
(2002) 09 DEL CK 0160
In the Delhi High Court
Case No : C.W.P. No. 2497 of 2001

Surinder Singh Sihag

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-09-2002

Acts Referred:

Army Act, 1950 — Section 48, 48(2), 80, 81

Army Rules, 1954 — Rule 13

Constitution of India, 1950 — Article 14, 21, 300A, 309

Citation : (2002) 100 DLT 705 : (2003) 1 SLJ 154

Hon'ble Judges : S.B. Sinha, C.J.; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : K. Digamber Singh, for the Appellant; Jayant Bhushan and Anil Dutt, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—Whether red-ink entries awarded to a person by way of reprimand and/or imposition of sentence on earlier occasion itself would be sufficient to discharge an employee from service is the question involved in this writ petition.

FACTS:-

2. The petitioner joined Indian Army on or about 07.10.1985. After obtaining requisite training, he was posted to Headquarter 2, Mountain Division Provost Unit and served there till March, 1990. Some time in September, 1987, he was promoted to the rank of L/Nk. Thereafter from March, 1990 to November, 1999, he worked at various stations such as HQ Maharashtra and Gujarat Area, HQ 7 Mountain Division, HQ Victor Force in J&K, and HQ 1 Armour Division at Patiala, etc.

2.1 On or about 13.09.1999, he was served with a show cause notice indicating the details of five Red Ink entries incurred in his service record, which are as

follows :-

- (a) Severe Reprimand 16 Jan 95 AA Sec 48
- (b) Deprived of Appt of L/Nk. 03 Feb 95 AA Sec 48
- (c) Severe Reprimand 10 Feb 99 AA Sec 48
- (d) Severe Reprimand 08 Mar 99 AA Sec 48
- (e) 28 days RI 17 Aug 99 AA Sec 39 (a)

The aforesaid show-cause notice dated 13.09.1999 was replied by him on 15.09.1999.

2.2 However on or about 01.12.1999, his services were terminated and a certificate on termination of service dated 01.12.1999 was issued.

2.3 Thereafter from January, 2000 to March, 2001, allegedly he made personal liaison-making attempts to be reinstated in service and/or the sanction of his pension.

2.4 However, the respondent No. 3 intimated the petitioner vide letter dated 02.03.2000 only about the release of Rs. 64,441/- on account of AFPP Fund.

In the aforementioned situation, the petitioner has filed the present writ petition.

3. The contentions of the petitioner in this writ petition are as under :-

- (i) The show-cause notice issued by the Brigadier is contrary to the provisions of the Army Act, 1950 and the Army Rules, 1954;
- (ii) As the orders awarding punishment had been passed by authorities lacking inherent jurisdiction, the same being nullities; no action pursuant thereto or in furtherance thereof can be taken;
- (iii) The impugned order being vocative of the procedure for the removal of undesirable and inefficient JCOs, WOs and OR as laid down in the circular letter dated 28.12.1988 are liable to be set aside;
- (iv) The show-cause notice dated 05.11.1999 having not been received as would appear from the petitioner's reply dated 13.09.1999, the impugned action must be held to be bad in law.

4. The contention of the respondents, on the other hand, is that as despite severe reprimands; the petitioner did not improve his performance, the impugned order was passed.

5. Before adverting to the question involved in this writ petition, we may notice some of the relevant provisions of the said Act and the Rules framed there under.

Section 48 of the said Act reads thus :-

"48. Intoxication.-

(1) Any person subject to this Act who is found in a state of intoxication, whether on duty or not, shall, on conviction by court-martial, if he is an officer, be liable to be considered or to suffer such less punishment as is in this Act mentioned; and, if he is not an officer, be liable, subject to the provisions of Sub-section (2), to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

(2) Whether an offence of being intoxicated is committed by a person other than an officer when not on active service or not on duty, the period of imprisonment awarded shall not exceed six months."

Section 80 of the said Act is as under :-

"80. Punishments of persons other than officers, junior commissioned officers and warrant officers.-

Subject to the provisions of Section 81, a commanding officer or such other officer as is, with the consent of the Central Government specified by the (Chief of the Army Staff) with the consent of the Central Government, may, in the prescribed manner proceed against a person subject to this Act otherwise than as an officer, junior commissioned officer or warrant officer who is charged with an offence under this Act and award such person, to the extent prescribed, one or more of the following punishments, that is to say,-

- (a) imprisonment in military custody up to twenty-eight days;
- (b) detention up to twenty-eight days;
- (c) confinement to the lines up to twenty-eight days;
- (d) extra guards or duties;
- (e) deprivation of a position of the nature of an appointment or of corps or working pay, and in the case of non-commissioned officers, also deprivation of acting rank or reduction to a lower grade of pay;
- (f) forfeiture of goods service and good conduct pay;
- (g) severed reprimand or reprimand;
- (h) fine up to fourteen days' pay in any one month;
- (i) penal deductions under Clause (g) of Section 91;
- (j) any prescribed field punishment up to twenty-eight days, in the case of a person on active service."

