

(2004) 12 CAL CK 0026
In the Calcutta High Court
Case No : M.A.T. No. 2856 of 1997

Union of India (UOI) and Others

APPELLANT

Vs

Ram Sunder Ram

RESPONDENT

Date of Decision : 10-12-2004

Acts Referred:

Air Force Rules, 1969 — Rule 137
Army Act, 1950 — Section 17, 19, 20, 72
Army Rules, 1954 — Rule 13(3), 177, 182
Constitution of India, 1950 — Article 33

Citation : (2005) 4 CHN 361

Hon'ble Judges : Tapan Kumar Dutt, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Pradip Kumar Sen, for the Appellant;Subir Kumar Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—This appeal has been filed by Union of India & Others impugning a judgment and order dated 7th August, 1997 passed by a learned Judge of the Writ Court. By the said judgment and order under appeal, the learned Judge was pleased to set aside the order of discharge passed against the petitioner/respondent. The learned Judge was pleased to set aside the order of discharge mainly on the grounds that Principles of Natural Justice have not been followed in the instant case while passing the order of discharge. The learned Judge was pleased to hold that since the words "dismissal" or "termination" will have the same effect it has a difference in terminology only. Therefore, while passing the order of discharge, the authority should have given the petitioner a sufficient opportunity to defend himself and that not having been done, the order of discharge cannot be sustained. The learned Judge also held that considering the socio-economic conditions of the day, the Court cannot give any indulgence in the matter of termination of service which has been passed without following the due process of law.

2. The learned Counsel appearing in support of the appeal urged that the learned Judge has not properly appreciated the legal questions involved in this case and the learned Judge failed to appreciate that proper opportunity of hearing was given to the respondent/writ petitioner and he is not entitled under the law to any further opportunity save and except what has been given to him, a member of the Armed Force. The learned Counsel also submitted that in the facts of the case and considering the statutory provisions the order passed by the learned Judge, which is under appeal, couldn't be sustained.

3. Now, coming to the facts of the case, it appears that the writ petitioner/respondent was discharged from army service under the provisions of section 20 of the Army Act, 1950 read with Army Rules 13(3)(V) read with Clause (v) of the Table and after affording the writ petitioner/respondent the opportunity of showing cause against the order of discharge.

4. In the instant case a show-cause notice dated 3rd July, 1991 was served on the writ petitioner/respondent and in the show-cause notice it was, inter alia, stated that while serving with "A" Coy, the petitioner received illegal payment of Rs. 12,500/- from one Sri Rajinder Singh, who is the owner of Pansari shop and converted the same to his self-use knowing the amount to be sale-proceeds from illegal sale of 87 M.T. Gas through BPLs and Kerbside pump. It was also alleged in the show-cause notice that the petitioner failed to report the matter to his superior officers.

5. It was not in dispute that the said show-cause notice was received by the petitioner and pursuant to the said show-cause notice the petitioner also gave a detailed reply. After receiving the said reply the Brigadier Commander passed the order of discharge on 9th September, 1991 stating that the reply sent by the writ petitioner/respondent to the show-cause notice was unsatisfactory and in exercise of powers conferred on the said Brigadier commander u/s 20 of the Army Act, the said Brigadier discharged the writ petitioner/respondent from service with immediate effect.

6. From the relevant Act and rules, it appears that u/s 19 of the Army Act, the Central Government may dismiss or remove from service any person who is subject to this Act other than an Officer. Power of the Central Government u/s 17 has been delegated to various officers u/s 20 of the Act.

7. Therefore, on a combined reading of these two sections, it appears that the power of termination, of service, which is vested in the Central Government u/s 19 of the Army Act and in view of delegation u/s 20 of the Act, such power can be exercised by the other officers in respect of any person who is subject to the said Act save and except an officer. It is urged that prior to the issuance of the show-cause notice there was an inquiry and the writ petitioner was heard in that inquiry and he was also given the opportunity to cross-examine in the said inquiry. But the learned Counsel for the appellant submits that the petitioner refused to exercise the opportunity of cross-examination.

