
(2002) 10 GAU CK 0022
In the Gauhati High Court
Case No : WP (C) No. 2605 of 2000

Pradip Kumar Tomer

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-10-2002

Acts Referred:

Army Act, 1950 — Section 39, 4(1)
Army Rules, 1954 — Rule 115(2), 115(2A), 34

Citation : (2003) 2 GLR 171 : (2003) 1 GLT 498

Hon'ble Judges : B. Biswas, J

Bench : Single Bench

Advocate : R.P. Sarma, T. Dhar and R. Dhar, for the Appellant; N.D. Sarma, CGSC, for the Respondent

Final Decision : Dismissed

Judgement

B. Biswas, J.—The petitioner joined the 24 Assam Rifles on December 9, 1987 as Nursing Assistant. At the relevant time, he was serving in the 26 Assam Rifles on transfer. The petitioner was charged with the offence of unauthorized absence from duty for the period of 40 days with effect from December 30, 1999. The charge reads as following :

"TENTATIVE CHARGE SHEET

The accused No.371051W Rfn/NA Pradeep Kumar Tomer of 26 Assam Rifles is subject to the Army Act under the provision of Army Act Section 4(1) reads with SRC 318 of 06 December 62 and charged with:

Army Act section 39(b) without sufficient causa overstaying leaving granted to him

In that he.

at field, on 11th October, 1999 having been granted leave of absence (60 days ELPw.e.f. 11th October 1999 to 09th December 1999 and extension of 20 days

HPL wef 10th December 1999 to 29th December 1999 failed without Sufficient cause to rejoin duty on expiry of the said leave and later voluntarily rejoined on his own accord on 07th Feb 2000 (AN).

(Total period of absence -40 days).

Station : Field Dated: 17 February 2000 Sd/- A.K. Sachdeva Colonel Commandant 26 Assam Rifles

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2. On conclusion of the proceedings before the Summary Court Martial the petitioner was dismissed from service by the order dated 24.2.2000 (Annexure - VI). The order "dismissal" was remitted to discharge by an order passed on September 21, 2001 by the Director General of Assam Rifles.

3. The petitioner challenged the aforesaid decision on the ground of procedural irregularities in the proceedings of the Summary Court Martial. The penalty of dismissal has been controverted as disproportionate to the offence committed. His case is that he had applied for 60 days leave with effect from 11.10.1999 to 9.12.1999. The leave was granted and the petitioner left for the home. The petitioner's mother was in her death-bed and it took about two months to get her cured. It is pleaded that the petitioner before expiry of leave informed the Medical In-charge of 26 Assam Rifles over telephone for extension of leave for 20 days. He was informed that the leave has been extended. The petitioner again on 29.12.1999 tried to communicate with the Medical-In-charge. On 30.12.1999 the petitioner made a call to Mrs. Pravati Rana, F.A. of 26 Assam Rifles and informed her to convey the concerned authority his request for extension of leave. On 4.1.2000 and 12.1.2000, calls were allegedly made to Mrs. Aruna and Mr. Prakash Singh Dhattulia urging them to request the authority for extension of leave. The petitioner sent a telegram on 2.2.2000 for extension of leave. On his resumption of duty after 40 days, he was served with the charge sheet and on completion of the proceeding dismissed from service. The sentence of dismissal, however, was converted into discharge by the Deputy Inspector General, Tripura Range.

4. The respondents in their affidavit submitted that the petitioner had earlier committed two offences during his 13 years of service for which he was awarded rigorous imprisonment for 28 days and confined to lines. According to them, the prayer for leave of 60 days and extension thereof was granted in usual course. After expiry of the leave, the petitioner failed to rejoin his duty and did not pray for extension of leave, as alleged. It is further pleaded that the petitioner also failed to prove that for some valid reason he was unable to resume his duty on expiry of leave. The charge preferred u/s 39(b) of the Army Act for overstaying the leave granted to him has not been denied and no attempt was made during the proceedings before the Summary Court Martial to prove that all efforts were made to contact the appropriate authority for extension of leave. The petitioner

pleaded guilty to the charge and, as such, the procedure as envisaged in Army Rules 115(2) and (2A) were followed.

5. Mr. Sarma, learned senior counsel for the petitioner submitted that the petitioner's mother was seriously ill for which he could not resume his duty on expiry of leave and he made all efforts to communicate with the authority for extension of leave. Shri Sarma also challenged the penalty of dismissal as disproportionate to the offence committed.

