
(2013) 09 GAU CK 0030
In the Gauhati High Court
Case No : Writ Petition (C) 1118 of 2008

Sri Sudhangshu Sarma

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 10-09-2013

Acts Referred:

Constitution of India, 1950 — Article 311
Police Act, 1861 — Section 7

Citation : (2013) 09 GAU CK 0030

Hon'ble Judges : Tinlianthang Vaiphei, J

Bench : Single Bench

Advocate : N.N. Karmakar and Ms. S. Baruah, for the Appellant; S. Saikia, Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Tinlianthang Vaiphei, J.—The legality of the impugned order dated 23.4.99 issued by the Assam Commandant Battalion (Respondent No. 2) discharging the petitioner from service w.e.f. 12.1.99 is called into question in this writ petition. The case of the petitioner is that he was appointed as AB Constable in the Assam Commandant Battalion, Kahilipara on 16.9.98. According to him, on 30-12-98, in the course of training, he fell sick. Though he orally reported his sickness through his immediate superior, this superior did not send him to a hospital. This led him submit an application on 7.1.99 to the respondent No. 2 for granting him medical leave, but the Officer-in-Charge, Training Camp, Mandakata did not accept his application whereafter he left for home on 12-1-1999 and underwent medical treatment at Diphu Civil Hospital, Diphu on 13.1.99. The respondent No. 2 then by his letter dated 30.1.99 asked the petitioner to resume his duty within 7 days from the date of receipt of his letter. Though the petitioner received the letter on 14.2.99, he, however, sent a telegram to the respondent No. 2 on 16-2-1999 stating that he was not yet fit for resuming his duty. On receipt of the letter, the petitioner approached the respondent No. 2 on 23.2.99 for resuming his duty, but he was not allowed to do so. The respondent again by his letter

dated 20-2-1999 asked the petitioner to join the Unit within seven days, failing which departmental action would be taken against him. On receipt of the said letter, he appeared before the respondent No. 2 on 23-2-1999 to resume his duty as he had by then become fit: he also procured a certificate of fitness from a Medical Practitioner who had treated him. He was waiting for a favorable order all day long in the office compound of the respondent No. 2. But when such order was not forthcoming, he returned home.

2. It would appear that on 7-3-99, he received the show cause notice dated 23.2.99 from the respondent No. 2 along with a statement of allegation that he had deserted from training 12-1-1999 and to show cause as to why the penalties prescribed in Section 7 of the Police Act should not be inflicted upon him for his gross misconduct, intentional misbehavior and indiscipline conduct. The petitioner thereafter submitted his written statement of defense by registered post on 15.3.99. However, on 1-8-2003, he was surprised to discover a copy of the order dated 23-4-1999 discharging him from service in the Letter Box used by the Piphu Police Reserve: he was never served a copy of such order at any time. As a result, he could not file departmental appeal against the impugned order as by the time he found it, the appeal had become time-barred. He then filed WP(C) No. 6354/2003 before this Court on 13.8.2003 challenging his discharge order, but he withdrew the same on 5.3.2008 with liberty to file a fresh case. This is how this writ petition came to be filed by the petitioner.

3. The contention of Mr. NN Karmakar, learned counsel for the petitioner is that once the petitioner, in compliance with the show cause notice dated 20-2-99 (Annexure-4), reported himself for duty on 23.2.99 before the respondent No. 2 i.e. within well before the expiry of seven days, no departmental action could have been taken against him for his absence from duty for the period preceding the notice: a true construction of the notice could only mean that his absence from duty for the pre-notice period should stand condoned. The stance taken by the learned counsel for the petitioner is that if there is any lapse on his part such as desertion from headquarters after he reported for duty, any penalty for such misconduct could be imposed only after holding an inquiry. The learned counsel for the petitioner, therefore, submits that the impugned order of discharge is in violation of principles of natural justice and is, therefore, liable to set aside for this reason only. The learned counsel for the petitioner has also raised many other contentions which I do not find it necessary to deal with for disposal of this writ petition. Court does not decide more than what is necessary. On the other hand, Mr. S Saikia, learned State counsel, has supported the impugned order and submits that the petitioner is a habitual absentee from duty, and he never took permission for his long absence from duty and the fact that he was sick and was under medical treatment cannot be a substitute for obtaining leave of absence, medical or otherwise. According to the learned State counsel, the impugned order has been rightly issued by the respondent No. 2 and no interference by this Court is called for. He contends that any interference by this Court in the impugned order will send a wrong signal to the police personnel, who belong to a

disciplined force. The learned State counsel, therefore, submits that this writ petition has no merit, and liable to be dismissed.

4. Before proceeding further it will be apposite to refer show cause notice dated 23.2.99, which is as below:

You were found absence from your duty w.e.f. 2.2.99 with out leave or permission from the competent authority and in this connection, you are asked to join in this unit within 7 (seven) days vide this office memo No. M/No.c/DU/R/PF/891 Dt. 30.1.99 but, you have failed to report your joining nor any intimation to this office till date.

You are therefore, again asked to resume your duty within 7 (seven) days on receipt of this communication failing which departmental action will be taken against you."

"You are hereby to show cause U/s. 7 of Police Act (Act victim girl of 1861) read with Rule 66 of A.P. Manual Part-III and Article 311 of the Constitution of India as to why any of the penalties prescribed therein should not be inflicted on you on the charges based on the statement of allegation enclosed herewith.

