent witnesses and again he having pleaded guilty to the charge of absence without leave during the Summary

Court Martial, no further proof is required and, therefore, the disciplinary authority imposed the punishment of dismissal. The learned single Judge

considering the said fact i.e. admission of absence by the appellant, dismissed the writ petition.

2. The contention raised in this appeal is that the disciplinary authority while passing the order has not considered the gravity of the delinquency and

has not stated any reasons in the order of dismissal, therefore, the punishment imposed without considering the gravity of offence and the order

passed without reasons cannot be upheld as various punishments are provided under Section 39(a) of the Army Act, which includes warning

withholding of increments, reversion and dismissal, and no reason is stated for imposing the extreme penalty of dismissal by the disciplinary

authority.

3. Lt. Col Alok Shukla, OIC Legal Cell appearing for the respondents defended the action of the military by stating that Rule 39(a) of the Army

Act nowhere requires stating of reasons for imposing the penalty and in the absence of any statutory obligation to state the reasons for awarding

the punishment, the order of dismissal is not vitiated. He has also relied on a judgment of Hon'ble the Supreme Court reported in S.N. Mukherjee

Vs. Union of India, and prayed for dismissing the appeal.

4. The army officer was put a specific question as to whether the appellant has

any previous delinquency of unauthorized absence. The officer, on perusing the records, submitted that there is no previous delinquency and absence of 145 days, which is the delinquency found proved, is the first delinquency committed by the appellant.

5. We have gone through the material on record particularly the order of dismissal as well as the judgment relied upon by the officer representing the respondents.

6. The allegation leveled against the appellant was that he absented in reporting for duty for 145 days. It is not in dispute that while carrying out the

duties at GOC's guard the appellant complained of medical problem and he reported to MI Room at Chanderkote. He was referred to Command

Hospital Udhampur where he was admitted for treatment for 15 days from 29.11.1997. At the time of his discharge from Hospital he was advised

to come for further check up. According to the appellant, he was relieved for reporting for medical check up only on 18.07.1998 instead of

13.07.1998 and the Command Hospital Udhampur refused entry inside the hospital. Not reporting for duty for 145 days for some reason or the

other has been admitted by the appellant and the same is recorded in the enquiry file. Hence the appellant is not justified in contending that

procedure contemplated under the Army Rules, particularly Rule 118, was not followed. However, the appellant having explained the reason for

his absence and having regard to the fact that delinquency alleged against the appellant being the first one, and there being no previous antecedent,

the said fact should have been taken into consideration by the disciplinary authority while inflicting the punishment order.

6A. As per Section 71 of the Army Act, 1950, there are set of punishments right from warning, withholding of increments, reversion or dismissal

etc. In this case the Disciplinary Authority has chosen to impose the extreme punishment of dismissal from service and fails to reflect in the order

passed by the Disciplinary Authority the reasons for imposing such punishment. The order of the Disciplinary Authority, as stated supra, is without

any specific reasons as to why he proposed the extreme penalty of dismissal from service. The dismissal of the appellant is having serious civil

consequences as it affects not only the appellant but also his family members and, therefore, serious thought should have been given by the

Disciplinary Authority before passing the order of dismissal from service. In such circumstances, before passing the order of punishment, which has

got serious civil consequences against whom the order is imposed, the Disciplinary Authority is bound to state reasons for arriving at such a

decision in compliance with the principles of natural justice.

7. The officer representing the respondents justified the order by stating that no reason need to be recorded in the order of dismissal as the

appellant admitted the fact of not reporting for duty for 145 days. The Disciplinary Authority being the first authority whose decision is required to

be reviewed by the Appellate Authority as well as before the court of law, it is always incumbent upon the Disciplinary Authority to record the

reasons for imposing punishment like dismissal. The decision cited by the Officer representing the department, namely, S.N. Mukherjee Vs. Union

of India, will not give any assistance to the department as the said decision is relating to passing of order by the Appellate Authority without giving

reasons as he concurred with the order of the Disciplinary Authority. In paragraph Nos. 38 and 39 of the said judgment it is clearly stated that an

administrative authority in exercise of judicial or quasi-judicial functions must record reasons for the order he has passed, unless the recording of

reasons is specifically dispensed with or expressly or by necessary implication debarred. Hon'ble the Supreme Court in the decision reported in G.

Vallikumari Vs. Andhra Education Society and Others, held thus:

.....The requirement of recording reasons by every quasi-judicial or even an administrative authority entrusted with the task of passing an order

adversely affecting an individual and communication thereof to the affected person is one of the recognized facets of the rules of natural justice and

violation thereof has the effect of vitiating the order passed by the authority concerned.

8. In the present scenario it is well settled in law that punishment imposed against the delinquent should be proportionate to the level of charge and

unless the person is having previous antecedent/bad record of service, extreme penalty cannot be imposed. In the decision reported in Chhel Singh

Vs. M.G.B. Gramin Bank, the Hon'ble Supreme Court held that extreme punishment of dismissal cannot be imposed for unauthorized absence.

9. It is also well settled in law that the Disciplinary Authority while passing the

order should consider the nature of the charges, how it is proved and whether there was any previous antecedent and only after recording the same in the order, he can impose the extreme punishment. In the light of the said finding arrived at by us, we are of the view that the order passed by the Disciplinary Authority, which is lacking from any reasons to impose the extreme penalty of dismissal from service, which was upheld by the Writ Court, is liable to be set aside and is accordingly set aside. The matter is remitted back to the Disciplinary Authority to consider all aspects in the proper perspective including the proportionality of the punishment and to pass fresh orders within a period of three months from the date of receipt of a copy of this order. No costs.