The relevant portion of Section 81 referred to in Section 80 is in the following terms :-

"81. Limit of punishments u/s 80.-

.....

(5) The punishment specified in Clause (g) of the said section shall not be awarded to any person below the rank of a non-commissioned officer."

The relevant portion of Rule 13 of the said Rules is in the following terms :-

"13. Authorities empowered to authorize discharge.-

.....

Category	Grounds of discharge	Competent Authority to authorize discharge	Manner of discharge
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III.(v) All other classes of discharge
Brigade/Sub Area Commander The Brigade of Sub Area Commander before ordering the discharge shall, if the circumstances of the case permit Give the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge.

6. A perusal of the aforesaid provisions would clearly go to show the difference in punishments in different ranks of Officers of the Army. The aforesaid provisions furthermore clearly show that the punishment cannot be awarded upon an officer below the rank of a Non-Commissioned Officer.

7. The first show-cause notice issued upon the petitioner dated 13.09.1999 is in the following terms :-

"Pro/7774829/SSS/A 1 Armed Div Pro Unit C/o. 56 APO

No. 7774829 K/Sep/MP 13th Sept. 99 Surender Singh Sihag 1 Armd Div Pro Unit C/o. 56 APO
ISSUE OF SHOW CAUSE NOTICE FOR DISCHARGE AS UNDESIRABLE / INEFFICIENT PERSONNEL FROM SERVICE

1. On perusal of your record of service, it is noticed that the following "Red Ink Entries" have been awarded to you during your 13 years 10 months of service :-

S.No.	Punishment awarded	Date of Punishable	Section Act Army Concerned
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(a) Severe Reprimand 16 Jan 95 AA Sec 48

(b) Deprived of Appt of L/Nk. 03 Feb 95 AA Sec 48

(c) Severe Reprimand 10 Feb 99 AA Sec 48

(d) Severe Reprimand 08 Mar 99 AA Sec 48

(e) 28 days RI 17 Aug 99 AA Sec 39 (a)

2. It is evident from your record of service that you are a habitual offender, indulge in excessive drinking even while on duty, lacking interest in service and have undesirable habits. Despite of so many warning, advise and punishments, you have failed to improve.

3. In view of the above, please show cause as to why you should not be discharged from service under the provisions of Army Rule 13 (III)(v) and AG's

Branch, Army HQ letter No. A/13210/159/AG/PS 2(c) dt. 28 Dec. 88.

4. Your reply should reach this office by 16th Sep. 99.

Sd/-

(Ashok Kumar)

Col

CO"

The aforementioned officer indisputably was not authorised to issue the said notice.

8. The petitioner in answer to the said notice by his letter dated 15.09.1999 stated :-

"Dated: 15.9.1999.

To

Commanding Officer

1 Armd Div Pro Unit

C/o 56 APO.

Sub: ISSUE OF SHOW CAUSE NOTICE FOR DISCHARGE AS UNDESIRABLE / INEFFICIENT PERSONNEL FROM SERVICE.

Sir,

Reference your show cause letter No. 7774829/ SSA/A dated 13th Sep. 1999.

I beg to submit that I have served in the Army for a period of 14 years. Though the punishments awarded to me are under Army Act Section 48 which is for intoxication. Sir, I have left my drinks all together and assure you that I shall not be consuming the rationed free issue of rum as long as I am in service. I have never consumed more than rationed Rum which was issued to me on issue days Along with other troops:

In view of the above I may kindly be allowed to serve the balance of service of three years to complete my 17 years of colour service for which I will be ever grateful sir.

Your faithfully

(Surendar Singh Sihag)

No. 7774829 K Sep/MP"

9. However, it appears that without rescinding the earlier notice, Brigadier Off. GOC by a letter dated 05.11.1999 issued a show-cause notice, which is in the following terms:-

"1. On perusal of your record of service, it is noticed that the following punishment (Red ink entries) have been awarded to you during your 13 years and 10 months of service:-

S.NO. Punishment awarded Date of Punishment Offence Committed

(a) Severe Reprimand 16 Jan 95 under Sec 48 of A A

(b) Deprived of Appt of L/Nk. 03 Feb 95 - do -

(c) Severe Reprimand 10 Feb 99 -do-

(d) Severe Reprimand 08 Mar 99 - do -

(e) 28 days RI 17 Aug 99 Under Sec 39 (a) of A A

2. It is evident from your record of service that you are a habitual offender. You indulge in excessive drinking even while on duty. You lack interest in service and have undesirable habits. Despite many warning, advise and punishments, you have failed to improve.

3. In view of the above, please show cause as to why you should not be discharged from service under the provisions of Army Rule 13 (III)(v) and AG's Branch, Army HQ letter No. A/13210/159/AG/PS 2(c) dt. 28 Dec. 88.

