

(2011) 03 AP CK 0113

In the Andhra Pradesh High Court

Case No : Writ Petition No. 15439 of 2009

Plaban Kumar Pahari

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Army Act, 1950 — Section 121, 63, 80, 82, 83
Army Rules, 1954 — Rule 22, 22(1), 22(3), 23(3)

Citation : (2012) 275 ELT 321

Hon'ble Judges : Goda Raghuram, J;G. Krishna Mohan Reddy, J

Bench : Division Bench

Advocate : B. Sree Rama Krishna, for the Appellant; Ponnam Ashok Goud, Asst. Solicitor General for Respondent Nos. 1 to 6, for the Respondent

Final Decision : Allowed

Judgement

Goda Raghuram, J.—The Petitioner was inflicted with the penalty of 14 days pay fine by the 6th Respondent by an order published as Part I order Ser. No. 120/2009, dated 30-5-2009. This is the order challenged in this writ petition.

2. The Petitioner joined the service of the Armed Forces on 15-1-2001 as a Nursing Assistant. Consequent on his success at the Entrance Test for the course of General Nursing and Midwifery (GNM) conducted by the 3rd Respondent on 15-6-2008, the Petitioner joined the School of Nursing, Military Hospital at Secunderabad for undergoing the GNM course in Batch No. XLI. He joined for the course on 2-9-2008, the duration of the course is for 3? years. After the commencement of the course and after completion of 12 weeks, an eligibility test was conducted and the Petitioner claims to have successfully appeared the said test as well.

3. The final examinations for the 1st year course of Batch No. XLI were scheduled to be held in August, 2009 and the pre-final examinations were conducted from 25-5-2009 to 28-5-2009. This the Petitioner claims only a practice test. Be that as it may.

4. On the 2nd day of the pre-final examination i.e., on 26-5-2009 a book was found in the desk at which the Petitioner sat for writing the pre-final examinations. The Petitioner disclaimed any knowledge of the existence of that book in the desk and categorically denied that he had indulged in malpractice at the examination. The book was however recovered from the desk and the Petitioner alleged to have committed malpractice in the examination. The Petitioner asserts in detailed pleadings that he had not indulged in the malpractice alleged, but in the view that we take, it is not necessary to go into the issue whether the Petitioner was found to have indulged in malpractice in the examination or otherwise. The Petitioner claims to have been victimized by Respondents 5 to 7, which is denied in the counter-affidavit. But even on this aspect, we do not consider it necessary to record a finding.

5. On 26-5-2009 after discovery of a book in the desk while the Petitioner was writing the examination, the 7th Respondent is stated to have taken both the question paper and the answer sheet from the Petitioner and he was asked to leave the examination hall. He was not permitted to write the other examinations on the other days of the pre-final examinations. Thereafter he was withdrawn from the course and put on general duties since 27-5-2009. Pursuant to the orders dated 8-7-2009 the Petitioner was permitted to pursue and continue the GNM diploma course vide Army Medical Corps Records, by its proceedings dated 8-7-2009. A learned Division Bench of this Court in a miscellaneous application in W.A. No. 1053 of 2009 had also directed the Petitioner to appear for the final examinations, however, the results were directed not to be declared and to be kept in a sealed cover. The result of the Petitioner was not declared in respect of the final examinations. On 23-7-2009 the Petitioner was transferred to the 354 Field Hospital. This writ petition filed on 31-7-2009 seeking invalidation of an order notified on 30-5-2009 inflicting the penalty of 14 days pay fine.

6. The Petitioner challenges the imposition of the penalty by an arbitrary and ultra vires process and in transgression of the provisions of the Army Act, 1950 (for short "the 1950 Act") and the Army Rules, 1954 (for short "the Rules").

7. A counter-affidavit is filed on behalf of the Respondents. With regard to the process followed to impose the penalty of 14 days pay fine u/s 80(h) of the 1950 Act, the counter-affidavit asserts the following sequence of events.

(i) that the offences are required to be reported to the Commanding Officer immediately on occurrence.

(ii) The disciplinary process commences with the hearing of the charge and the procedure to be followed during the hearing of charge is laid down in Army Rule 22, which enjoins; every charge against a person subject to the Act shall be heard by the commanding officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence.

(iii) The charge is a tentative charge at this stage, which means that the

accusation of an act or omission against an individual are set out and are read to the person accused of the same; which the accused thereafter signs as having understood. The Commanding Officer after hearing the prosecution witnesses provides ample opportunity to the accused to cross-examine any witness and further opportunity is available to call such witnesses and make such statement as may be necessary for his defence. The record of proceedings at the time of hearing of charge under Army Rule 22 are to be in Appendix "A" to Army Order 24/94 .

