

(2011) 09 DEL CK 0410
In the Delhi High Court
Case No : Writ Petition (C) 5023 of 2011

Sepoy Islam Khan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-09-2011

Acts Referred:

Army Act, 1950 — Section 39, 40, 63, 8
Army Rules, 1954 — Rule 13, 13(3), 56

Citation : (2011) 09 DEL CK 0410

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Santosh Kumar, for the Appellant; Ankur Chhibber, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The writ Petitioner has challenged the order dated 20.1.2011 passed by the Armed Forces Tribunal dismissing TA No. 64/2010 in which the Petitioner had challenged the order dated 26.10.1994 discharging him from service. It may be noted that TA No. 64/2010 was the number assigned by the Armed Forces Tribunal to W.P.(C) No. 850/1999 which was filed by the Petitioner in this Court and since the Armed Forces Tribunal was constituted during the pendency of the said writ petition in this Court, it was transferred to the Tribunal for adjudication. The second order which has been challenged is dated 28.2.2011 dismissing RA No. 7/2011 under cover of which application the Petitioner sought a review of the order dated 20.1.2011. On 25.4.1994 the Brigadier In-charge issued a notice to the Petitioner alleging that in the 11 years" service rendered by him he had earned 4 red ink entries. Prima facie opining that the Petitioner was not fit to be retained in service, Petitioner was called upon to show cause against the proposed action to discharge him from service.

2. The 4 red ink entries earned by the Petitioner pertained to his being found having committed an offence punishable u/s 39(a) of the Army Act and vide

order dated 9.11.1983 sentenced to undergo 7 days" RI. The next month the Petitioner repeated the offending act and for which vide order dated 17.12.1983 he was sentenced to RI for 7 days. For having committed another offence vide order dated 10.9.1991 the Petitioner was sentenced to undergo RI for 28 days and the offence was having violated Section 63 of the Army Act. On 7.12.1991 the Petitioner was found guilty of using insubordinate language before a superior officer, an offence u/s 40(c) of the Army Act for which the Petitioner was deprived promotion to the rank of L/Nk.

3. The reply filed by the Petitioner did not dispute the penalties levied but he simply requested that he be permitted to continue in service.

4. The Petitioner was discharged from service and the writ petition came to be filed.

5. A perusal of the writ petition filed by the Petitioner which got transferred to the Armed Forces Tribunal would reveal, that vide para 4 to 6 thereof he has challenged the penalties imposed on 9.11.1983 and 17.12.1983. Thereafter, we find that in para 10 to 13 thereof the Petitioner has challenged the penalty imposed upon him on 10.9.1991.

6. Needless to state the Petitioner has, in para 17 questioned the penalties as mala fide. The prolix writ petition is full of challenge to the penalties imposed and we find that the prayers made are to quash all 4 penalties and declare the same to be of no legal consequence and thereafter quash the order discharging the Petitioner from service.

7. Though the Tribunal has not so held, it is apparent that it was too late in the day for the Petitioner to have challenged the penalties. The writ petition filed by the Petitioner merited dismissal on the said short ground.

8. Be that as it may it appears that before the Tribunal by placing reliance upon a decision of a Division Bench of this Court reported as Surinder Singh Sihag Vs. Union of India (UOI) and Others, it was sought to be urged that without an inquiry the penalty could not be levied.

9. The same issue was considered by a Division Bench of this Court in LPA No. 136/2003 Pratap Singh v. Chief of Army Staff and Ors., in which the decision of the Division Bench in Surender Singh Sihag's case (supra) was noted and was opined to be in conflict with the law declared by the Supreme Court in the decision reported as Union of India (UOI) and Others Vs. Dipak Kumar Santra, . The decision in LPA No. 136/2003 reads as under:

1. Having been awarded 5 red ink entries between the years 1986 till 2000 and after issuing a notice to show cause and enabling the Petitioner to submit his response to the proposed action of his being discharged from service, the competent authority passed an order that retention of Petitioner in service was not warranted, resulting in the Petitioner being discharged from service with pension benefits.

