
(2013) 12 J&K CK 0032
In the Jammu And Kashmir High Court
Case No : LPASW No. 63 of 2011

Union of India

APPELLANT

Vs

Suresh Kumar

RESPONDENT

Date of Decision : 11-12-2013

Acts Referred:

Citation : (2014) LabIC 702

Hon'ble Judges : M.M. Kumar, C.J;Hasnain Massodi, J

Bench : Division Bench

Advocate : Deepika Mahajan, CGSC, for the Appellant; B.S. Salathia and Ms. Meenakshi Salathia, for the Respondent

Final Decision : Dismissed

Judgement

Hasnain Massodi, J.—Letters Patent Appeal, on hand, is directed against judgment dated 08.10.2010 whereby learned Single Judge has allowed the respondent/writ petitioner's petition, set aside his discharge ordered vide order dated 09.11.2007 and directed appellant/respondent to reinstate him with all consequential benefits. The background facts need to be noticed, in the first place. Respondent/writ petitioner was enrolled in Army on 22.11.1995. He was initially posted in 8th Bn. J & K Light Infantry Regiment and thereafter deputed to 24th Rashtriya Rifles where he served for two years and participated in anti-insurgency operations in terrorist infested areas. He, after a brief interval was again sent on extra regimental duty to 42 Rashtriya Rifles. He resented his second posting to Rashtriya Rifles, because of stress he experienced while posted at 24 Rashtriya Rifles and combating militancy. He after his second deputation overstayed on leave. Though he reported back to his regiment 8th Bn

JAKLI, yet a few years after resumption of duty he was discharged from service vide order dated 09.11.2007. The reason given in the discharge

order was that respondent/writ petitioner's service, was no more required. His representation against the discharge order did not yield any result,

constraining him to invoke writ jurisdiction of this Court through writ petition being SWP No. 867/2008.

2. The case set up before the writ Court was that the discharge order impugned in the petition had been made in flagrant violation of principle of

natural justice; that it was made in disregard of the Army Act and Rules made thereunder and that he was not given a fair and reasonable

opportunity to explain that his absence from duty was not willful or deliberate. It was insisted that his overstay on leave and absence from duty was

attributable to the mental stress he suffered because of his active participation in anti-insurgency operations.

3. The appellant/respondent opposed the writ petition on the grounds that the discharge order impugned in the petition did not suffer from any

procedural irregularity and its judicial review was, therefore, not warranted. It was admitted that the respondent/writ petitioner was posted to 24th

Rashtriya Rifles on 26.11.1998 and reverted back to 8th JAKLI (Siachen) on disciplinary grounds and was again posted to 41st Rashtriya Rifles

on 20.03.2002. The respondent/writ petitioner was said to have unauthorizedly absented himself from duty and avoided to report to 8th Bn.

JAKLI (Siachen) or to 41st Rashtriya Rifles. The appellant/respondent insisted that as the respondent/writ petitioner was not dismissed but

discharged from service under Army Rule 13(3)III(v) on the ground services no longer required by the order of Commandant 268 Infantry

Brigade, the appellant/respondent was not required to stick to any particular time frame. The appellant/respondent admitting that the last

punishment was awarded to the respondent/writ petitioner on 07.07.2005 and the order of discharged passed after a gap of two years on

09.11.2007, pleaded that the delay in taking action was due to the operational commitment of the Battalion in Northern Areas and thereafter duties

as part of United Nation Mission in Sudan. The appellant/respondent insisted that the discharge order impugned was made on the basis of overall

disciplinary record of respondent/writ petitioner and having regard to Integrated HQ of Ministry of Defence (Army) Letter No.

41776/48/AG/DV-I(P) dated 07.04.2007 requiring discharge of personnel found habitual offenders and undesirable for retention in service after

four red ink entries. It was pointed out that a show cause notice was served on the respondent/writ petitioner, before his discharge was ordered

under rules and, therefore, he was left with no grievance as regards his discharge either on the ground that procedure was not adhered to or that he was not given a fair opportunity to explain his stand.

4. The writ Court vide judgment rendered on 08.10.2010, allowed the writ petition and set aside order dated 09.11.2007 whereby

respondent/writ petitioner was discharged from service under Rule 13(3)III(v) Army Rules, 1954. The writ Court noticed that the respondent/writ

petitioner after he rejoined his unit in March, 2004 did not indulge in any misconduct till his discharge on 09.11.2007 and took the view that

misconduct committed three years before the date of discharge, could not be used to throw out the respondent/writ petitioner. Furthermore, as the

misconduct alleged related only to absence from duty without leave, it, in the opinion of the Writ Court could not, be made basis for the discharge.