4. Your reply should reach this office by 20 Nov. 99.

(DS Dhadwal)

Brig

Off GOC"

The said notice, thus, is identical in nature, which had been issued to the petitioner by an authority who was not competent therefore. The petitioner received the said notice on 18.11.1999. On the very same day, he asked for mercy on the ground that he had two children and prayed for taking a lenient view.

The contention of the petitioner, Therefore, to the effect that he has not received the notice issued by the Brigadier bearing No. 3582/A/A1 dated 05.11.1999 is not correct.

However, from his reply dated 18.11.1999, it appears that he proceeded on the basis that he had been replying only in relation to the earlier notice dated 13.09.1999.

Be that as it may, it is not in dispute that the order of discharge is required to be passed in the prescribed manner. Apart from prescribing the authorities, who are competent to issue such orders of punishment, procedures Therefore had not been laid down in the statutory rules.

10. In the aforementioned situation, the respondents were bound to follow the

procedures laid down in the circular letter dated 28.12.1988, the relevant provisions whereof are as under :-

"5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below :-

(a) Preliminary enquiry : Before recommending discharge or dismissal of an individual the authority concerned will ensure :-

(i) That an impartial enquiry (not necessarily a court of inquiry) has been made into the allegations against him and that he has had adequate opportunity of putting up his defense or Explanation and or adducing evidence in his defense.

(ii) That the allegations have been substantial and that the extreme step of termination of the individual's service is warranted on the merits of the case."

.....

(d) Action by competent authority : The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is warranted, he should direct that a show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individuals. The allegations must be specific and supported by sufficient details to enable the individual to clear understand and reply to them. A copy of the proceedings of the enquiry held in the case of ... also be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.

.....

Note :

1. As far as possible, JCO, UO and Dr. awaiting dismissal orders will not be allowed to mix with other personnel.

2. Discharge from service consequent to four red ink entries is not a mandatory or legal requirements. In such case Commanding Officer must consider the nature of offences for which each red ink entry has been awarded and not to 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. Such discharge should be approved by the next higher commander."

(Emphasis supplied)

From a bare perusal of the aforesaid Clause (a), it appears that a preliminary enquiry is required to be held. Thus, the delinquent employee must be given an adequate opportunity of putting his defense or Explanation or adducing evidence in support of his case. The allegations against him must be substantial. Extreme step of termination of the individual's service is warranted only upon considering the merit of each case.

Recommendations for dismissal or discharge is required to be forwarded to the competent authority, whereupon the intermediate authorities must consider the case in the light what is stated in Clause (a) above.

Only upon receipt of the show-cause notice action thereupon can be taken and thereafter only the competent authority may pass final orders.

Note 2 appended to Clause (f) of paragraph 5 clearly spells out the procedures required to be followed. In the instant case, the procedures laid down have been given a complete go bye.

11. Right to receive salary is akin to the right of property as contained in Article 300A of the Constitution of India.

The Fundamental Right of Army personnel may be taken away by a law enacted by the Parliament, but they have the protection of Human Rights. There cannot be any doubt whatsoever that procedures laid down as far as possible should be followed.

12. We may notice that the Apex Court in D.K. Yadav Vs. J.M.A. Industries Ltd., has held that before terminating the services of an employee, the principles of natural justice are required to be complied with. It was held :-

"13. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, this Court held that right to public employment and its concomitant right to livelihood received protective umbrella under the canopy of Articles 14 and 21 etc. All matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, regulations or instructions having statutory flavour. They must be conformable to the rights guaranteed in Parts III and IV of the Constitution.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee / workman visits with civil consequences of jeopardizing not only his / her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee / workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and

Others, the Constitution Bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside."

13. It is not in dispute that an order of discharge casts a stigma. Having regard to 14 years of service rendered by the petitioner, he was otherwise entitled to pension. An order of discharge of service without following the procedure prescribed Therefore, in our opinion, Therefore, cannot be sustained. It is now trite he who carries the procedural sword must perish with it. (See *Vitarelli v. Seaton* (1959) 359 US 535 : 3 L. Ed. 2nd 1012).

14. In that view of the matter, we are of the opinion that although the petitioner had not in this writ petition disclosed about the receipt of the notice dated 05.11.1999, which, in fact, had been received by him on 18.11.1999, his writ petition cannot be dismissed only on that ground as contended by the learned counsel for the respondents. It appears from his letter dated 18.11.1999 that he was under a misconception. However, such a conduct on the part of the petitioner would not deprive him from obtaining a discretionary relief.

15. In *SPRY on Equitable Remedies*, Fifth Edition at page 5, referring to *Moody v. Cox* (1917) 2 Ch. 71 and *Meyers v. Casey* (1913) 17 C.L.R. 90 it is stated :-

"... that the absence of clean hands is of no account "unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". When such exceptions or qualifications are examined it becomes clear that the maxim that predicates a requirement of clean hands does not set out a rule that is either precise or capable of satisfactory operation. ..."

16. For the reasons aforementioned, we are of the opinion that the impugned order cannot be sustained, which is set aside accordingly. This writ petition is, Therefore, allowed without being any order as to costs.