
(2001) 11 KAR CK 0054
In the Karnataka High Court
Case No : Writ Petition No. 9377 of 1993

S.K. Katoch

APPELLANT

Vs

Ministry of Defence and Others

RESPONDENT

Date of Decision : 21-11-2001

Acts Referred:

Army Act, 1950 — Section 20 (3)

Citation : (2002) 1 KCCR 357

Hon'ble Judges : Chandrashekaraiah, J

Bench : Single Bench

Advocate : A.S. Krishna Murthy, for the Appellant; Hari Prasad, A.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

Chandrashekaraiah, J.—The Petitioner in this writ petition has sought for quashing the order of dismissal dated 5.5.1992, the copy of which is produced as Annexure-D2 to this writ petition.

2. The Petitioner joined the service of the Indian Army on 9.3.1977 as Gunner. Thereafter, he was appointed as Clerk's trade in October 1981 by way of change of trade. In the year 1984, the Petitioner on promotion was appointed as Havildar. In the year 1990 when he was working as Havildar at Belgaum, he was sent to Bangalore to collect the examination papers pertaining to the candidates to be tested at Belgaum for recruitment to the post of Havildar-Clerk. On 20th December, 1990 on the basis of certain telegram received in the Office of the Army at Bangalore, the Petitioner's baggage was subjected to search. Accordingly, in the search, it is found in the baggage 15 application forms and Rs. 500/-. On the basis of this search the disciplinary proceedings were initiated as the Department is of the opinion that it is a misconduct as provided u/s 64(e) of the Army Act, 1950 (herein after referred to as the Act). Thereafter, as provided under Rule 22 of the Army Rules, 1954 (hereinafter referred to as the Rules) the Petitioner was heard regarding the charge. In the said proceedings,

summary of evidence as provided under the Rules were recorded. But, pursuant to the recording of summary of evidence, no order was passed by the Commanding Officer, since the higher Officers were of the view that the Commanding Officer who recorded the summary of evidence has not followed the proper procedure. Thereafter, the Commanding Officer, ordered for rehearing of the Charge by recording the summary of evidence. This summary of evidence so recorded was submitted to the Deputy Judge Advocate General (herein after referred to as D.J.A.G.) for his opinion in order to make application seeking for reference to the Court Martial. The D.J.A.G. has furnished his opinion by his letter dated 13th August, 1991 stating that it is not advisable to frame any charge for enquiry, as there is no sufficient evidence on record to prove the misconduct u/s 64(e) of the Act. Further, he has advised in the said letter to take steps to terminate the services of the Petitioner under Rule 13 of the Army Rules. It appears, pursuant to the advise given by the D.J.A.G., a show-cause notice dated 12.11.1991 was issued by the Lt. Col. to the Petitioner calling upon him to show cause within 30 days from the date of the receipt of the said notice. Immediately, thereafter the Petitioner had written a letter dated 6.12.1981 requesting for providing a copy of the summary of evidence recorded in the first instance in order to furnish his reply to the show-cause notice dated 12.11.1991. Pursuant to his letter it is submitted that Department has furnished the documents as sought. Thereafter, the Petitioner had filed his reply to the show-cause notice, a copy of which is produced as Annexure-C to the writ petition after the receipt of the reply, the Commanding Officer passed the order on 5.5.1992 dismissing the Petitioner from service. It is this order which is the subject matter of this writ petition.

3. Sri A.S. Krishna Murthy, learned Counsel appearing for the Petitioner submitted that the Commanding Officer on the basis of the summary of evidence recorded in the first instance ought to have taken further steps in the matter as provided under the Rules. But, in the instant case, the Commanding Officer, without any authority of law has proceeded to rehear the Charge by recording summary of evidence. Further, it is submitted by the learned Counsel that on the basis of the summary of evidence recorded for the second time, the D.J.A.G. has furnished his opinion to the effect that there is no sufficient evidence in order to prove the misconduct u/s 64(e) of the Act and therefore, in view of this advice, the Respondents ought to have dropped the further proceedings instead of invoking the power u/s 20 of the Act read with Rule 17 of the Rules to dismiss the Petitioner from service. It is nextly submitted by the learned Counsel that when the authorities are of the opinion that there is no evidence to prove the misconduct there is no reason for the authorities to dismiss the Petitioner from service in the Administrative side.