The fact that the respondent/writ petitioner had put in twelve years of service on the date of discharge, according to the writ Court ought to have

been considered by the competent authority while recommending and ordering respondent/writ petitioner's discharge.

5. The writ Court judgment is called in question in the present Letters Patent Appeal on the grounds that the writ Court while allowing the writ

petition did not notice Ministry of Defence (Army) letter dated 28.12.1988 and No. 41776/48/AG/DV-I(P) dated 07.04.2004 providing for

discharge of an army personnel under Rule 13(3)III(v) Army Rules, 1954, on the ground of being undesirable? for Army service. It is pleaded that

the respondent/writ petitioner even after four red ink entry marks recorded on 17.01.2002 was allowed to remain in service and discharged on

09.11.2007 after show cause notice was served on him and he afforded an opportunity to explain his stand. The respondent/writ petitioner is said

to have unauthorizedly remained absent from 24.06.2004 to 06.05.2005 for a period of 319 days and, therefore, rightly discharged from service

to maintain discipline.

6. Heard and considered.

7. Chapter IV, the Army Act 1950 lays down conditions of service of a person subject to the Act. Section 19, subject to other provisions of the

Act, gives power to terminate service of such person to the Central Government. In terms of Section 20 of the Act dismissal, removal or reduction

in rank may be ordered by the Chief of the Army Staff and by other officers identified therein. Section 22 deals with retirement, release or

discharge. It reads:-

22. Retirement, release or discharge. Army person subject to this Act may be retired, released or discharged from the service by such authority

and in such manner as may be prescribed.

8. Chapter III Army Rules, 1954 prescribes mode and manner in which dismissal, discharge, termination, release and retirement of such a person

may be effected. Rule 13 regulates discharge of a person subject to the Act. The discharge of Other Ranks (OR) can be ordered (i) on fulfillment

of the conditions of enrollment, (ii) on completion of period of service or tenure (iii) because the person subject to the Act, is found medically unfit

for further service or (iv) at request of such person. Rule 13(3)III(v) leaves room for discharge in other cases i.e. for reasons other than identified

in Rule 13(3)III(i) to (iv). Rule 13(3)III(v) is, thus, residuary in character open ended and brings within its sweep, all the grounds like misconduct

etc. that may warrant discharge of an Armed Forces Personnel.

9. The question arises as to, whether the power of the Officer identified in Rule 13, Army Rules, 1954 to order discharge is unguided, absolute,

unqualified and unbridled or the Armed Forces Personnel proposed to be discharged from service has any procedural rights before such discharge

is ordered. The answer obviously is an emphatic No. In the first place, Rule 13(3)III(v) itself controls the power to discharge, by restricting such

power to Brigade/Sub Area Commander. It needs to be pointed out that while discharge on medical ground, completion of period of service or

tenure may be ordered by a Commanding Officer, the rule makers in their wisdom have given power to discharge in other cases like one on hand

to a senior officer so that such a decision is taken at a higher level and is well considered, objective, depicting application of mind.

10. The appellant's to guide exercise of power available under Rule 13(3)III(v) Army Rules, 1954 have laid down procedure titled PROCEDURE

FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs AND OR (hereinafter the Procedure. The Procedure has been

circulated vide Army Headquarter No. A/13210/159/AG/PS 2(c) dated 28.12.1988. The excerpts from the Procedure relevant to the present

controversy need to be noticed:-

JCOs, WOs AND OR Who Have Proved Inefficient 3(a) Before recommending or sanctioning discharge, the following points must be

considered:-

(i) If lack of training is the cause of his inefficiency, arrangements will be made for his further training.

(ii) If an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) .. (c) .. Procedure for Dismissal/Discharge of Undesirable JCOs/WOs/OR 4. 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 and adequate opportunity of putting up his defence or explanation

and of adducing evidence in his defence given.

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

(b) Forwarding of Recommendations. The recommendation for dismissal or discharge will be forwarded, through normal channels, to the authority

competent to authorize the dismissal or discharge, as the case may be, alongwith a copy of the proceedings of the enquiry referred to in (a) above.

(c) Action by Intermediate Authorities. Intermediate authorities through whom the recommendations passes will consider the case in the light of

what is stated in (a) above and make their own recommendations as to the disposal of the case.

(d) Action by Competent Authorities. 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 individual. The allegations must be specific and

supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings of the enquiry held in the

cause will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the

proposed dismissal or discharge.