(iv) If the Commanding Officer while hearing the charge is satisfied and is of the opinion that the charge ought to be proceeded with, he may exercise any of the options set out in Sub-rule (3) of Rule 22 which read as under;

(3) After compliance of Sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-

(a) dispose of the case u/s 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial.

(v) If the Commanding Officer decides to dispose of the matter u/s 80, then the accused is marched up on an offence for summary disposal of charges against non-commissioned officers and other ranks and the Commanding Officer disposes of a case summarily by awarding one or more of the punishments specified in Section 80 of the 1950 Act, except the punishments set out in Clauses (a) to (c) of that Section.

8. Since the penalty imposed on the Petitioner is 14 days pay fine, the Commanding Officer took up the case of the Petitioner for summary disposal and there is no requirement of recording of evidence or of obtaining the signature of the accused on a plea of guilt entered by him.

9. The counter-affidavit also sets out the details of the disciplinary process followed in the case of the Petitioner and the reasons for the same, as under;

10. On 26-5-2009 during pre-final examination, the Petitioner was caught copying from a book by the invigilator Capt. Alka Thomas. The matter was reported to the Senior Registrar and Officer Commanding troops of Military Hospital, Secunderabad by the Invigilator and he took up the matter by way of disciplinary process for an offence u/s 63 of the 1950 Act, namely, "an act prejudicial to good order and military discipline"; the disciplinary proceedings were conducted under Rule 22 of the Army Rules; the hearing of the tentative charge was carried out by the Commanding Officer troops in the presence of the accused; the charge was read out to the Petitioner who having understood the

same signed on the tentative charge-sheet. During this hearing on the tentative charge two prosecution witnesses were heard by the Commanding Officer troops. After hearing the prosecution witnesses and examining the copied text and the book from which it was copied the Commanding Officer gave full liberty to the accused to cross-examine the prosecution witnesses, which he declined. Entry to the effect was made in column 4 of Appendix "A" signifying the disinclination of the Petitioner to cross-examine the witnesses. The Petitioner's signature on this statement was also obtained. The Petitioner also declined to produce any witness in his defence. This was also recorded in column 5 and 6 of Appendix "A", a proceeding, which the Petitioner signed. After hearing the prosecution witnesses and examining the evidence, the Officer Commanding in accordance with Army Rule 22(3)(a) decided to dispose of the case u/s 80. An endorsement to the effect "to be disposed of summarily u/s 80 of the 1950 Act, put up on offence report" was made in column 7 of Appendix "A", on 27-5-2009. The proceedings of the hearing of tentative charge was held in the presence of two independent witnesses and also recorded in Appendix "A"; the Petitioner was thereafter proceeded against for summary disposal u/s 80 of the 1950 Act. The charge was read out to him and he was asked to plead if he pleads guilty or otherwise to the charge. The Petitioner unequivocally pleaded guilt to the charge and accepted the offence committed by him. Since the Petitioner pleaded guilty, the Commanding Officer pronounced the punishment.

11. The order of penalty in form for use at summary trials of NCO's and other Ranks under Sections 80-82 of the Army Act, 1950 furnished to this Court as Annexure VII along with the counter-affidavit of the Respondents shows that a plea of guilt is recorded as having been entered by the Petitioner. The names of two witnesses JC-693687-L Subedar, Ch. R.K. Sabar and 1396409-H Company, Hawaldar Major P.V. Rao are mentioned in the Form and the punishment awarded is 14 days pay fine, signed by the Senior Registrar and Officer Commanding troops, for the Commandant, on 27-5-2009. In the remarks column it is recorded as automatic forfeiture of pay and allowance for 14 days.

12. It is the specific case of the Petitioner (pleaded at para 28 of the writ petition) that not only were there no witness (except the 7th Respondent who bore grudge against the Petitioner), there was also no documentary evidence recorded at the trial on 27-5-2009. It is the specific plea of the Petitioner that he did not plead guilt during the trial and that a plea of guilt was entered unilaterally by the Officer conducted the trial, without the Petitioner pleading so.

13. On behalf of the Respondents, it is pleaded in the counter that since the proceedings are taken up for summary disposal u/s 80 of the 1950 Act, it is not necessary to record the statement of witnesses obtained at such proceedings, since the proceedings are processed under Rule 22(3)(a) of the Rules. It is the further case on behalf of the Respondents that no provision exists under Military Law wherein, the plea of guilt on the Offence Report has to be signed by the accused.

