
(2016) 04 GAU CK 0038
In the Gauhati High Court
Case No : WP (C) No. 4493 of 2015

NK. Laxmi Mohan Sinha

APPELLANT

Vs

Union of India and Ors.

RESPONDENT

Date of Decision : 21-04-2016

Acts Referred:

Army Act, 1950 — Section 26 41(2), 79, 80
Constitution of India, 1950 — Article 226

Citation : (2016) 3 GauLT 458 : (2016) 3 NEJ 631

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : Mr. A.R. Tahbildar, Advocate, for the Appellant; Mr. D.C. Borah, CGC, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J. (Oral) - Heard Mr. A.R. Tahbildar, learned counsel for the petitioner and Mr. D. C. Borah, learned Central Govt. Counsel for the respondents.

2. During the hearing Court had also granted audience to Major Dibakar Chandra representing the respondents who was present in the Court. He had handed over the original record for perusal of the Court.

3. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 29.10.2010 whereby penalty of severe reprimand and fine of 7 (seven) days pay was imposed on the petitioner under Section 41 (2) of the Army Act, 1950 (for short "the Army Act") as well as the order dated 13.05.2014 ki directing cancellation of promotion of the petitioner from Naik to Havildar.

4. Case of the petitioner is that he is serving as Naik in the Indian Army. He was despatched from Assam Regimental Centre (Training Battalion) to 4 Assam on permanent posting along with 26 days of balance annual leave plus 6 days of preparatory leave excluding Sunday and journey period vide the movement order

dated 23.07.2010. During this period petitioner went to the quarter of one Naik Jiten Sinha of Assam Regimental Centre on 27.08.2010 at about 6:45 p.m. and quarrelled with him. According to the petitioner, Jiten Sinha had borrowed Rs. 5000.00 from him to meet an urgent necessity but later on he started avoiding the petitioner with the intention of not refunding the money. Since the petitioner was moving out and was in need of money, he went to the residence of the said Jiten Sinha with a request to return his money. Commanding Officer of the Assam Regimental Centre (Training Battalion) telephonically informed the Commanding Officer of 4 Assam and also sent a DO letter dated 13.09.2010 regarding the aforesaid incident. Col. Arindom Mazumdar of 4 Assam interviewed the petitioner and tried him summarily on 29.10.2010 under Section 41(2) of the Army Act where after the punishment of severe reprimand and 7 days pay fine was imposed on the petitioner. It appears that petitioner had submitted representation before the higher authorities against the penalty imposed though not as per the procedure prescribed but such representation was rejected.

5. In the meanwhile, petitioner was promoted to the rank of Havildar vide order dated 14.04.2014 and by virtue of his promotion, petitioner drew the higher pay scale of the promoted post of Havildar.

6. By the impugned order dated 13.05.2014 issued by the Record Officer on behalf of the Officer-in-Charge Records, Assam Regiment, it was stated that petitioner was punished under Section 41(2) of the Army Act during the year 2010. As per policy in force, a person convicted under Section 41(2) is permanently debarred from further promotion during his service career in the Army. Therefore, promotion of the petitioner from Naik to Havildar after imposition of such punishment was found to be irregular and accordingly, it was held that such promotion was required to be cancelled. Commanding Officer of the petitioner's unit was requested to issue the consequential cancellation order. It is submitted that thereafter consequential cancellation order was issued.

7. With the above grievance, petitioner had moved the Armed Forces Tribunal, Regional Bench at Guwahati by filing original application which was however dismissed on withdrawal giving opportunity to the petitioner to approach the appropriate forum. Thereafter, the present writ petition has been filed.

8. Respondents have filed counter affidavit. Stand taken in the affidavit is that petitioner by admittedly lending money to a fellow army personnel had breached the army conduct prohibiting indulging in lending of money. Proceeding under Section 41(2) of the Army Act was rightly conducted against the petitioner where after commensurate penalty was imposed. Punishment imposed is valid. Though petitioner had represented against the punishment imposed he had violated the prescribed procedure of making such representation by not following the hierarchy but nonetheless the authority concerned had duly considered the grievance of the petitioner but since the same was found to be without any merit it was rejected. It is reiterated that petitioner was summarily tried under Section 41(2) of the Army Act and awarded the punishment on 29.10.2010. Regarding

cancellation of promotion, it is stated that promotion was issued by 2 Arunachal Scouts and was cancelled by them.

9. Petitioner has filed rejoinder affidavit contesting the stand taken by the respondents and reiterating the contentions advanced in the writ petition.

