

(1987) 12 KL CK 0003
In the High Court Of Kerala
Case No : O.P. No 5714 of 1984

P.K. Ramachandran

APPELLANT

Vs

The Officer Commanding and Others

RESPONDENT

Date of Decision : 08-12-1987

Acts Referred:

Army Act, 1950 — Section 16, 17, 17(2), 18, 19
Constitution of India, 1950 — Article 14, 310, 311, 311(2)

Citation : (1988) 1 KLJ 102

Hon'ble Judges : V. Sivaraman Nair, J

Bench : Single Bench

Advocate : K.P. Dandapani and Sumathi Dandapani, for the Appellant; K. Juju Babu and P.V. Madhavan Nambiar, for the Respondent

Final Decision : Dismissed

Judgement

V. Sivaraman Nair, J.—The petitioner challenges his discharge by Ext. P3 from the Army under Rule 13 Item IV of the Table for the Army Rule and its affirmation in Ext. P5. He submits that the discharge was arbitrary and violative of principles of natural justice in that his service was terminated without disclosing to him the reasons for such termination. The petitioner enrolled in the Artillery Regiment on 18-1-1981, got training in Hyderabad and passed recruits' training in October 1981, as is evident from Ext. P1. Later, he obtained Ext. P2 certificate of technical proficiency in the trade of driver. He was thereafter assigned to the Nasik Road Camp of 841, Independent Light Battery. Ext.P2 contained notes to the effect that

(1) The above certificate does not entitle the individual to be mustered in that category by right.

(2) An individual must obtain all the requisite qualifications vide Qualification Regulations for the Soldiers, 1958 to be eligible to be mustered permanently in the class for which this certificate is granted.

2. After enrollment and training in the array, every soldier has to be attested into army service. That is ordinarily preceded by a verification of character and antecedent. Such verification took place in the case of the petitioner some time, after he had completed about 2 years of service, by which time, he had been able to help his poor family financially to some extent. The police Constable who went to his village for verification could not obtain any illegal gratification from his mother. His frustration and the local jealousies prompted that official to send up an adverse report indicating that the petitioner was a naxalite and that resulted in his discharge without attestation. Petitioner submits that his career should not have been blasted on the basis of a report from such a source without farther verification. He enclosed certificates of the Local Panchayath and the Head Mistress of the School in which he had studied for 10 years to sustain his character. He is entitled at least to know whether his service was terminated due to adverse verification report and even that courtesy was not denied to him. He avers that the protestation that he was not discharged due to adverse verification report is only an attempt to convert an otherwise punitive termination of service into an innocuous discharge. He submits that Ext.P3 and its affirmation in Ext. P5 are illegal, arbitrary and violative of the principles of natural justice.

3. The respondents maintain that the discharge of the petitioner from Army Service was due to the reason that his service was no longer required. According to them, that is good enough reason and the petitioner is not entitled to insist upon more elaborate reasons either in accordance with any provision of the rules or the principles of natural justice. At the stage of attestation of soldiers, the Army is entitled to ascertain whether a person is entitled to be mustered in permanently and to eliminate those who will not make good soldiers for any reason whatever. That ascertainment cannot be approximated to a fault-finding proceedings, which alone, if at all, requires observance of the principles of natural justice. The purpose of the ascertainment is not to terminate the service of an enlisted soldier, but only to verify the suitability of the soldier for regular and permanent enrolment. Even in respect of personnel in Public Service other than defence services, there can be no objection to conduct of an inquiry for ascertaining suitability for enrolment, nor any obligation to disclose reasons at that stage. The respondents have got the rights to weed out the ineligible at the time of attestation of enrolment. The defence forces cannot be compelled to disclose more elaborate reasons for discharge of a soldier at that stage. Article 311 of the Constitution of India does not apply to men of the defence forces. The procedure thereunder cannot be introduced indirectly in the guise of principles of natural justice. They also maintain that there was non-disclosure of reasons contrary to the Army Rules, nor did any adverse report of verification of character influence the discharge of the petitioner as asserted in his pleadings.

4. The point which really requires an answer is whether the defence services can desist from giving detailed reasons or any reason at all for discharge of an enlisted person at the time of attestation? The next question will be whether in

an appeal which is competent under the Army Rules, the appellate authority is not bound to advert to the ground raised by the aggrieved person in his appeal?

5. There is no averment that the petitioner was a regular soldier in the armed services. The entry of such persons into service is by enrolment. The next stage is "attestation" which consists of an oath affirmation as administered by the Commanding Officer in front of the troops or such portion thereof or such of the members of his department. These are provided in Sections 16 and 17 of the Army Act. Section 17 (2) of the Act dealing with the form and content of the oath indicates that the person concerned enters the regular army at that stage. The oath has to be authenticated by the officer administering the oath. That probably explains the concept of "attestation" which is used in those two provisions.

6. Some of the other provisions of the Army Act which throw light on the controversy are Sections 18, 19, 22, 23, 24 (4) and 26 of the Army Act.