14. While the Petitioner has specifically pleaded (as already noticed in para 28) that no witnesses were present on the date of the disciplinary proceedings, the counter admits, though equivocally, to this position. In para 12 of the counter-affidavit it is stated that "the accused Sepoy....(the Petitioner) was thereafter marched up on an offence report (IAFD-90) (Ref Annexure-VII). The charge was read aloud to the Petitioner herein. He was asked whether he pleads "guilty" or "Not guilty" to the charge. The Petitioner herein unequivocally pleaded to the charge and accepted the offence committed by him." The learned Counsel for the Respondents also admits that no statement of the witnesses said to have been examined at the inquiry, was recorded. It is however the contention on behalf of the Respondents by the learned Counsel that since the procedure under Rule 22(3)(a) was followed, statement of witnesses need not be recorded and that the requirement of recording the statement of witnesses is only warranted if Commanding Officer proceeds under Rule 22(3)(c) i.e., if he adjourns the case for the purpose of having the evidence reduced to writing.

15. Rule 23 of the Army Rules, 1954 sets out the procedure for taking down the summary of evidence and this provision enjoins that "where the case is adjourned for the purpose of having the evidence reduced to writing, at the adjourned hearing evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs." Sub-rule (3) of Rule 23 enjoins that "the evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded." This is a salutary and fair procedure.

16. In the context of the Petitioner's unequivocal assertion that no witnesses were examined at the summary proceedings on 27-5-2009 and in the context of his further and specific plea that he had not entered a plea of guilt in respect of the offence charged, it is the burden of the Respondents to establish that the Petitioner had pleaded guilty and that, witnesses were examined at the proceedings on 27-5-2009.

17. The proceeding recording the penalty of 14 days pay fine also suffers from an incurable ambiguity. It is not clear from this whether the punishment was awarded on the basis of the plea of guilt allegedly entered by the Petitioner or on the basis of the evidence purportedly tendered by the two witnesses whose names/particulars are enumerated in the form. Para 12 of the counter-affidavit avers as though since the Petitioner entered the plea of guilt, the Commanding Officer proceeded to announce the punishment. Since the Petitioner has clearly, categorically and unequivocally denied having entered a plea of guilt for the offence charged against him (malpractice at the pre-final examination) and in the absence of any verification available with the signature of the Petitioner duly

appended thereto, as to having entered the plea of guilt, the impugned order of punishment visiting the Petitioner with 14 days pay fine cannot be sustained.

18. On the aforesaid premise, the writ petition is allowed and the order of punishment of 14 days pay fine is quashed.

19. Normally in the factual matrix as in this case, we would have preserved liberty to the Respondents to conduct a de novo trial/disciplinary proceedings in a context of the rather serious allegation that the Petitioner had indulged in malpractice at an examination. We are not persuaded to accept the contention of the Petitioner that since failure at the pre-final examination has no consequence to his academic performance of the final examination, any malpractice committed by him at such pre-final examination also ought not to be treated as a serious misdemeanor/malfeasance warranting disciplinary proceedings. The essential requisite of a soldier is integrity, as is the essential characteristic of any individual and is more so. It cannot therefore be contended that lack of integrity in one sphere is of no consequence. Malpractice in examination can legitimately be treated as a serious misconduct whether the examination is of substantial academic consequence or otherwise. Be that as it may.

20. Section 121 of the 1950 Act, reads:

121. Prohibition of second trial.

When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections.

21. The Petitioner is subject to the provisions of this Act and has been dealt with u/s 80 of the said Act and visited with the punishment of 14 days pay fine. In view of the provisions of Section 121, he cannot be tried again for the same offence or dealt with u/s 80 of the Act. In view of the mandate of Section 80, we are not persuaded to the request on behalf of the Respondents that liberty be preserved permitting the Respondents to proceed against the Petitioner again u/s 80 of the Act.

22. There is no provision in the Army Act or the Rules, which expressly or by any compelling implication enables the Commanding Officer to either sui generis and without verification by the signature of an accused officer, to enter a plea of guilt of such charged Army Officer or to record evidence in a disciplinary or other proceedings subject to the provisions of the Act in his absence or without obtaining a signature of the accused on the statement of the witnesses examined during the proceedings initiated under the Act.

23. In the particular facts and circumstances of this case where the Petitioner, as already noticed, clearly denied that any witnesses were examined at the post tentative charge stage and he had not entered a plea of guilt; in the absence of any law made by the Parliament in the Army Act, 1950 which enables the

Commanding Officer to whittle down Petitioner's right including under Chapter III of the Constitution, no exclusion of fair procedure can be countenanced. The disciplinary process even for imposition of minor penalty u/s 80 of the Act must therefore, advisedly be conducted consistently and in compliance with the full cornucopia of fair process enjoined except to the extent avoidance of the plenitude of such fair process is permitted by the provisions of the Army Act, 1950 or the Army Rules, 1954.

24. For the aforesaid reasons, the writ petition is allowed. The order of punishment dated 27-5-2009 as notified in Part I order Ser. No. 120/09 dated 30-5-2009, in so far as the Petitioner is concerned, is also quashed. There shall however be no order as to costs.