2. Petitioner questions his name being struck off from the strength of the Indian Army with effect from 7.8.2000. Challenge was by and under W.P.(C) No. 5346/2000 which has been dismissed vide order dated 8.4.2002. Said order is under challenge in the instant appeal.

3. It may be noted that in August 1997 a show cause notice was issued to the Petitioner requiring him to respond to the proposed action of his being discharged from service under Army Rule 13(3) Item III (4). The action was proposed on the fact that till 1997, red ink entries pertaining to 4 misdemeanours for which Petitioner was severely reprimanded were inflicted upon him in the month of May 1986, May 1987 as also in the month of June 1996 and April 1997.

4. Petitioner submitted a response on 5.9.1997 and considering the same, action proposed was dropped. While dropping the action it was noted that keeping in view the gravity of the offences committed by the Petitioner for which punishment was awarded, it did not warrant the proposed action.

5. In June 2000 another penalty of severe reprimand was inflicted upon the Petitioner and taking into account the same and the fact that with the levy of said penalty a 5th red ink entry was made in the record of the Petitioner, on 5.7.2000, a show cause notice was issued calling upon the Petitioner to respond as to why he be not discharged from service under Army Rule 13(3) Item III (4).

6. Petitioner filed a reply highlighting that on 8.7.1997, pertaining to 4 red ink entries earned, it was proposed to discharge him from service and considering his reply as also forming an opinion that the misdemeanours committed by the Petitioner were not of a very serious nature, action was dropped. Thus, Petitioner highlighted that past misconduct was considered and that for a wrong committed for which he was severely reprimanded on 6.6.2000, his discharge from service was not warranted.

7. Rejecting the defence the order was passed directing Petitioner to be discharged from service.

8. Questioning the action taken against him, 4 contentions were urged. It was firstly urged that the Commandant of the Central Ordnance Depot who had passed the order was not competent to do so. Second contention urged was that no reasons were given by him while passing the impugned order. The third contention was that by dropping proposed action pursuant to the show cause notice dated 8.8.1997 the Respondents waived, for all times, a right to predicate further action on the 4 red ink entries awarded to the Petitioner in the months of May 1986 and 1987, as also the month of June 1996 and April 1997. Lastly it was urged that in view of the law laid down by a Division Bench of this Court in the decision reported as Surinder Singh Sihag Vs. Union of India (UOI) and Others, without conducting an inquiry the services of the Petitioner could not be discharged.

9. Pertaining to the first contention urged, we find that notwithstanding the same being pleaded in the writ petition it not being dealt with by the learned Single Judge in the order impugned. It is possible that the plea was given up. But, we need not rest our opinion on the technicalities of the law inasmuch as we note that vide SRO No. 161 dated 11.6.1979, in exercise of the power conferred by Section 8 of the Army Act 1950 the Central Government prescribed the officers listed in the SRO with the powers under the Army Act with respect to persons under their command. The Commandant Central Ordnance Depot Delhi finds a mention in the notification in question.

10. The order directing Petitioner's discharge from service has been passed by the Commandant of the Central Ordnance Depot Delhi.

11. With respect to the second plea we note that the Commandant has accorded approval to a note dated 7.8.2000 penned by Major Ravinder Singh and which note gives reasons as to why Petitioner should be discharged from service. Suffice would it be to state that where a proposal contains the reasons and the same is approved by the Competent Authority, the reasons in the proposal have to be treated as the reasons of the authority concerned. Thus, it cannot be said that the Commandant of the Unit has not given adequate reasons in support of the decision.

12. Pertaining to the third submission suffice would it be to state that it is settled law that while taking any action against a person pertaining to a subsequent wrong, past conduct can be considered, and that when a wrong or wrongs are overlooked at a given point of time, their negative effect revives when a further wrong is committed.

