
(2006) 09 GAU CK 0036
In the Gauhati High Court

Ravindra Yadav

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 06-09-2006

Acts Referred:

Army Rules, 1954 — Rule 13, 13(2), 13(3)
Constitution of India, 1950 — Article 14, 19, 226, 309, 310

Citation : (2009) 3 GLR 919 : (2006) 4 GLT 381

Hon'ble Judges : B. Sudershan Reddy, C.J;T.N.K Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T. Nandakumar Singh, J.—The appellant/writ petitioner preferred this writ appeal against the Judgment and order of the learned Single Judge dated 30.7.2002 dismissing the writ petition being C.R. No. 6436 of 1998 filed by the appellant/writ petitioner assailing the order of discharge dated 26.8.1998 discharging the appellant/writ petitioner from service.

2. The precise factual panorama of the appellant/writ petitioner's case is that:

The appellant/writ petitioner was selected for enrolment in the army as Sipahi on 22.11.1984. Thereafter, the petitioner joined in the army as Sipahi on 27.11.1984 and he was sent for training. The appellant/writ petitioner also completed training for 6(six) months and also completed 18(eighteen) months course for trade work at Pune.

3. The appellant/writ petitioner was posted at Siliguri Khaprel as Sipahi on 2.3.1987 and remained at Siliguri up to August 1987.

4. The appellant/writ petitioner was sent to Bikaner as Sipahi in the month of August 1987 and on 20.8.1988 the appellant/writ petitioner was promoted to Lash Nayak and he was at Bikaner for about 4(four) years. The appellant/writ petitioner fell ill at Bikaner and was given treatment there. And later on he was sent to Delhi Army Hospital. He was under medical treatment in Delhi Army

Hospital for about a month and thereafter he again joined at Bikaner. And he was there up to 1991.

5. In the year, 1992 the appellant/writ petitioner was posted at Jammu & Kashmir, Nagrota and he were there for about 2? years. From there the appellant/writ petitioner was sent again to Bhopal in the year 1994 as Lansh Nayak. While the appellant/writ petitioner was at Bhopal he went on leave for 6(six) days but after expiry of six days" leave he could not join for duty. It is stated that he wrote a letter to the Commanding Officer for extension of leave for 122 (one hundred and twenty two) days. The authority did not give any reply to his letter for extension of leave and also the petitioner/writ appellant did not join his duty even after expiry of the leave. It is also stated that the appellant/writ petitioner also informed on telephone regarding the accident of his father and mother when they were going on for pilgrimage to Banaras. But the Commanding officer did not give any reply to the said letter of the appellant/writ petitioner for leave. Admittedly without having any sort of leave, the appellant/writ petitioner continued to absent from his duty for a period of about 122 (one hundred and twenty-two) days. And only on 7.5.1995 the appellant/writ petitioner joined his duty.

6. On 19.10.1995 the appellant/will petitioner was called for charge sheet in the office of the Commanding Officer and he was apprised about the charges regarding 122 (one hundred and twenty two) days absence without leave. After giving sufficient opportunity to the appellant/writ petitioner to submit his show cause to the said charges of absence of 122 (one hundred and twenty two) days without leave and also after holding necessary proceeding contemplated in the Army Act, 1950 and Army Rules, 1954, he was convicted and sentenced for 14 (fourteen) days IMC and after completion of 14 days IMC the appellant/writ petitioner again joined as Sipahi as he was demoted to lower rank, i.e., from Lansh Nayak to Sipahi.

7. On 25.4.1996 the appellant/writ petitioner went on leave for about two months. It is stated that during the said period of two months his mother fell ill and as such the appellant/writ petitioner sent a telegram to the Commanding Officer to extend his leave but the Commanding Officer did not give any reply and the appellant/writ petitioner without any leave granted by the competent authority he overstayed for 81 (eighty one) days and thereafter he joined his duty only on 15.7.1996. Agatin for the said unauthorized absence of 81 (eighty one) days the Commanding Officer awarded 7 (seven) days IMC to the appellant/writ petitioner and he was put under quarter Guard for 7 (seven) days. Thereafter, the appellant/writ petitioner again resumed his duty.

8. In the month of December 1997 the appellant/writ petitioner went on leave for 15 (fifteen) days. It is also stated that he wrote a letter to the concerned authority to extend his leave on the ground of his illness but the leave was not granted by the competent authority. The appellant/writ petitioner without any leave overstayed for 81 (eighty one) days. The appellant/writ petitioner was

charged for overstaying of leave w.e.f. 15.12.1997 to 2.3.1998. And for the said charge he was again convicted and sentenced for 28 (twenty eight) days IMC and 14 (fourteen) days pay fine and immediately he was sent to Quarter Guard. On 17.4.1998 the appellant/writ petitioner joined his duty.