(e) Action on Receipt of the Reply to the Show cause Notice. The individual's reply to the show cause notice will be forwarded through normal

channels to the authority competent to authorize his dismissal/discharge together with a copy of each of the show cause notice and the proceedings

of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.

(f) Final Orders by the Competent Authority. The authority competent to sanction the dismissal/discharge of the individual will before passing

orders reconsider the case in the light of the individual's reply to the show cause notice.

A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge

would meet the requirements of the case. If the competent authority considers that termination of the individual's service is not warranted but any of

the actions referred to in (b) to (d) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand,

if the competent authority accepts the reply of the individual to the show cause notice as entirely satisfactory, he will pass orders accordingly.

Note:- 1. 2. Discharge from service on four 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.

Such discharge should be approved by the next higher Commander.

11. An overall view of the Procedure would reveal that discharge of person subject to the Act is not to be ordered as a matter of Court but

avoided as far as possible, more so when such a person has rendered fairly long service or is nearing retirement. Before the extreme step of

discharge is taken the Competent Authority has to explore other options like transfer, that may attain the intended object. The duties under the

Procedure, cast on an officer competent to order or recommend discharge and corresponding rights of the erring personnel may be summarized as

under:-

i) The Officer before recommending or sanctioning discharge has to find out whether the misconduct committed by the Personnel is attributable to

lack of training or circumstances beyond his control. In such case discharge is to be avoided and the Personnel deputed for further training or given

extra-regimental duties.

ii) The Officer before recommending or sanctioning discharge has to ensure that an impartial enquiry has been made wherein adequate opportunity

has been given to the Personnel to put up his defence and adduce evidence in his defence and that the allegations stand substantiated, warranting

extreme punishment of discharge from service.

iii) The Officer recommending discharge has to forward such recommendation through normal channel so that it is also gone through at intermediate

level and the intermediate officer has an opportunity to go through the recommendation to find out whether it satisfies the Procedure and makes his

own recommendation accordingly.

iv) The Authority competent to order discharge, if satisfied on perusal of the record received that the discharge is warranted, is to issue notice to

the Personnel and ensure that such notice gives all the details of the cause of action against him, to enable him to clearly understand the allegations

and submit his reply. A copy of the proceedings of enquiry held in the matter, is to be supplied to the personnel so that he is in a position to submit

his reply and show cause against the proposed discharge

v) The Competent Authority is duty bound to go through the reply submitted by the Personnel and examine whether an action other than discharge

would meet the requirements of the case and in case he is satisfied that discharge can be avoided, the Authority is to make order accordingly.

vi) The Competent Authority while taking a decision in the matter is to be conscious that four red ink entries are not invariably to lead to discharge.

vii) While discharge from service is proposed to be ordered on the basis of four red ink entries, the Competent Authority is under an obligation to

consider the nature of the offences for which each red ink entry was made and not order discharge when such offences/lapses are of minor

character and the Personnel has long service at his credit and is about to complete the pensionable service.

viii) The Competent Authority while taking a decision in the matter is also required to consider whether the Personnel has been previously posted

at hard stations and exposed to difficult living conditions. The discharge is to be ordered only when it is absolutely necessary in the interest of

service.

12. The communication No. 41766/48/AG/DV-I (P) dated 07.04.2007 does not in any manner dilute the Procedure of 1988. It, after giving a few

illustrations of habitual offenders, impresses upon Commanders at all levels to terminate the service of such Personnel who are habitual offenders

and are undesirable for retention in service especially after four red ink entries. The communication dated 07.04.2004 does not advise a departure

from the Procedure. It only emphasizes the need to get rid of habitual offenders as their presence amongst ranks is bound to prejudicially affect

over all discipline in the Armed Forces.

13. The argument that the Procedure notified vide Army Headquarter No. A/13210/159/AG/PS 2(c) dated 28.12.1988 is devoid of any value

and need not be followed by the Competent Authority while recommending or ordering dismissal/discharge is without substance. Rule 13(3)III(v)

does not lay down the procedure to be followed in such matters. It only identifies the Authority competent to order discharge in other cases. The

Procedure is supplied by Army Headquarter No. A/13210/159/AG/PS 2(c) dated 28.12.1988. It would be absurd to conclude that the

Procedure circulated is not nothing more than a piece of paper and does not

warrant any adherence. Reliance placed on Union of India (UOI) and Others Vs. Dipak Kumar Santra, is grossly misplaced. The facts of the aforesaid case are markedly distinguishable from the facts of the present case. In the reported case, discharge was ordered of an Armed Forces Personnel not attested. Rule 13 in Column 4, titled Manner of discharge itself prescribed the Procedure to be followed in case of discharge of personnel not attested. It is in the said background, the Court held that in face of the prescribed Procedure Letter of Army Headquarters, New Delhi laying down the procedure required to be followed in respect of individuals who fail in clerks proficiency and aptitude test while undergoing the basic Military Training, was not to be compulsory followed. In the case before the Apex Court neither PROCEDURE FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs AND OR was subject matter of the discussion nor the appellant before the Court was attested. The respondent/writ petitioner as already stated has been attested and had more than 13 years of service to his credit on the date of discharge.