7. Section 18 provides that "Every person subject to this Act shall hold office during the pleasure of the President". Section 19 takes power to dismiss, or remove any such person subject to the provisions of the Act or rules and regulations framed thereunder. Section 22 is to the effect that any such person may be retired, released or discharged from the service by such authority and in such manner as may be prescribed. Section 23 deals with certificate of termination of service and provides for issue of such certificates in English and the language of the individual, setting forth, & among others "the cause for such termination". Section 26 of the Act is in Chapter V. dealing with service privileges and provides Sec. 26 Remedy of aggrieved persons other than Officers:-

(1) Any person subject to this Act other than an officer who deems himself wronged by any superior other officer may, if not attached to a troop or company complain to the officer under whose command or orders he is serving and may, if attached to a troop or company complain to the officer commanding the same.

(2) When the officer complained against is the officer to whom any complaint should, under sub-section (i), be preferred, the aggrieved person may complain to such officer's next superior officer.

(3) Every officer receiving any such complaint shall make as complete an investigation into it as may be possible for giving full redress to the complaint or, when necessary, refer the complaint to superior authority.

(4) Every such complaint shall be preferred in such manner as may from time to time be specified by the proper authority.

(5) The Central Government may revise a decision by the Chief of the Army Staff under sub-section (2), but, subject thereto, the decision of the Chief of the Army staff shall be final.

8. Chapter III of the Army Rules deals with dismissal, discharge etc. Rule 12 provides for a discharge certificate. Rule 13 provides for the authorities

empowered to authorise discharge. Clause IV of the table thereunder is the one applicable to the present case. That is in the following terms:

A Category

Grounds of Discharge.

Competent Authority

to authorise discharge

Manner of Discharge

(1)

(2)

(3)

(4)

IV.

Person enrolled under the Act, but not attested

All classes of discharge

Commanding Officer or an officer commanding a Recruits" Reception Camp or Recruiting, Technical Recruiting, Deputy Recruiting or Deputy Technical Recruiting Officer.

Recruits "who are considered unlikely to become efficient soldiers will be dealt with under this Item.

9. Rule 14 deals with termination of service by the Central Government for misconduct. Rule 17 confers such powers on the Chief of Army Staff and any other officer. Such termination of service has to be preceded by information to the delinquent of the charges and a reasonable opportunity to show cause.

10. It is evident from the above provisions that termination of service of an enlisted person may be either for misconduct or stigmatised and therefore penal in character. It may as well be an innocuous termination by a simple discharge at the time of attestation and mustering into regular army. The petitioner has no case that the 1st respondent did not have competence to issue the order of discharge. His only complaint is that he should have been retained in service and mustered into the regular army in the absence of any adverse materials which rendered such continuance in service undesirable. Rule 13 of the Army Rules read with Clause IV of the table did not justify Ext.P1 order, since it could not have been found that "he was considered unlikely to become an efficient soldier" in view of Exts.P1 and P2. He also submits that in any case, Section 23(2) of the Army Act casts an obligation on the competent authority to state "the cause of termination of service" and Ext.P1 did not comply with that statutory

requirement. Yet another submission is that the appellate authority is, in any case, obliged to pass a speaking order and Ext. P5 fails this standard which is a basic requirement of natural justice. The last contention which the petitioner urges is that any stigmatised termination of service, by whatever name it is called, should be preceded by notice, an opportunity to show cause and a reasoned order.

11. Defence personnel are under certain constraints which are imposed by the provisions of the Constitution and the relevant enactments. These relate mainly to rights under Parts III and XIV of the Constitution of India. Article 310 of the Constitution contains the pleasure doctrine. Article 311 of the Constitution applies only to numbers of the Civil Service, of the Unions or the State. An obligation is cast by clause (2) of that Article that the delinquent shall be informed of the charges and given a reasonable opportunity of being heard in respect of those charges. The competent authority may dispense with such an inquiry for recorded reasons that it is not reasonably practicable to hold such an enquiry. Even in regard to such personnel, the President or the Governor, as the case may be, is empowered to dispense with an inquiry which is a part of the Constitutional guarantee contained in Article 311 (2) if he is satisfied that it is not expedient to hold such an inquiry in the interests of security of the State.

12. It is true that a wayward or arbitrary termination of service of defence personnel is not beyond the scope of judicial review altogether. A punitive termination of service has to be based on charges which are communicated to the delinquent, materials and evidence oral and documentary to support the charge and reasoned findings recorded by the - (whether it be a Court Martial or an authority or officer) - inquiring authority - all with notice to the delinquent. A statutory right of appeal enables an appellate scrutiny as provided in the Army Act and the Rules. The only exceptions are those involving defence of the State or Public interest which make disclosures equally if not more dangerous.

13. Counsel for the petitioner relies on two decisions *Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety*, = *Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety*, and *Harcharan Singh Premi Vs. The Officer Commanding Army, Military Hospital, Madras-16* and Another, . What was involved in those cases was termination of service of defence personnel-in the former, after a Court Martial and in the latter under the Army instructions. The observations made in that context on the need to comply with the provisions of the Army Act, Rules, and Regulations may not strictly apply to the present case.