10. Mr. Tahbildar, learned counsel for the petitioner submits that both the punishment imposed on the petitioner as well as his reversion are wholly untenable in law and as such liable to be appropriately interfered with by this Court. He submits that punishment was imposed on the petitioner under Section 41(2) of the Army Act without petitioner being convicted by Court Martial. Therefore, there is non-compliance of the mandatory condition laid down in the statutory provision which has vitiated the impugned punishment. Further submission of learned counsel for the petitioner is that even admitting the allegation brought against the petitioner by the respondents to be correct, it would still not make out a case of disobedience of any lawful command given by the superior officer or showing wilful defiance of authority either on active service or not on active service. Therefore, the condition precedent for invoking the power under Section 41(2) of the Army Act was non-existent which has rendered the impugned penalty untenable in law. Referring to the reversion of the petitioner, learned counsel submits that from mid April, 2014 to August, 2014, petitioner had received higher salary of the promoted post of Havildar. Petitioner was promoted following a due selection process. Following cancellation of such promotion he has been reverted back to his original post of Naik which entailed adverse civil consequences in the form of reduction in pay and lowering of status. No notice was issued to the petitioner before cancellation of such promotion. Thus cancellation of promotion was in violation of the principles of natural justice. He, therefore, submits that both the impugned orders should be set aside and direction may be issued to the respondents to restore the service status of the petitioner in the promoted post of Havildar.

11. Per contra Mr. Bora, learned Central Govt. Counsel while opposing the submissions made by learned counsel for the petitioner, has referred to the averments made in the counter affidavit and submits that the Commanding Officer of petitioner's Unit had summarily tried him as per provisions contained in the Army Act and thereafter imposed the punishment on the petitioner. Conduct of the petitioner was such that it required imposition of punishment as otherwise such conduct would have had an adverse effect on the overall discipline and moral of the men in uniform. There is no infirmity in the impugned order of penalty and as per policy in force, consequential reversion of the petitioner being automatic had to be resorted to.

12. At this stage, Major Dibakar Chandra who was present during the hearing on 19.04.2016 sought leave of the Court to make a brief submission which was granted by the Court. While submitting the record for perusal of the Court, the officer contended that though Section 41(2) of the Army Act mentions conviction by Court Martial, Sections 79 and 80 of the Army Act also make provision for

imposition of punishment otherwise than by Court Martial. In fact, punishment imposed on the petitioner is a punishment prescribed under Section 80. He has referred to Rule 192 of the Army Rule, 1954 which prescribes the extent of punishments made under Section 80 of the Army Act. Referring to under Section 26 of the Army Act, the officer submitted that the petitioner had adequate alternative remedy for ventilation of his grievance but instead of exhausting the remedies prescribed under the statute, he has approached this Court by filing the present writ petition. He has also referred to Regulations 364 and 557 of the Army Regulations in support of his contention that the petitioner had not completely exhausted his statutory remedy of appeal. Therefore, on the ground of non-exhaustion of the alternative remedy, writ petition of the petitioner should not be entertained. Further submission is that as per the policy in force in the Army, any army personnel punished under Section 41(2) of the Army Act would automatically stand debarred from getting further promotion in the Army. This aspect was overlooked by the authority in the new unit of the petitioner while granting him promotion from Naik to Havildar. When this was brought to the notice of the authority, the mistake was realised and thereafter corrective measures were taken by issuance of the order dated 13.05.2014 which was consequential in nature. Therefore question of violation of the principles of natural justice would not arise.

13. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record.

14. Two issues arise for consideration in this proceeding. The first issue is the punishment imposed on the petitioner under Section 41(2) of the Army Act and the second one is cancellation of promotion of the petitioner from the rank of Naik to the rank of Havildar.

15. However, before addressing the above two issues, since a submission has been made regarding non-exhaustion of alternative remedy dis-entitling the petitioner to any relief in exercise of writ jurisdiction, it would be apposite to address the said objection which is preliminary in nature, at the outset.

16. It is true that Section 26 of the Army Act lays down the scheme of ventilation of grievance and the remedy of aggrieved persons in the army other than officers. It provides that an aggrieved person may approach even the Central Government for ventilation of his grievance which is empowered to revise any decision even of the Chief of the Army Staff. However, from the pleadings and the materials on record, it is evident that petitioner had submitted representation against the punishment imposed on him before the authority higher than the one who had imposed the punishment. Such representation of the petitioner was considered and was ultimately rejected vide order dated 21.02.2013 by holding that punishment imposed was valid. It also appears that petitioner had submitted an application before the Ministry of Defence, Govt. of India. But the record does not indicate any decision on such application. So it is not a case where the aggrieved person did not avail any of the remedies provided under the statute or

had bypassed the remedies provided under the statute and has directly approached the High Court under Article 226 of the Constitution of India. Petitioner had approached the higher authority which considered the grievance of the petitioner but turned down the same as being untenable. Petitioner had also approached the Armed Forces Tribunal where liberty was granted to the petitioner to approach the appropriate forum by filing fresh application. Therefore, it is not a case where showing complete disregard to the statutory remedy available, petitioner has approached the Writ Court. Restriction on invoking the writ jurisdiction imposed by the Writ Court on itself on the ground of non-exhaustion of statutory alternative remedy is a self-imposed limitation to ensure maintenance of discipline and uniformity in Court procedure. In appropriate cases, the Writ Court can always entertain an application despite the aggrieved party not availing the alternative remedy provided by the statute. Law on this point is well settled and it is not necessary to refer to the large body of judgments of the Apex Court on this aspect of the matter. However, as already noticed above, the present is not a case where the petitioner did not at all avail the alternative remedy. He did avail such remedy but may be not to the fullest extent. Having regard to the facts and circumstances of the case and on due consideration, this Court is unable to accept the preliminary objection raised which is accordingly overruled.