14. In the present case, respondent/writ petitioner on the date he was discharged from service had 13 years of service to his credit. He was deputed on extra regimental employment to 24th Rashtriya Rifles and 42nd Rashtriya Rifles and participated in anti-militancy operations in militancy infested areas. During his service tenure stretching over a period of 13 years he earned four red ink entries because of his unauthorized absence/overstayal on leave. There is no offence or misconduct alleged against him except unauthorized absence/overstayal on leave. The last such misconduct was reported on 22.06.2004 and it involved 15 days unauthorized absence from duty/overstayal on leave. The respondent/writ petitioner did not indulge in any misconduct for last next three years. The allegation in the show cause notice as also the discharge order that the respondent/writ petitioner had not shown improvement, therefore, was not correct. It is important to point out that there was no instance of any misconduct or lapse on part of the respondent/writ petitioner from the date he was enrolled in Army that was 22.11.1995 till 08.07.2002 i.e. till he was deployed a second time to 42 Rashtriya Rifles on extra regimental employment. The instances of unauthorized absence/overstayal on leave

occurred only after the respondent/writ petitioner notwithstanding his requests was deployed a second time to 41 Rashtriya Rifles in counter insurgency area, ignoring that he had served in such area on deputation to 24 Rashtriya Rifles for a period of three years immediately before his second deployment. These and other like aspects in terms of the Procedure of 1988, governing exercise of discretion/power u/s 13(3)III(v) Army Rules, 1954 were required to be examined by the appellant. The record available on the file would reveal that the Authority competent to order discharge did not look into the aspects, that it was required to examine in compliance of the Procedure before making the discharge order in question. The Competent Authority did not consider that the respondent/writ petitioner had 13 years long service at his back, he was deployed twice to a hard station, was exposed to difficult living conditions and that the lapses occurred only after his deployment to counter insurgency area a second time ignoring that he had already served in the area. The nature of misconduct that earned the respondent/writ petitioner four red ink entries was also not examined by the Authority. The instances quoted in the Communication No. 41776/48/AG/DV-I(P) dated 07.04.2004 are theft of identity card of a Senior Officer, forgery with the bank, theft of AK 47 Rifle, theft of LMG, 11 Magazines and 322 rounds of Ammunition and an attempt to sell the stolen arms and ammunition for an amount of Rs. 1.00 Crore. The offences had earned the Personnel four red ink entries. It is in such instances of grave misconduct that the Commanders at all levels, were asked to get rid of such habitual offenders by ordering their discharge from service. In the present case, had the Authority competent to discharge, or the Authority recommending discharge looked into the nature of misconduct against the respondent/writ petitioner and adhered to the Procedure of 1988, the results probably would have been different.

15. The Authority making the discharge order did not also examine whether discharge was the only option and whether the matter could have been dealt with, following other courses open under the Procedure. The Authority appears to have been under an erroneous impression that four red ink entries are to invariably lead to discharge. Such an impression, it may be stated at the cost of repetition, runs contrary to letter and spirit of the

Procedure. The record would also not indicate whether any enquiry was conducted in the matter and enquiry report made available to the respondent/writ petitioner at the time show cause notice was served upon him.

16. Looking from any angle the Authority ordering respondent-writ petitioner's discharge vide order dated 09.11.2007 has not adhered to the

mandate of Rules 13(3)III(v) read with PROCEDURE FOR THE REMOVAL OF UNDESIRABLE AND INEFFICIENT JCOs, WOs AND

OR notified vide Army Headquarter Letter No. A/13210/159/AG/PS 2(c) dated 28.12.1988. The writ Court, therefore, has rightly allowed the

writ petition and set aside the discharge order dated 09.11.2007.

17. We, for the reasons discussed, do not feel persuaded to take a view different from one taken by the Writ Court. The Letters Patent Appeal,

therefore, is destined to fail. For the reasons discussed, the Letter Patent Appeal is dismissed and the Writ Court judgment upheld.