9. On 20.5.1998 the appellant/writ petitioner was served with the show cause notice as to why he should not be discharged from service under the Army Rules 13(3)(v) on the ground that the appellant/writ petitioner had incurred 4 (four) red entries, details of which are as follows:

(a) Awarded 14 days IMC by CO, Trg Bn-1, BEG & Centre, Kirkee on 13 Dec 85 under AA Section 39 (b).

(b) Awarded 14 days IMC by Col Deepak Grover, CO, 111 Engr Regt on 19 Oct 95 under AA Section 39(1) for being AWL for 122 days w.e.f. 6th January, 1995 to 7th May, 1995.

(c) Awarded 97 days IMC by Col Deepak Grover, CO, 111 Engr Regt on 94 Mar 97 under AA Section 39(b) for being OSL for 81 days w.e.f. 25th April, 1996 to 15th July, 1996 at 0800 hrs.

(d) Awarded 28 days IMC for 14 days Pay Fine by Lt. Col. III Mahapatra, CO, Depot Bn., REG & Centre for 78 days w.e.f. 15th December, 1997 to 2nd March, 1998.

10. Under the show cause notice dated 20.5.1998 the appellant/writ petitioner has to submit his show cause statement by 30.5.1998. It has also been mentioned in the show cause notice dated 20.5.1998 that in the failure of the appellant/writ petitioner to file his show cause statement, it will be assumed that the appellant/writ petitioner had nothing to say. In reply to the show cause notice dated 20.5.1998 the appellant/writ petitioner by admitting the charges against him in the show cause notice had filed his show cause statement dated 22.5.1998 requesting the authority to forgive him so that the future of his children shall not ruin. The English rendering of the show cause statement dated 22.5 1998 reads as follow:

No. 1573035 X Rank-Sapar/DPMT Name-Ravindra Yadav Company-391 Field Company Through-99A.P.O.

Hon"ble Command Officer, 111 Commanding Company, Through 99 A.P.O.

Date 22.5.1998.

Sub : Prayer for apology.

Sir,

I No. 1573035 X Sapar DPMT Ravindra Yadav is a soldier in 391 Field Company of 111 Commanding Company. I have been serving in this regiment since, 1987. Sir, I request you to forgive me for the wrong done by me. I do swear not to commit such mistakes in future, which may hamper me and my children in

future. Sir, the financial condition of my family is very weak and keeping in view all these aspects I would like to serve again. Considering all these matters I request you to forgive me so that the future of my children shall not ruin. And for this I shall remain ever grateful to you.

Yours obediently,

Sd/- No. 1573035 X Rank-Sapar/DPMT Name - Ravindra Yadav Company - 391 Field Company Through-99A.P.O.

11. For easy reference the relevant portion of Rule 13 of the Army Rules, 1954 is quoted hereunder:

13. Authorities empowered to authorize discharge.- (1) Each of the authorities specified in column 3 of the Table below, shall be the competent authority to discharge from service person subject to the Act specified in column 1 thereof on the grounds specified in column 2.

(2) Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority superior to it.

....

TABLE Manner of discharge Category Grounds Competent of Authority
discharge to authorize discharge (1) (2) (3) (4) III.(v)All Brigade/Sub The
Brigade or Sub Area Commander before ordering the discharge shall, if Other
Area the circumstances of the case Classes of Commander permit give to the
person discharge. whose discharge is contemplated an opportunity to show
cause against the contemplated discharge.

12. From bare perusal of Rule 13 of the Army Rules 1954 it is clear that Rule 13 authorize the power to the authority indicated in column 3 of the Table to discharge category of the Officer or Army personnel h mentioned in column 1 of the Table in the manner prescribed in column No. 4 of the Table. According to the manner mentioned in column 4 of the Table for discharging the army personnel, the concerned authority shall give an Opportunity to show cause to the contemplated discharge against the army personnel against whom action is being contemplated for discharging him.

13. After the appellant/writ petitioner admitted the charge of 4 (four) red entries in his service book, discharge order dated 26.8.1998 was issued for discharging the appellant/writ petitioner from service.

14. In the course of hearing, learned Counsel appearing for the respondents submitted that the discharge order dated 26.8.1998 was issued after according sanction under the provisions of Army Rule No. 13(3) item III(V) dated 13.8.1998 by the Major General, GOC. A copy of the sanction dated 13.8.1998 was also placed before this Court for our perusal. The said sanction order reads as follows:

SACNTION OF GENERAL OFFICER COMMANDING 21 MOUNTAIN DIVISION FOR DISCHARGE FROM SERVICE IN RESPECT OF NO. 1573035X SPR/DPMT RAVINDRA YADAV OF 111 ENGR REGT

1. I have examined the reply of No. 1573035X Spr/DPMT Ravindra Yadav of 111 Engr Regt to the Show Cause Notice. Despite numerous opportunities, the individual has failed to show cause any improvement and is a habitual offender.

