
(2013) 11 MEG CK 0003
In the Meghalaya High Court
Case No : Writ Petition (C) No. 17 of 2013

Sanjay Bhattachaijee

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Citation : (2013) 11 MEG CK 0003

Hon'ble Judges : S.R. Sen, J

Bench : Single Bench

Advocate : R. Jha, for the Appellant; S.C. Shyam, for the Respondent

Final Decision : Allowed

Judgement

S.R. Sen, J.—The instant writ petition is directed against the Impugned Order dated 13th May, 2009 issued by the Commandant 3rd Battalion, Assam Rifles, whereby, the petitioner was dismissed from service. The petitioner's case in a nutshell is that:

This Writ petition has been filed by the petitioner under Article 226 of the Constitution of India for issuance of a Writ of Certiorari and mandamus for setting aside and quashing the Impugned Order dated 13th May, 2009 passed by the Commanding Officer in exercise of power vested under the Assam Rifles Act, 1941. The grounds on which the Petitioner challenged the Impugned Order is that the commanding officer had acted upon the power which is not vested in it and passed the impugned order of dismissal without any authority of law. The petitioner was held to be subjected to the Assam Rifles Act, 1941 in spite of the fact that after the commencement of the Assam Rifles Act, 2006, the Assam Rifles Act of 1941 is repealed.

The Petitioner also challenge the said impugned order of his dismissal on the other grounds that had been mentioned by the Petitioner in Para 8 of the Writ Petition. This instant Writ Petition has been filed challenging the said Impugned Order dated 13th May, 2009, with the prayer to set aside and quashed the said

Impugned Order which is arbitrary, illegal, unconstitutional, unwarranted inasmuch as the same is not tenable in the eyes of law and other service Rules and Laws made therein and hence the writ petition of the Petitioner challenging the illegal acts and deeds of the Respondent Authority in spite of the enactment and commencement of the Assam Rifles Act, 2006 and Assam Rifles Rules 2008.

The instant case is covered with the Judgment and Order dated 20th July, 2011 passed in Writ Petition No. 148 (SH) of 2010 which was upheld by the Hon'ble Division Bench of the High Court vide Order dated 29th August, 2011 passed in Writ Appeal No. 33 (SH) of 2011 as well as by the Hon'ble Apex Court as such the impugned order dated 13th May, 2009 is liable to be set aside and quashed and same relief may please be granted to the petitioner.

2. Being aggrieved by the Impugned Order referred above, the petitioner approached this Court by way of this instant writ petition.

3. The learned counsel, Mr. R. Jha appearing for and on behalf of the petitioner submits that, the Impugned dismissal order dated 13th May, 2009 is in contrary to the provision of section 11 of the Assam Rifles Act, 2006. The learned counsel further contended that, the Assam Rifles Act, 2006 came into force vide Gazette Notification dated 20.02.2009. Therefore, the said Assam Rifles Act came into force with effect from 20.02.2009. And the instant dismissal order in question has been issued on 13th May, 2009; hence the instant order in question is contrary to the Assam Rifles Act, 2006 which was in force at the time and day when Impugned Order was passed. The learned counsel also further argued that, as per Section 11 of the Assam Rifles Act, 2006, it is the Deputy Inspector-General of the Assam Rifles who has been authorized to dismiss or remove from service a person under his command not by a Commandant. Hence, the impugned order is not in conformity with the Assam Rifles Act, 2006, so it needs to be set aside. The learned counsel further contended that the 5(five) Nos. of Red Ink entries in the service book of the petitioner was also not in conformity with the Rules 22 of the Army Rules, 1954. So, the 5(five) Nos. of Red Ink entries also may be quashed.

4. On the other hand, the learned Sr. counsel, Mr. S.C. Shyam appearing for and on behalf of the respondents submits that, it is a fact that the impugned Order dated 13th May, 2009 was passed, the Assam Rifles Act, 2006 was already in force. However, the learned Sr. counsel did not agree that, the 5(five) Nos. of Red Ink entries were not in conformity with the mandatory provision of Rule 22 of the Army Rules, 1954. The learned counsel also contended that there is no averment made in the writ petition or pleading for quashing the 5(five) Nos. of Red Ink entries as well as in proceedings and the 5(five) Nos. of Red Ink entries was entered on plead (sic) guilty by the petitioner.

