

(2011) 11 GAU CK 0026
In the Gauhati High Court
Case No : Writ Petition (C) No. 96 of 2001

Sri Subrata Kar

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 15-11-2011

Acts Referred:

Tripura State Rifles (Discipline, Control, Service Conditions etc.) Rules, 1986 — Rule 46
Tripura State Rifles (Recruitment) Rules, 1984 — Rule 15
Tripura State Rifles Act, 1983 — Section 10

Citation : (2011) 11 GAU CK 0026

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : S. Deb, Mr. S.B. Debnath, for the Appellant; A.S. Lodh, Addl. GA, Tripura, for the Respondent

Final Decision : Dismissed

Judgement

1. By means of this writ petition, filed way back in 2001 and to be precise on 19.2.2001, the petitioner has challenged the Annexure-3 order dated 6.7.1988, by which he was discharged from service as per provisions of Para 15(1) of the Tripura State Rifles (Recruitment) Rules, 1984. Be it stated here that at the time of such discharge from service, the petitioner was on probation and no order of confirmation of service was passed. As the impugned order itself reflects he was in unauthorized absence from duty w.e.f. 8.4.1988 to 5.7.1988 and that his performance was not satisfactory.

2. Long 13 (thirteen) years after the said order of discharge, the petitioner filed the instant writ petition without furnishing any explanation as to the cause of such delay. In paragraph 13 of the writ petition, he has stated thus :-

Your petitioner however in the desire of having his too ends meet prayed to the Authority including the Hon'ble Home Minister, Govt. of Tripura for favour of consideration so that he could serve with his poor family.

3. According to the petitioner, the impugned order of discharge is illegal and arbitrary and not sustainable in law.

4. As per the own showing of the petitioner, he was absent from duty w.e.f. 7.4.1988. However, he seeks to explain such absence on the ground of purported illness. According to the statement made in the writ petition, on his return from absence, he was handed over a letter dated 21.4.1988 issued by the Commandant by which he was apprised of his unauthorized absence and desertion from unit lines. By the said letter, he was directed to join duties within 15 days. He was also intimated that upon failure to do so, same would lead to a cognizable offence under the Tripura State Rifles Act, 1983 and that he would be declared as a deserter.

5. The petitioner did not comply with the directions contained in the said letter and instead made a representation on 8.7.1988 i.e. after about 3 (three) months of the said communication dated 21.4.1988 purportedly appraising the authority the reasons for his unauthorized absence. By the said communication, he also appraised the authority about his willingness to join duty within one week from 8.7.1988.

6. According to the petitioner, he was expecting the sympathetic consideration of his prayer. However, by order dated 6.7.1988 issued by the respondent No.2, he was discharged from service w.e.f. 6.7.1988 on account of desertion and unsatisfactory service. The details of the impugned order dated 6.7.1988 have been indicated above.

7. It is the plea of the petitioner since he was given an opportunity to join duties, the respondents ought not to have passed the order discharging him from service and instead taking a sympathetic view of the matter, should have allowed him to join duties. It is the case of the petitioner that he should have been given an opportunity of being heard and at-least a notice before discharging him from service. The petitioner has also stated about his purported quasi-permanency in service.

8. As stated above, there is not even an iota of explanation regarding the delay which is 13 years in filling the writ petition. Being confronted with the said situation, Mr. S. Deb, learned senior counsel for the petitioner has referred to the statement made in paragraph 13 of the writ petition, quoted above. The purported representation was made on 28.2.1990. Even if the said representation is taken into account then also there is unexplained delay of 11 (eleven) years in filling the writ petition.

9. The respondents have filed their counter affidavit, in which it has been stated that the petitioner was enrolled as Rifleman on 2.5.1985. It has also been stated that the petitioner absented himself from duties without any intimation w.e.f. 7.4.1988. The respondents have pointed out that such conduct on the part of the petitioner was breach of discipline requiring rigorous punishment u/s 10(f) of the said Act of 1983.