2. Hence, sanction is hereby accorded under the provisions of Army Rule 13(3) item III(IV) for discharge from service in respect of No; 1573035X Spr/DPMT Ravindra Yadav, his services being no longer required.

Station :C/0 99 A.P.O. (B.K. Bopanna)

Dated 13th August, 1998 Maj. Gen., GOC.

15. The appellant/writ petitioner filed the writ petition being CR No. 6436 of 1998 assailing the discharge order dated 26.8.1998 on the inter alia, grounds that:

(1) the impugned discharge order dated 26.8.1998 is in clear violation of Articles 14, 19 and 311 of the constitution of India;

(2) the impugned discharge order was issued by the Company Commander who has no authority and jurisdiction to pass the discharge order;

(3) the impugned discharge order was based on false and wrong fact;

(4) the impugned discharge order was issued in clear violation of the Principles of natural justice ; and

(5) the impugned discharge order was issued without giving full opportunity of show cause but the same was issued without taking up any proceeding.

16. The first ground for challenging the discharge order dated 26.8.1998 that it was issued in clear violation of the Article 311(2) of the Constitution of India is not sustainable. From bare perusal of the Article 311 of the Constitution of India it is crystal clear that protections contemplated in Clause (2) of Article 311 is available only to the persons who is a member of the civil service of the Union or an all India Service or a civil service of the State or holding a civil post under the Union or the state. Admittedly the appellant/writ petitioner is a member of the Defence Service being a Sipahi in the Army and he is not holding the civil post. The Constitution Bench of the Apex Court had defined "civil post" in State of Assam and Others Vs. Shri Kanak Chandra Dutta, In that case the Apex Court held that:

there is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State, see marginal note to Article 311. In Article 311, a member of a civil

service of the Union or an all India service or a civil service of a State is mentioned , separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State, see the marginal notes to Articles 309, 310 and 311.

By following the ratio laid down in the Kanak Chandra Dutta (supra) the Apex Court in Dr. (Mrs.) Gurjeewan Garewal Vs. Dr. (Mrs.) Sumitra Dash and Others, held that the protection under Clause (2) of the Article 311 of the Constitution of India is available only to the employee holding civil post. Para Nos. 12 and 13 of the SCC in Dr. Gurjeewan Garewal (Mrs.) v. Dr. Sumitra Dash (Mrs.) and Ors. (supra) reads as follows:

12. At the outset it is to be mentioned that Article 311 cannot be automatically invoked in all the instances where a person is not given an opportunity of hearing. Article 311 confers certain safeguards upon persons employed in civil capacities under the Union of India or a State. Only persons who are holding "civil posts" can claim the protection provided under Article 311. The 1st respondent could claim the protection of Article 311 only if she holds a "civil post". A Constitution Bench of this Court in State of Assam v. Kanak Chandra Dutta has explained the meaning of "civil post".

13. In State of Assam and Others Vs. Shri Kanak Chandra Dutta, it was also held that "a post is an employment but every employment is not a post". While dealing with the termination of an employee, another Constitution Bench of this Court looked into the applicability of Article 311 in Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd., is the nature of independent existences. Hindnustan Steel Company. Considering this and other aspects it is ruled that Hindustan Steel Company is not a State for the purpose of Article 311.

17. Regarding the ground No. 2 for assailing the impugned discharge order dated 26.8.1998 that it was issued by the incompetent authority is also not acceptable inasmuch as the impugned discharge order dated 26.8.1998 was issued after according necessary sanction under the provisions of Army Rule No. 13(3) item No. III(V) for discharging the appellant/writ petitioner by the senior army officer of the rank of Major General, GOC under his order dated 13.8.1998. From the conjoined reading of the Sub-rule (2) of Rule 13 and column No. 4 of the Table to Rule 13 of the Army Rules, 1954 it is crystal clear that the Major General (GOC) is the competent authority for discharging the appellant/writ petitioner from his service and the said impugned discharge order dated 16.8.1998 was issued after according necessary sanctions by the Major General. According to column No. 4 of the Table to Rule 13 of the Army Rules, 1954 even the officer, of the rank of Brigadier or Sub Area Commander are the competent authority for discharging the appellant/writ petitioner from the service as the appellant/writ petitioner is only a Sipahi.

18. The ground No. 4 for assailing the impugned discharge order dated

26.8.1998 that it was issued in clear violation of the Principles of natural justice has no force of law in the peculiar facts and circumstances of the present case.

