

(1998) 10 PAT CK 0009
In the Patna High Court
Case No : C.W.J.C. No. 1040 of 1997

Pramod Kumar

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-10-1998

Acts Referred:

Army Act, 1950 — Section 106, 20(3)
Constitution of India, 1950 — Article 226

Citation : (1999) 1 PLJR 82

Hon'ble Judges : Radha Mohan Pd., J

Bench : Single Bench

Advocate : Shahjahan Ali, Jai Shankar Pathak and Abdul Wadood, for the Appellant; K.K. Mandal, for the Respondent

Final Decision : Allowed

Judgement

Radha Mohan Pd., J.—In this writ petition the prayer is to quash the order dated 8.11.1996, contained in Annexure-1, issued by the Commanding Officer, Topkhana Abhilekh, Artillery Records, Nasik Road Camp, Nasik (Respondent No. 2) dismissing the Petitioner from service with effect from 28.10.1996. The said order was addressed to the Secretary, Zila Sainik Welfare Office, District Gaya (Bihar) (Respondent No. 3) and communicated to the Petitioner at Gaya through Respondent No. 3.

2. Mr. Mandal, learned Standing Counsel appearing for the Union of India has raised a preliminary objection as regards the maintainability of this writ application in this Court as, according to him, the order having been issued from Nasik, Maharashtra does not fall within the jurisdiction of this Court. It is submitted by Mr. Mandal that even last posting of the Petitioner was outside the jurisdiction of this Court at Ambala Cantt. under the command of Respondent No. 2. In this regard, he referred to a decision of the Supreme Court in the ease of State of Rajasthan and Others Vs. Swaika Properties and Another, .

3. I am unable to accept the said submission of Mr. Mandal. I fail to appreciate as

to how the said decision of the Supreme Court is of any help to him. In the said decision, the Apex Court held that the cause of action is a bundle of facts which taken with the law applicable to them gives the Plaintiff right to relief against the Defendant. The notification issued in the said case by the State Government u/s 52(1) of the Rajasthan Urban improvement Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. As such, the Supreme Court held that mere communication of the said notification to the person concerned at Calcutta will not vest jurisdiction in the Calcutta High Court to entertain a writ petition under Article 226 of the Constitution.

4. It is not the case in the present case that the impugned order was published in the Official Gazette and/or that it shall be deemed to have been communicated the moment it was issued from Nasik under any provision of the Army Act or the rules framed thereunder. Un-disputedly the impugned order of dismissal was communicated to the Petitioner at Gaya which falls within the jurisdiction of this Court. As such, the said order, of dismissal became effective only on its communication to the Petitioner at Gaya. Accordingly, in my opinion, this Court will have the jurisdiction to entertain the present writ petition.

5. Mr. Md. Shahjahan Ali, learned Counsel appearing for the Petitioner on merit submitted that the impugned order is in clear violation of Section 106 of the Army Act which provides for holding an enquiry into absence of Army personnel without leave. It was also submitted by him that the impugned order is violative of principles of natural justice in as much as the Petitioner was given no opportunity before his dismissal from service to defend himself.

6. A counter affidavit has been filed on behalf of the Respondents. In the said counter affidavit the Respondents have taken the plea that the dismissal of the Petitioner was done as per the provisions contained in Army Head quarter's letter bearing No. 17774/AC/DV-1 dated 11th March, 1980, a photo copy whereof has been annexed as Annexure-A.

7. It is submitted by Mr. Mandal, learned Standing Counsel appearing for the Union of India that the Petitioner who was serving in the Army was declared a deserter because of his absence for a period of three years u/s 20(3) of the Army Act. He further submitted that since the Petitioner neither surrendered himself nor was apprehended by the Police within the specified period laid down by the higher authorities, the Petitioner was rightly dismissed from service and the same was communicated to the concerned authorities under impugned letter dated 8.11.1996.

8. I fail to appreciate the said submissions of the learned Standing Counsel appearing for the Union of India. The Respondents have not brought on record any order declaring the Petitioner a deserter. Learned Standing Counsel has failed to point out any provision in the Army Act or the rules framed whereunder a person is to be declared a deserter. In any view of the matter even as per the

provision contained in Annexure A, a Court of Inquiry is to be held in the case of all absentees after 30 days of their absence u/s 106 of the Army Act. It is not the case of the Respondents that any such Court of Inquiry was ever held against the Petitioner for his alleged unauthorised absence beyond thirty days. According to the Petitioner, initially he went on leave and thereafter remained unwell about which he communicated to the authority concerned under certificate of posting. This fact however, has been disputed by the learned Standing Counsel.

9. Be that as it may, the fact remains that no Court of Inquiry in terms of Section 106 of the Army Act was ever held as against the Petitioner. The Petitioner, undisputedly, was permanently employed in the Army and remained absent after his leave. Under such circumstances, the Respondents were obliged to hold enquiry into absence without leave after a period of thirty days of his absence in terms of Section 106 of the Army Act. This having not been done, in my opinion the impugned order cannot be sustained and it is, accordingly, quashed.

10. The writ petition is, thus, allowed.

11. However, this order shall not come in the way of the authority from proceeding afresh against the Petitioner, in accordance with law.