4. In reply to the contentions advanced by the learned Counsel for the Petitioner, Sri Hari Prasad, learned Assistant Central Government Standing Counsel for the Respondents submitted that even though there is no sufficient evidence to prove the misconduct of the Petitioner, it is open for the Respondents to terminate the

services of an employee in the Department of Defence, if it is of the opinion that an employee is involved in undesirable activities without holding any enquiry. In support of this contention, he relied on Section 20 of the Act and Rule 17 of the Rules, which confer power on the disciplinary authority to dismiss any employee in the Administrative side, if the employee is found to be involved in undesirable activities in the National interest.

5. Section 64 of the Army Act, 1950 reads as follows:

64. Miscellaneous offences.-Any person subject to this Act, who commits any of the following offences, that is to say:

(a) x x x x x (b) x x x x x (c) x x x x x (d) x x x x x

(e) directly or indirectly accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gratification as a motive or reward for procuring the enrolment of any person, or leave of absence promotion or any other advantage or indulgence for any person in the service, or

(f) commits any offence against the property or person of any inhabitant of, or resident in, the country in which he is serving;

shall, on conviction by Court-martial, be liable to suffer imprisonment for a term which may extend to seven years of such less punishment as is in this Act mentioned.

6. The allegation against the Petitioner is that he was in possession of 15 application forms for the enrolment along with Rs. 500/- in cash. This according to the Respondents is misconduct u/s 64(e) of the Act. When once the allegations are found to be a misconduct as provided u/s 64 of the Act, the proper procedure to be adopted is to hear a charge under Rule 22 of the Rules and thereafter to record summary of evidence under Rule 23 of the Rules. After recording of the summary of evidence, the Commanding Officer has to pass the order remanding the accused for trial by Court Martial, or to refer the case to the appropriate superior military authority, or if he thinks it desirable to rehear the case and either dismiss the charge or dismiss the summary of evidence under Rule 24 of the Rules.

7. From the facts, it is seen that the Commanding Officer, after recording the summary of evidence submitted all the materials to the D.J.A.G. for his opinion. The D.J.A.G. is of the opinion that there is no sufficient evidence to proceed with the case by framing a charge and there is no sufficient evidence to prove the misconduct as required u/s 64(e) of the Act. In view of this advise, it is open for the Commanding Officer either to accept the said advise, or to proceed with the case by making application for trial by the Court Martial, or referring the case to the proper superior military authority and to rehear the matter and dispose of the case summarily. In the instant case, he has not taken any steps to pass any order as contemplated under Rule 24 of the Rules.

8. On the basis of the alternative advice furnished by the D.J.A.G., the Commanding Officer, ASC Centre (South) directed the Commanding Officer, No. 4, Training Division, ASC Centre (S) Bangalore-7, to issue a show-cause notice to the Petitioner to take action u/s 20 of the Act read with Rule 17 of the Rules. Accordingly, the Lt. Col. issued a show-cause notice to the Petitioner on 12.11.1991. Under the Act and Rules, the Lt. Col. has no jurisdiction to issue such show-cause notice. But, the said notice has been issued at the direction of the Commanding Officer, A.S.C. Centre (South), Bangalore, who is under the Act and Rules is the disciplinary authority. The Petitioner after obtaining the certain documents submitted his reply to the show-cause notice dated 1.3.1992. Thereafter, the disciplinary authority passed the order dismissing Petitioner from service, which reads as under;

In exercise of the powers conferred by the Army Act Section 20(3) read in conjunction with Army Rule 17, I direct that No. 1445217ON Havildar/Clerk Surindar Kumar of Branch Recruiting Office, Belgaum, attached to Training Battalion 4 (MT), A.S.C. Centre (South), Bangalore, be dismissed from service.

9. This order, according to the learned Counsel for the Petitioner is liable to be quashed firstly on the ground that it is in violation of the principles of natural justice and secondly on the ground that the disciplinary authority having not able to prove the charge of misconduct ought not to have resorted to invoke the Administrative power u/s 20 read with Rule 17 of the Rules.

10. In order to appreciate this contention of the Petitioner it is just and necessary to refer to Section 20 of the Act and Rule 17 of the Rules.

11. Section 20 of the Army Act, 1950 reads as under:

20. Dismissal, removal, or reduction by the Chief of the Army Staff and by other Officers.-(1) The Chief of the Army Staff may dismiss or remove from the service any person subject to this Act, other than an officer.

(2) (The Chief of the Army Staff) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.

(3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under the command other than an officer or a junior commissioned officer.

(4) Any such officer as is mentioned in Sub-section (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer under his command.