6. In *Raj Kumar Sarmah v. Union of India and Ors.* 2000 (1) GLT 240, a learned Single Judge of this Court dealt with the scope and applicability of the Army Act, 1950 to the Assam Rifles with reference to the notification No. SRO 318 dated 6.12.1962 issued by the Central Government u/s 4 of the Act. The Learned Single Judge held that the provisions of the Army Act are applicable to the Assam Rifles. I do not find any reason to disagree with the aforesaid. This decision disposes of the preliminary objection raised onthe writ petitioner.

7. With regard to the alleged improprieties and irregularities, it has been argued that the petitioner was not given any opportunity to cross-examine the prosecution witnesses and to produce his witnesses in defence. This argument does not appear to be supported by materials on record. It appears from the summary evidence (Annexure III of the writ petition) that the petitioner declined to cross-examine the prosecution witnesses No. 1 and 2. Both the witnesses testified that the petitioner remained absent for a total period of the 40 days until he rejoined on his own accord. The evidence was recorded on February 20, 2000 and, thereafter, on February 23, 2000 a notice was issued by the writ petitioner as per provision of Army Rules 34 to call in witness in the favour. He was also served with a notice to furnish name of the officer/JCO to assist him in the proceedings and according to him Sub Chhotu Ram was detained as a friend of the accused (the petitioner). The statement of the witnesses was read over to him. It appears from the proceeding of the Summary Court that the petitioner pleaded guilty and expressed his desire not to make any statement in support of his defence. The consequence of the plea of guilty was also explained to the petitioner. After completion of the proceedings, the Summary Court Martial awarded the sentence of dismissal from service. The petitioner was immediately informed that he has a right to present a petition to the Central Government, the Chief of the Army Staff or any officer superior in Command to the officer who had held the Summary Court Martial. The petitioner submitted an application to the Director General of Assam Rifles challenging the order of dismissal and to the Chief of Army Staff. The outcome of the aforesaid petitions is available in the order passed by the Director General of Assam Rifles converting the penalty of "dismissed" to one of "discharge". Considering the materials on record, this Court is unable to find procedural irregularities in the proceedings of the Summary Court Martial. There is no denial that the petitioner had overstayed the leave. The burden was on the petitioner to prove that he had before expiry of leave taken steps for extension of leave and that he was prevented for valid reason from joining his post on

expiry of leave. Obviously, the record do not show that he made any attempt to substantiate the same. Receipt of the PCO submitted by the petitioner show that he had made a call to Agartala on 30.12.19.99 i.e., after the expiry of the period of leave. The telegram was sent by him only on 2.2.2000, i.e., long after the expiry of the leave. No evidence was led by the petitioner to substantiate that his mother was in vicarious condition which prevented him from joining the post within time. There is no doubt that, in the given circumstances of the case, the petitioner did not act diligently. Rather, his conduct shows that he has little respect of the Rules and Regulations of the disciplined force to which he belonged.

8. The Supreme Court in *B.C. Chaturvedi Vs. Union of India and others*, with regards to the powers of the High Court held that the disciplinary authority, and on appeal the appellate authority, have exclusive powers to consider the evidence with a view to maintain discipline. The High Court/Tribunal while exercising the powers of judicial review cannot normally substitute its own conclusion on penalty. The Supreme Court further held that if the punishment imposed shakes the conscience of the High Court/Tribunal, it would appropriate mould the relief, either directing the disciplinary/appellate authority to consider the penalty imposed or in exceptional and rare cases, impose appropriate punishment with cogent reason in support thereof.

9. Here is a case of overstay after the expiry of the period of leave. The petitioner remained absent without authority for 40 days. Obviously, the offence committed by him cannot be taken lightly since he belongs to a disciplined force. Atleast he should have before expiry of the leave sent appropriate fillers requesting for extension of leave. He called somebody at Agartala on 30.12.1999 on phone, i.e., after expiry of leave and, thereafter, sent a telegram on 2.2.2000. The copy of the telegram is also not available. The respondent-authority denied having received any such communication. On earlier occasions also, he had committed two offences for which he was awarded 28 days rigorous imprisonment and confined to lines. Situated thus, this court is unable to agree with Mr. Sarma, learned senior counsel for the petitioner that the punishment of discharge awarded to the petitioner is harsh and disproportionate to the offence committed. Unauthorised absence from duty for 40 days without any intimation, for whatsoever reason it may be, if condoned and set a precedent to the other members of the force to follow suit and this would inevitably disturb the discipline sought to be maintained by the Organisation. This Court is, therefore, not inclined to interfere with the penalty of discharge.

10. In the result, the writ petition is dismissed.

No costs.