19. The application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned persons. No decision must be taken which would affect the right of any person without his/her first being informed the case and give him/her an opportunity of putting up his/her case. The expressions "opportunity to represent against the proposed actions" were discussed by the Apex Court in *S.L. Kapoor Vs. Jagmohan and Others*, and held that opportunity to represent against the proposed actions does not necessarily include oral hearing. The Apex Court in *S.L. Kapoor v. Jagmohan and Ors.* (supra) further held that on the admitted or undisputable facts only one (-(inclusion is possible under and under the law only one penalty is permissible, the court cannot issue different writs to compel the observation of natural justice, not because it is not necessary to observe natural justice but because the courts do not issue futile writs. In the present case, since the appellant/writ petitioner had already admitted the charge of four red entries unauthorized absence in his service book and also the opportunity of show cause or opportunity to represent against the proposed action had been made available to the present writ petitioner before issuing the impugned discharge order dated 26.8.1998 there is no necessity of compelling the respondents/army authority to observe the principles of natural justice by quashing the impugned discharge order dated 26.8.1998. The Apex Court also discussed the procedural requirement before imposing penalty to an employee who has admittedly an unauthorized absentee from duty for a long period in *Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another*, The fact spelt out in the *Syndicate Bank v. General Secretary, Syndicate Bank Staff Assn and Anr.* (supra) is that the clerk-cum-typist was an employee of the Syndicate Bank and he had developed the habit of remaining unauthorizedly absent from duty for long period, a show cause was issued to him for taking necessary actions against him for his unauthorized absence and in the case of failure to submit his show cause statement he would be deemed to have voluntarily retired from the service of the Bank. Notice was sent by registered post to him but it was returned with the report of postal authority that he refused to receive the same. By an order dated 19.12.1995 the Bank treated him as having voluntarily abandoned his service. The order of the Bank dated 19.12.1995 was challenged by the clerk-cum-typist by filing application before the Industrial Tribunal and the Industrial Tribunal set aside the said order dated 19.12.1995 and being aggrieved by the order of the Industrial Tribunal, the Bank filed writ petition under Article 226 of the Constitution of India in the Court of Karnataka High Court. Both the Karnataka High Court and the Tribunal by relying on the principles of natural justice had interfered with the said order of the Bank. The Apex Court ultimately held that as there was an admitted fact that the said clerk-cum-typist had developed the habit of remaining unauthorizedly absent from duty for long period there may not be necessity of

inquiry as to whether the clerk-cum-typist is a habitual absentee or not. The Apex Court, further held that undue reliance on the principles of natural justice by the Tribunal and even by the High Court has certainly lead to miscarriage of justice so far as the bank is concerned. The Apex Court in Dharmarathmakara Raibahadur Aroot Ramaswamy Mudaliar Educational Institution Vs. The Educational Appellate Tribunal and Another, held that giving of opportunity of inquiry to the employee against whom action is contemplated is a check and balance concept that no one's right to be taken away without giving him and her the opportunity or without enquiry in a given case. But this cannot be in a case where allegations and charges are admitted no possible defense is placed before the concerned authority. The fact in that case was that the respondent No. 2 admitted that she did not join M.Phil course and extraordinary leave for a period of one year was granted to the respondent No. 4 to enable her to do M.Phil for which the prescribed period is one year. But in violation of the terms and conditions of extra ordinary leave she got herself registered for Ph.D course. The action was taken up against her for violation of the extraordinary leave for a period of one year granted to her for enabling her to do M Phil and for such violation of terms and conditions of extraordinary leave she was terminated from service. Respondent No. 2 herself admitted the violation of terms and conditions of extra ordinary leave. Para No. 8 of the SCC in p.338 of Dharmarathmakara Raibahadur Arcot Ramaswamy Mudaliar Educational Institution v. Educational Appellate Tribunal & Anr. (supra) reads as follows:

8. The contention of learned Counsel, for the respondent is confined that there was no enquiry in terms of Section 6 of the said Act. There is no submission of any defence on merit. Even before us when we granted learned Counsel an opportunity to give any prima facie or plausible explanation on record to defend her actions, nothing could be placed before us. Giving of opportunity or an enquiry of course is a check and balance concept that no one's right be taken away without giving him/her opportunity or without enquiry in a given case or where the statute requires. But this cannot be in a case where allegation and charges are admitted and no possible defence is placed before the authority concerned. What enquiry is to be made when one admits violations? When she admitted she did not join M. Phil course, she did not report back to her duty which is against her condition of leave and contrary to her affidavit which is the charge, what enquiry was to be made? In a case where the facts are almost admitted, the case reveals itself and it apparent on the face of the record, and in spite of opportunity no worthwhile explanation is forthcoming as in the present case, it would not be a fit case to interfere with the termination order.

20. The learned Single Judge dismissed the writ petition filed by the writ petitioner by passing the impugned judgment and order dated 30.7.2002 wherein the learned Single Judge held that "no interference in this writ petition is called for". We are in conformity with the finding of the learned Single Judge in the impugned judgment and order dated 30.7.2002 for the reasons discussed above. Writ Appeal is devoid of merit. Accordingly, dismissed and parties are to

bear their own costs.