(5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.

(6) The commanding officer or an acting non-commissioned officer may order him to revert to his permanent grade as a non- commissioned officer,or if he has

no permanent grade above the ranks, to the ranks.

(7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder.

12. Rule 17 of the Army Rules, 1954 reads as under;

Rule 17. Dismissal or removal by Chief of Army Staff and by other officers.-Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under Sub-section (1) or Sub-section (3) of Section 20, unless he has been informed of the particulars of the cause of action against him allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service:

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may, after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government.

13. Sub-section (3) of Section 20 of the Army Act, 1950, provides that an officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer.

14. Rule 17 of the Army Rules, 1954 provides that where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by criminal court or a court-martial, no person shall be dismissed or removed under Sub-section (1) or Sub-section (3) of Section 20, unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any person he may have to urge against his dismissal or removal from the service.

15. In the show-cause notice, what has been stated is that on the summary of evidence the Lt. Col. No. 4 Trg. BN (MT), ASC Centre (South), Bangalore, is satisfied that your detention in service is undesirable. Therefore, he has directed that you should be so informed and called upon to submit in writing as to why your service be not terminated in terms of Army Act, Section 20(3) read with Army Rule 17. As stated earlier, on the basis of the summary of evidence the D.J.A.G. has furnished his opinion to the effect that on the basis of the evidence available that it is not possible to establish misconduct u/s 64(e) of the Act. In view of this advise, no further proceedings has taken place by the Commanding Officer. If that is so, the disciplinary authority ought not to have invoked Section 20 of the Act and Rule 17 of the Rules in the Administrative side only because it is not possible for the Commanding Officer to establish the Charge on the basis of the summary of evidence.

16. It is an admitted fact that the Petitioner is a regular employee in the Office of the Department of Defence. The learned Additional Central Government Standing Counsel submitted that as per the Circular dated 26th July, 1984 if any employee is indulged in undesirable activities, it is open for the Department to initiate proceedings in the Administrative side and therefore the proceedings initiated under Rules 22 and 23 of the Rules will not be a bar to take action against the employee or person concerned in the Administrative side by invoking Section 20 of the Act and Rule 17 of the Rules. A copy of the circular is available in the records produced by the learned Additional Central Government Standing Counsel for my perusal. Paragraph 3 of the said circular reads as under;

Para 3. Administrative action would become necessary in the following circumstances;

(a) Where adequate evidence exists to prove that the person concerned has committed an offence under the Indian Official Secrets Act, but a trial by court-martial is time barred under Army Act, Section 122.

(b) Where there is a strong suspicion of the individuals involvement in espionage activities but a trial by Court-martial is not resorted to due to inadequacy of evidence against the accused.

17. The said Circular further states that where there is strong suspicion of the individual's involvement and adequate evidence is not available to secure conviction, the complete case will be forwarded to Military Intelligence Directorate with the recommendation of the formation of commanders in the chain. In the instant case, there is no such recommendation to the Military Intelligence Directorate on the ground that there is strong suspicion in the Petitioner's involvement and there is no adequate evidence available to secure conviction. Further, it is not the case of the Respondents that there is any evidence exists to prove that the Petitioner has committed any offence under the Indian Officials Secrets Act, or he has been involved in espionage activities. If that is so, as per the circular of the Department itself there cannot be any action in the Administrative side invoking Section 20 of the Act read with Rule 17 of the Rules. The allegation against the Petitioner is that he has committed misconduct as provided u/s 64(e) of the Act. When such being the case, since the Petitioner is a permanent employee of the Department, the authority if it is satisfied on the summary of evidence ought to have made application seeking for reference to the Court-martial, if there is any material or evidence available so as to establish the charge against the Petitioner by framing necessary a charge. The legal adviser of Ministry of Defence (Respondent-1 herein) is also of the opinion that there is no material or sufficient evidence so as to establish a charge. If that is so, I am of the considered view that the disciplinary authority is not right in invoking Section 20 of the Act read with Rule 17 of the Rules in the Administrative side, only because it is not possible for the disciplinary authority to establish the charge as against the Petitioner. Therefore, the impugned order of dismissal is liable to be quashed. Hence, I pass the following:

ORDER

The writ petition is allowed. Rule made absolute.

- a) The impugned order of dismissal dated 6.6.1992 is hereby quashed.
- b) The Respondents are directed to reinstate the Petitioner into service.
- c) The Petitioner is entitled for all consequential benefits.