10. Referring to Rule 15 of the TSR Rules, the respondents have stated that a member of the Tripura State Rifles remains on probation for 3 (three) years, during which he is liable to be discharged. Though the petitioner remained unauthorized absent but instead of imposing any penalty he was given a chance to report for duty but he did not comply with the same. It has also been stated that the petitioner failed to make any appeal to the appellate authority against the impugned order as provided for under Rule 46 of the Tripura State Rifles (Discipline, Control, Service Conditions, etc) Rules, 1986.

11. The respondents have also stated that the petitioner not only did not report for duty but also did not produce any medical certificates relating to his purported illness. It was in such circumstances, the petitioner was discharged from service by way of Discharge Simplicitor.

12. The respondents have specifically taken the plea of delay and laches on the part of the petitioner i/by stating that the writ petition is not maintainable because of un-explained delay of 13 years in approaching the Court. The respondents have also enclosed the statement (Annexure-R/2) relating to the service of the petitioner to show that he was habitual absentee from duties and that his service was not satisfactory. It was in such circumstances, he had to be discharged from service during probation.

13. Mr. Deb, learned senior counsel for the petitioner has submitted that although there was delay in approaching the Court but when the impugned order of discharge is prima-facie illegal and without jurisdiction, such delay needs to be condoned. He further submits that since the impugned order of discharge depicts stigma and is not a discharge simplicitor, the same is liable to be interfered with. He has also placed reliance on the following decisions in support of his arguments :

- 1) Samsher Singh Vs. State of Punjab and Another,
- 2) Corporation of the City of Nagpur, Civil Lines, Nagpur and another Vs. Ramchandra and others,
- 3) (2001) 2 SCC 259 (K. Thimmappa Vs. Chairman, Central Board of Directors (SBI).
- 4) Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others,
- 5) Indu Bhushan Dwivedi Vs. State of Jharkhand and Another,
- 6) Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another,
- 7) Union of India (UOI) and Others Vs. Mahaveer C. Singhvi,

14. Countering the above arguments, Mrs. A.S. Lodh, learned State Counsel has argued that the writ petition is misconceived. She submits that the writ petition is liable to be dismissed both on the ground of delay and laches as well as on

merit. She submits that the impugned order having been passed during the period of probation because of unsatisfactory service of the petitioner, the same is required to be sustained.

15. I have considered the rival submissions made by the learned counsel for the parties and the materials on records.

16. The decisions to which Mr. Deb, learned senior counsel for the petitioner has referred to are primarily on the points of approach of the writ Court in the matter of delay and latches and the test towards determining as to whether termination of service of a probationer is simplicitor or punitive. Needless to say that ratio of any decision will have to be understood in the background of the facts of each and every case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it (See Lord Halsbury in *Quinn V. Leathem*, 1901 AC 495).

17. While it is true that no limitation has been prescribed towards exercising writ jurisdiction, however, the basic principles relating to limitation cannot altogether be ignored. In the instant case, the petitioner was discharged from service way back in February, 1988 and he filed the writ petition on 19.2.2001 i.e. after 13 (thirteen) years, taking a chance for favorable consideration. However, in the process there is not an iota of explanation as to what has caused the delay. Paragraph 13 of the writ petition quoted above and on which the learned counsel for the petitioner has much emphasized, does not in any manner explain the delay. In such a situation, in my considered view, the writ petition is liable to be dismissed on the ground of delay and latches.

18. None of the decisions on which the learned counsel for the petitioner has placed reliance mandates that under all circumstances, such glaring delay and latches in approaching the writ Court should be ignored. Many developments must have followed after the discharge of the petitioner from service long 13 years back. The post must have also been filled up giving rise to a third party right. It is in such circumstances, the delay attributable to the petitioner will have to be considered and cannot be ignored. As has been held by the Apex Court in *Ratan Chandra Sammanta and others Vs. Union of India and others*, delay itself deprives a person of his remedy available in law. A person who has lost his remedy by lapse of time, loses his right as well. As in the instant case, in that case also, the petitioner had approached the Court after about 15 years of retrenchment, claiming similar relief like that of other retrenched employees. Dismissing the writ petition on the ground of delay, it was held that even if the petitioners had some right, they had lost the same, due to delay.