5. I have perused the impugned order dated 13th May, 2009 vide Annexure-1 wherein, it is clearly stated that the petitioner has been dismissed from the service due to the 5(five) Nos. of Red Ink entries available in his service book in

exercise of the power under Assam Rifles Act, 1941. It is pertinent from the impugned order that the respondent has dismissed the petitioner by exercising the power under the Assam Rifles Act, 1941 Section 4(a) read with Para 24, Chapter VII of Assam Rifles Manual and Para 5 of Record Office Instructions 1/2004.

6. It is undisputed from the submissions advanced by the learned counsel as well as from the Gazette Notification on record at Page 21 that Assam Rifles Act, 2006 had come into force on 20.02.2009. Therefore, if any dismissal order or other orders are to be guided by the Assam Rifles Act, 2006 with effect from 20.02.2009, in this case, it is not disputed that dismissal order was issued on 13th May, 2009. Therefore, in my view, the dismissal order should have been guided and regulated by section 11 of the Assam Rifles Act, 2006. On this ground, the dismissal order is not only bad in law, but against the principle of the Assam Rifles Act, 2006. Hence, the impugned order cannot stand. Accordingly, the said impugned order is hereby quashed and set aside.

7. Now, second question comes, whether the 5(five) Nos. of Red Ink entries entered in the service book of the petitioner is in conformity with rules and laws? The answer is definitely not because, Rule 22 of the Army Rules, 1954 speaks as follows:

Hearing of Charge--(1) 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 the defence:

Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with:

Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion 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:

Provided that the commanding officer shall not order trial by a summary Court-martial without a reference to the officer empowered to convene a district Court-martial or on active service a summary general Court-martial for the trial of the alleged offender unless--

(a) the offence is one which he can try by a summary Court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge.

8. On bare perusal of sub-rule (1) of 22, it appears that, every charge against a person subject to the Act needs to be heard in presence of the Accused, and Accused must be given the liberty to cross-examine the witnesses as well as to give the liberty to examine the defence witnesses and the said provision is mandatory in nature. However, in case when anything arise as a result of investigation by a Court of Inquiry and where Rule 180 of the Army Rules, 1954 is complied with, in such a case, the provision made in sub-rule (1) under Rule 22 may be dispensed with, but in this case in hand from the proceedings as placed by the learned Sr. counsel for the respondents, I do not find anywhere that, the charge had arisen out of investigation conducted by a Court of Inquiry Under Rule 180 of the Army Rules, 1954. I could not understand how and why the officer concerned has recorded at Para 2 of the proceedings dated 30.08.2004 as "Calling and hearing of witness in terms of the Army Rules 22(1) have been dispensed with, since the provision of AR 180 have been complied with at the Court of Inquiry, in respect of the Accused".

9. It is also further noticed from the proceedings that on 3rd August, 2006 some witnesses were examined, which I find is contradictory in nature. Therefore, I am of the considered view that, the 5(five) Nos. of Red Ink entries in the service book of the petitioner was not in conformity with Rule 22 of the Army Rules, 1954. Hence the said Red Ink entry is hereby quashed.

10. Thirdly, on perusal of the writ petition at Page 12 Clause E, it appears that the petitioner's counsel had taken the plea, if any new fact comes, he will take his plea in the rejoinder. On further perusal of the rejoinder, it is apparent that, he has challenged the 5(five) Nos. of Red Ink entries. Therefore, I am of the considered view that, it is not correct that the petitioner has not taken the plea for averment pertaining to quashing the 5(five) Nos. of Red Ink entries. Since the 5(five) Nos. of Red Ink entries as discussed above, in the service book of the

petitioner is found contrary to the provision of the Army Rules definitely which was mandatory in nature. It is also noticed from the proceedings filed at Page IAFD-901 dated 26th May, 2009, there is nothing mentioned whether the petitioner had pleaded guilty or not. It is simply written there guilty/not guilty. It also further shows that the petitioner had not pleaded guilty. Similarly, from the offence report dated 24th September, 2007 nothing appears that whether the petitioner had pleaded guilty or not pleaded guilty. Therefore, I am unable to agree with the submissions advanced by the learned Sr. counsel for the respondents.

11. Court Master is directed to return the proceeding record to the learned counsel for the respondent after making a Xerox copy, and is also directed to keep the Xerox copy of the departmental proceedings of the respondent tagged in the file.

12. Respondent is directed to re-instate the petitioner within 40 days from the date of receipt of copy of Judgment and Order with all consequential relief. With this observation and direction, the instant writ petition is allowed and stands disposed of.