13. The last plea urged is premised on the law laid down by a Division Bench of this Court in *Surender Singh Sihag's* case.

14. The decision deals with the right of the competent authority to discharge a force personnel who has earned 5 red ink entries, a power under Rule 13 of the Army Rules. The Division Bench noted that the army authorities had issued an administrative instruction by way of a letter circular dated 28.12.1988 which contemplated an inquiry before discharging or dismissing a person concerned.

15. The Division Bench took the view that no action could be taken under Rule 13 without an inquiry and since no inquiry was held against *Surender Singh Sihag* when his services were dispensed with by way of discharge pursuant to a show cause notice alleging against him that he had earned 5 red ink entries, the order was quashed.

16. But we find that the Supreme Court, in the decision reported as *Union of India (UOI) and Others Vs. Dipak Kumar Santra*, has taken a view contrary to the one taken by the Division Bench of this Court.

17. Pertaining to a discharge of an Army Officer exercising power under Rule 13 of the Army Rules, the Supreme Court held that once statutory Rules occupy the

field, there is no place for a policy guideline and as long as the procedure prescribed by the statutory Rule is followed, it hardly matters whether a policy guideline is not followed.

18. Relevant would it be to state that where a Rule deals with subject matter and the procedure to be followed with respect to the subject matter is also prescribed by the Rule, there is no scope to issue a policy guideline with respect to the procedure to be followed.

19. The procedure under Rule 13 of the Army Rule simply contemplates a prior notice to the person concerned before exercising power under the Rule.

20. That apart, it escaped the notice of the Division Bench of this Court as to what was the scope of the inquiry to be conducted if the power to discharge a force personnel was being exercised with respect to the service profile which shows that the person concerned had earned 5 red ink entries and the requirement of the rule was to consider whether such a person is required to be discharged from service.

21. Inquiries have to be held if facts are in dispute or blameworthiness of a delinquent employee has to be ascertained.

22. We see no scope for any inquiry to be conducted where a person is being discharged from service with reference to his past service record.

23. We note that under Rule 13(3) Item III (4) the Commanding Officer has to exercise the power upon being satisfied that the desirability to retain the person concerned on the strength of the Unit is not longer there. The objective material obviously has to be the service record. It is a power akin to the power exercised in civil service under Rule 56(j) of the fundamental rules.

24. Noting in the instant case that before taking the action a show cause notice was served upon the petitioner and after considering the reply filed by him the action was taken, meaning thereby procedures of the law were followed we dismiss the appeal but refrain from imposing any costs.

10. Thus, the issue which was urged before the Tribunal was rightly decided against the Petitioner.

11. Seeking review the Petitioner urged an altogether different ground. He urged that with respect to removal/discharge of undesirable and inefficient officers a policy guideline had been framed on 28.12.1988 as per which it was provided as under:

Discharge from service consequent to 4 red ink entries is not a mandatory or legal requirement. In such cases, Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not be harsh with the individuals, especially when they are about to complete the pensionable service. Due consideration should be given to the long service, hard stations and difficult living conditions that the OR has been exposed to during his service, and

the discharge should be ordered only when it is absolutely necessary in the interest of service.

12. The Petitioner sought to urge that enrolled in the Army on 24.3.1983 he would have completed pensionable service after he had served for 20 years and thus his discharge in the 11th year of service was not warranted. Second point urged in review was that the nature of the penalties were never considered by the officer concerned.

13. We would only observe that these are issues of fact and had required to be first pleaded by the Petitioner when the show cause notice was issued to him. He did not ever so plead. He never pleaded so even in the writ petition and it was too late in the day for the Petitioner to have raised the said issue in the review application. Needless to state that if the issue was raised at the first instance it would have required the authority competent to take the decision to have considered to same and if the authority had not considered the same the Court or the judicial fora would have compelled the authority to do so. It is too late in the day to permit the Petitioner to raise the point and then compel the authority to do the needful.

14. The writ petition is dismissed but without any orders as to costs.