19. Leaving aside the question of delay and latches on the part of the petitioner in approaching the Court, even on merit also he is not entitled to any relief. Although, the learned counsel for the petitioner seeks to argue that the impugned order is punitive in nature but the same is not so as would be evident from the order itself. The impugned order dated 6.7.1988 was passed

discharging the petitioner from service, recording the fact of desertion from duty w.e.f. 6.7.1988 and the unauthorized absence for the period in question. The order also speaks of non-satisfactory service performance. Mere mentioning of un-satisfactory service performance cannot be said to be stigmatic.

20. The Apex Court in the case of Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, explained the meaning of stigma in paragraph 8 of the judgment as follows :-

According to the Webster's New World Dictionary it is something that detracts from the character or reputation of a person, a mark sign, etc. indicating that something is not considered normal or standard. The Legal Thesaurus by Burton gives the meaning of the word to be blemish, defect disgrace, disrepute imputation, mark of disgrace of shame. The Webster's Third New International Dictionary gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary "stigma" is a matter for moral reproach.

21. In several cases and in particular in The State of Orissa and Another Vs. Ram Narayan Das, the Apex Court held that the use of the word "unsatisfactory work and conduct in the termination order will not amount to a stigma". In that case, the Apex Court held that an order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature. The Apex Court further observed that the fact of the holding of an enquiry is not decisive. What is decisive is, whether the order is by way of punishment. In the instant case the termination of services of the petitioner was not preceded by any full-fledged enquiry making the same to be the foundation of termination of the services of the petitioner. The appointing authority itself noticed the shortcomings and poor performance of the petitioner and it was on that basis her services was terminated. Thus it was the motive and not the foundation on the basis of unsatisfactory performance which led to termination of services of the petitioner. Such a termination cannot be said to be stigmatic.

22. The Apex Court in the case of Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, , held that the language used in the order of termination, "work and conduct has not been found to be satisfactory" fall within the class of non-stigmatic orders of termination. In that case also the services of the appellant was terminated during the period of probation on ground of "work and conduct" being not satisfactory. Referring to various decisions of the Apex Court and tracing back the history of such cases in which the services of a probationer is terminated, the Apex Court held that an employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. The Apex Court observed that whenever a

probationer challenges his termination, the court's first task will be to apply the test of stigma or the "form" test and if the order survives this examination, the "substance" of the termination has to be found out. The Apex Court further observed that generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for job, whether by reason of misconduct or ineptitude whatever the language used in the termination order may be. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Equally an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order.

23. I may also gainfully refer to the decision of the Apex Court as reported in Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, In that case also the services of the probationer was terminated on the basis of the opinion formed by the Committee set up for evaluation of the general performance of the probationer. The committee was of the opinion that the probationer's job proficiency was not upto the mark. Making the same explicit in the order of termination, the services of the probationer was dispensed with. The Apex Court held that there can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. The Apex Court pointed out that if the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, normally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged. Similar view has been expressed in Municipal Committee, Sirsa Vs. Munshi Ram,

24. The facts narrated in the writ petition speak for it. The petitioner has admitted the fact of unauthorized absence from duty. As has been held by the Apex Court in the case of Channabasappa Basappa Happali Vs. The State of Mysore, and (2004) 6 SCC 325 (Vice Chairman, KVS Vs. Girdharilal Yadav), admitted facts need not be proved. It will have to be borne in mind that the petitioner was a member of the disciplined force. As has been held by the Division Bench of this Court in Union of India (UOI) and Others Vs. Mithilesh Singh, , affirmed by the Apex Court in Mithilesh Singh Vs. Union of India (UOI) and Others, unauthorized absence from duty on the part of a member of the disciplined force cannot be viewed leniently. In that case, the delinquent was imposed with the penalty of removal from service on charge of unauthorized absence from duty. When the same was interfered with by the learned Single Judge, the Division Bench of this Court reversed the same upholding the order of removal from service and the same was affirmed by the Apex Court.

25. For all the aforesaid reasons, I do not find any merit in the writ petition and

accordingly it is dismissed leaving the parties to bear their own costs.