That while you were undergoing recruit basic training commencing from 15.1.99 at Manik-Nagar you deserted yourself from training as well as from your duty w.e.f. 12.1.99 without any authority. As you remained untraced notice was issued vide this memo No. CDO/R/PF/891 dt. 30.1.99 asking you to resume duty within 7 (seven) days, but you failed to resume duty till today.

Your above act tantamount to gross misconduct intentional misbehaviour and indisciplined conduct which makes you unfit to remain in this disciplined force.

You should submit your written statement in defence within 10 (ten) days from the date of receipt of this communication provided you do not intend to inspect the documents which have relevance in this respect. In case you intend to inspect those documents you should write to the undersigned for the same within 7 (seven) days from the date of receipt of this communication and submit you explanation thereafter within 10 (ten) days from the date of completion of the inspection.

Your written explanation stating whether you desire to be heard in person should be submitted to the undersigned within the period specified above failing which the proceeding will be disposed off ex-parte.

5. There is no dispute that in compliance with the aforesaid notice, the petitioner had duly appeared before the respondent No. 2 on 23-2-1999 to report for duty. The petitioner was apparently under the impression from the tone and tenor of the notice that if he would resume duty within 7 days, no departmental action would be taken against him. He, accordingly, reported to the respondent No. 2 and explained the reasons of his absence by producing medical fitness report. Instead, the impugned order was issued instead of allowing him to resume duty

as evident from the impugned order, which is at Annexure-7 to the writ petition and is also reproduced herein above:

I have gone through the enquiry report of the E.O. and all the records of this D/P No. 4/99 drawn up against R/C 350 Sudhangshu Sarmah.

He was appointed temporarily as AB Constable in Commando Battalion on 16.9.98. Before getting confirmed into the service and while undergoing 78th batch R/C basic training at Mandakata the delinquent R/C 350 Sudhangshu Sarmah deserted the training Centre on 12.1.99 without authority. Accordingly he was issued notice of unauthorized absence vide this office memo No. CDS/R/PP/891 dtd. 30.1.99 and was asked to resume duty within 7 (seven) days. He however failed to resume duty within stipulated time.

Accordingly on 19.2.99 drawing up of D/P against him was approved and he was issued a show cause notice vide this memo No. CDO/R/DP/98/1722 dtd. 23.2.99. He however failed to reply to this show cause notice till date. Accordingly it was decided to initiate the proceeding ex-parte on 12.3.99, since he failed to submit reply to show cause notice and failed to report at Bn. H.Q. despite being cautioned through O.C., Diphu P.S. (vide this office Lt. No. CDO/R/PF/pp/2083-85 dtd. 6.3.99 to O/C Diphu P.S.) to do so by 10.3.99 positively. In the meantime although he appeared at Bn. H.Q. on 23.2.99, submitted his joining report but again deserted the Bn. H.Q. the very next day on 24.2.99 without permission or leave. This despite the fact that the reported his joining after getting declared medically fit.

It is established from the records of the D/P that delinquent R/C 350 Sudhangshu Sarmah intentionally indulged in gross misconduct and indisciplined behavior by deserting the training camp for a such long time, thus throwing into disarray the overall discipline of the training center affecting the training of the course itself.

It is also clear that keeping such indisciplined person in Police Force is undesirable, and which will adversely affect the discipline of the force.

Under the circumstance and keeping all the above in view the following order is passed.

R/C 350 Sudhangshu Sarmah of Commando Battalion is discharged from service w.e.f. 12.1.99.

6. From the impugned order, it is seen that the respondent No. 2 has recorded that the petitioner again deserted the Bn. H.Q. on 24.2.99 i.e. the day immediately after he reported for duty, without permission or leave. In my opinion, once the petitioner did comply with the notice dated 20-2-1999 issued by the respondent No. 2 to report for duty and had duly reported for duty before the expiry of seven days given therein, the question of taking action against him for his absence from duty prior to 23-2-1999 no longer arose. If at all, the respondent No. 2 found that the petitioner was guilty of unauthorized absence from duty after 23.2.99 onwards, then he could take action against him only

after issuing another show cause notice to him and after holding a departmental enquiry for his alleged unauthorized absence after 23.2.99. After all, the petitioner is a regular employee and, as such, he is entitled to the principles of natural justice before any punitive action is taken against him. In my opinion, after the petitioner reported for duty on 23.2.99 in compliance with the notice dated 20-2-1999 issued by the respondent No. 2, his absence from thereafter prior to 23-2-1999 stood condoned or deemed to have been condoned. After all, the notice asking him to report for duty within seven days failing which departmental action would be taken against him can be construed to be a promissory estoppel. Once the petitioner reported for duty in compliance with such notice, the respondent No. 2 is, therefore, estopped from taking departmental action against him. The impugned action of the respondent No. 2 is a case of bad faith on the part of the respondent No. 2, which calls for the interference of this Court. For the reasons stated in the foregoing, this writ petition is allowed. The impugned order dated 23.4.99 is hereby quashed. The respondent No. 2 shall re-instate the petitioner to his post within a period of 4 weeks from the receipt of this judgment. However, it shall be open to the petitioner to initiate a fresh proceeding against the petitioner in accordance with law. No costs.