17. Having answered the preliminary objection as above, the Court may now revert back to the provision of Section 41(2) of the Army Act. For a proper appreciation, Section 41 is extracted hereunder:-

"41. Disobedience to superior officer-(1) Any person subject to this Act who disobeys in such manner as to show a wilful defiance of authority any lawful command given personally by his superior officer in the execution of his office whether the same is given orally, or in writing or by signal or otherwise, shall, on conviction by Court-Martial, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who disobeys any lawful command given by his superior officer shall, on conviction by Court-Martial,

if he commits such offence when on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and

if he commits such offence when not on active service, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned."

18. It is the pleaded case of both petitioner and the respondents that petitioner was punished under Section 41(2). A close scrutiny of Section 41(2) would make it clear that there are two distinct conditions precedent in this section-the first one is that any person subject to the Army Act commits the offence of disobeying

any lawful command in a manner amounting to wilful defiance of authority given by the superior officer whether on active service or not on active service; secondly, such person must be convicted by a Court Martial. Therefore, these two requirements are the sine qua non for invocation of the power under Section 41(2) of the Army Act. Coming to the second condition, the Army Act provides and lays down the detailed manner as to how Court Martial is convened and how a person may be tried by a Court Martial leading to his conviction. Learned counsel as well as the officer representing the respondents may be right in pointing out that in addition to Section 41(2) of the Army Act the authorities still have the power to impose punishments otherwise than by Court Martial, such as under Section 80 of the said Act. There is no dispute to such contention advanced on behalf of the respondents but from a reading of the impugned order dated 29.10.2010 as well as from the categorical stand taken by the respondents in the affidavit it is more than clear that the punishment imposed on the petitioner was under Section 41(2) of the Army Act. This is reinforced by the consequential action of cancelling the promotion given to the petitioner from Naik to Havildar. As per the policy in force in the Army (dated 10.10.1997) which is available in the record, a Junior Commissioned Officer/Non-Commissioned Officer who has been convicted of an offence mentioned in Appendix-A to the said letter, would be permanently debarred from further promotion. Appendix-A to the said letter contains a list of offences for commission of which one would be permanently debarred from promotion. This includes offences under Sections 34, 35, 36 (on active service only), 37 and 41(2). Appendix-A does not include or refer to Section 80 of the Army Act. Therefore, it is quite evident that imposition of punishment on the petitioner was under Section 41(2) of the Army Act.

19. It goes without saying that when a statute requires a thing to be done in a particular manner, it has to be done in that manner and in no other manner. This salutary principle has been consistently followed by the constitutional Courts of the country and there is good reason for application of such principle.

20. Section 41(2) prescribes that before any punishment is imposed under the section, the person must be convicted by a Court Martial. Under the army law Court Martial has got a definite connotation and a summary proceeding by the Commanding Officer would not and cannot be a substitute for a duly constituted Court Martial under the Army Act. Again, conviction by a Court Martial is akin to a conviction by a criminal court. Such conviction cannot be given by conducting a summary proceeding. Moreover, Section 79 of the Army Act does not speak of conviction; it only speaks of imposition of punishment. That being the position, Court is of the considered opinion that the condition precedent for imposition of punishment under Section 41(2) of the Army Act, viz, conviction by Court Martial being absent in the present case such punishment becomes vitiated rendering it untenable in law. Since the issue relating to punishment under Section 41(2) stands concluded on this ground, it may not be necessary to delve into the other aspect of the matter, viz, whether there was any disobedience amounting to showing wilful defiance of any lawful command of the superior officer by the

petitioner.

21. That brings the deliberation to the second limb of challenge by the petitioner i.e., cancellation of his promotion. There is no dispute that petitioner was promoted from the rank of Naik to the rank of Havildar which entitled him to drawal of higher salary. Cancellation of such promotion therefore entailed adverse civil consequences on the petitioner in the form of lowering of pay scale and service status. It is trite that any action, whether administrative or quasi-judicial, which results in adverse civil consequences must conform to the principles of natural justice. Contention of the respondents that cancellation of promotion was consequential following imposition of punishment is untenable, firstly because no adverse order can be passed without giving the affected person a notice and secondly, the very foundation for cancellation of the promotion no longer exists, as imposition of the punishment has been held to be illegal. It is also settled law that any decision taken affecting the rights of a person in violation of the principles of natural justice would be a nullity. Consequently, the impugned order dated 13.05.2014 cancelling the promotion of the petitioner is found to be untenable and is accordingly set aside and quashed.

22. Before parting with the record, it would be useful to refer to what the Apex Court had said way back in 1982 in the case of Lt. Col. Prithi Pal Singh Bedi v. Union of India reported in AIR 1982 SC 1413 and this is what the Supreme Court had said in paragraph 45:-

A person subject to the Army Act does not cease to be a citizen of India so as to wholly deprive him of his rights under the Constitution.

23. Writ petition stands allowed but without any order as to cost. Record produced is returned back.