14. Counsel for the respondent seems to be right in his submission that the decisions of the Supreme court in *Commodore commanding v. N.N. Rajan* (1984) (2) SCC 636) and *Union of India v. Thulasi Ram Patil* A.I.R-. 1955 S.C. 1416. have settled the law on the points involved in this Original Petition. In *N. N. Rajan's* case, (Supra) the Supreme Court upheld the distinction between termination of service of temporary Government "servant in accordance with the conditions of service on the ground of un-satisfactory conduct, or his unsuitability

for the job, and or his work being unsatisfactory, and the termination of service of the same temporary servant arbitrarily and for the purpose of imposing a penalty. Reference was made to the decision in *Government Branch Press v. Bel Happa*, 19790 S.C.C. 477, *State of Maharashtra v. Veerappa R. Saboji*, 1979(4) S.C.C. 466 *State of U.P. and Others Vs. Sughar Singh*, , *The Regional Manager and Another Vs. Pawan Kumar Dubey*, , and *Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali*, . The effect of these decisions is, that even a temporary Government servant is entitled to the protection of Article 311(2) of the Constitution, where the termination involves a stigma or amounts to punishment. Assessment of the performance of a temporary employee and ascertainment of the suitability for regularisation - in the present case, attestation - does not result in any stigma, which may colour the termination of service as a punishment. The scrutiny of the courts in this regard shall only be whether the action was really a penalty masquerading in the form of a discharge without penal consequences. In *Veerappa R. Saboji's* case, 1979 (4) SCC 466, the Supreme Court held, that --

The law, it seems to me, is that where the services of a temporary government servant or a probationer government servant are terminated by an order which does not ex facie disclose any stigma or penal consequences against the government servant and is merely a termination order simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of it that a stigma is cast on the government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Article 311(2) of the constitution have not been satisfied. In a given case, the Government servant may succeed in making out at prima facie case that the order was by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of determining the truth. It is in such a case generally that the official records may be called for by the Court. It is not open to the Court to send for the official record on a mere allegation by the government servant that the order is by way of punishment. For unless there is material on the records before the Court in support of that allegation, an attempt by the court to find out from the record whether the termination of service is based on the unsuitability of the Government servant in relation to the post held by him or in reality an order by way of punishment will in effect be an unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the government servant. On a sufficient case being made out on the merits before the court by the government it is open to the court to resort to scrutiny of

the official records for the purpose of verifying the truth.

According to me, petitioner fails in these standards of pleadings and proof as stated by the Supreme Court in the above case. Vague and half-hearted allegations, that termination of his service is due to improper motives and therefore is a punishment is not sufficient to justify a more detailed examination or to delve into the official records leading to the impugned order.

15. In *Union of India and Another Vs. Tulsiram Patel and Others*, , most of the decisions of the Supreme Court were considered in detail and it was held, that rules of natural justice are not based on any rigid or inflexible formula and that they are also capable of being excluded in particular situations by statutory provisions. After referring to a number of authorities, the Supreme Court held:

If legislation and the necessities of a situation can exclude the principles of natural justice including the audi alteram partem rule, a fortiori so can a provision of the Constitution for a Constitutional provision has a far greater and all-pervading sanctity than a statutory provision. Clause (2) of Art. 311 embodies in express words the audi alteram partem rule. This principle of natural justice having been expressly excluded by a Constitutional provision, namely the second proviso to clause (2) of Art.311, there is no scope for the introducing it by a side-door to provide once again the same inquiry which the Constitutional provision has expressly prohibited. To hold that once the second proviso is properly applied and clause (2) of Art.311 excluded, Art.14 will step into take the place of Clause (2) would be to nullify the effect of the opening words of the second proviso and thus frustrate the intention of the makers of the Constitution. The second proviso is based on public policy and is in public interest and for public good and the Constitution makers who inserted it in Art.311 (2) were the best persons to decide whether such an exclusionary provision should be there and the situations in which this provision should apply.

16. I have already held that the petitioner has not pleaded with sufficient materials any vitiating circumstance which invalidates Ext. P3 order of discharge or its affirmation in Ext. P5 order by the appellate authority. The facts of the case do not justify a finding that the exclusionary rule in Article 311 (2) of the Constitution of India shall not apply to this case. In such a situation, Article 14 of the Constitution can have no application to the present case. Only on a finding that the exclusionary rule was applied malaise and the resultant order is void can arbitrariness or discrimination violative of Article 14 of the Constitution be found to have vitiated Exts. P3 and P5 orders. In this view, I am not in a position to accede to the submission of the petitioner, that Ext. P3 order of discharge was mala fide, that it camouflaged a punitive termination of service, and that non-disclosure of the reasons in greater detail and the denial of opportunity to be heard vitiates Exts. P3 and P5.

In the result, the Original Petition fails and the same is hereby dismissed. There will be no order as to costs