8. It is not in dispute that prior to issuance of the show-cause notice there was a Court of Inquiry and the said Court of Inquiry was formed for the purpose of collection of evidence. Such a Court of Inquiry was formed under Rule 177 of the Army Rules. Such a Court of Inquiry may consist of a number of officers of any rank and in the instant case such a Court of Inquiry was a fact finding body which was assembled to collect the evidence for the information of superior officers to make up their mind about the involvement of the petitioner and the others in the racket of clandestine sale of petrol. It is not in dispute that in the Court of Inquiry, the petitioner was heard and was given the opportunity to cross-examine, which he declined. Thereafter, on the basis of the report of the Court of Inquiry and evidence collected therefrom, a further show-cause notice was issued" to the petitioner and the decision to discharge the petitioner was taken after receiving the petitioner's reply to the show-cause notice. The proceeding of a Court of Inquiry is controlled under Rule 182 of the Army Rules. The learned Counsel for the writ petitioner/respondent very much relied on Rule 182 of the Army Rules and to the extent that the evidence collected in the Court of Inquiry cannot be used against the writ petitioner/respondent for the purpose of discharging him from service.

9. In our view, the said contention of the learned Counsel, is not correct. The evidence collected in the Court of Inquiry is not admissible in evidence against a person, who is subject to the said Act. Nor shall any such evidence be given against any such person except upon the trial of such person for wilfully giving false evidence before the Court. There is a proviso to the rule with which we are not concerned.

10. In the instant case, the order of discharge was passed but that does not amount to using of the evidence in the Court of Inquiry against the petitioner in any trial of Court Martial or before any Court. It has also been made very categorically clear in para 20 of the affidavit-in-opposition, filed by the appellant, that in the Court of Inquiry the petitioner was given full opportunity to defend his case and to cross-examine the persons deposing before the Recording Officer, but, the petitioner was just sitting throughout when the evidence was been recorded against him. In paragraph 10 of the affidavit-in-reply, which deals with paragraph 20 of the affidavit-in-opposition, this assertion of fact has not been denied. The learned Counsel for the appellant submitted, and in our view rightly, that in view of such factual position, it is clear that the writ petitioner/respondent himself did not avail him of opportunity of hearing. Therefore, the learned Judge of the Writ Court was not right in setting aside the order of discharge, inter alia, on the ground that Principles of Natural Justice have not been followed and that the writ petitioner/respondent was not given adequate opportunity of hearing.

11. The learned Counsel appearing for the appellant relied on a few judgments in support of his contention. Reliance was first placed on the judgment in the case of Union of India (UOI) Vs. Capt. S.K. Rao, . The learned Counsel relied on the

said decision in order to contend that the power conferred u/s 19 is an independent power. The learned Counsel further contended that for removal of a person from service u/s 19 of the Army Act (hereinafter referred to as the said Act) a Court Martial -is not necessary. In fact in support of such contentions there are observations in paragraph 15 of the judgment. The learned Counsel relied on another judgment of the Division Bench of Delhi High Court rendered in the case of Gurdial Singh Cheerna v. Union of India and Ors., reported in 1976(1) SLR 289. The decision in Cheema's case was given relying on the ratio in the case of S. K. Rao. In Cheema's case it was held that the object of Rule 137(g) of Air Force Rules is that the statements recorded in the Court of Inquiry shall not be admissible in evidence in a proceeding in which summary of evidence is recorded to prove a charge against an accused person or in a proceeding before the Court Martial. The learned Counsel relied on the said observation in order to contend that in the instant case the provisions of Rule 177 of the Army Rules are identical with Rule 137(g) of Air Force Rules and here also the proceeding of the Court of Inquiry is not used against the respondent/writ petitioner in connection with any criminal case or in a proceeding before the Court Martial. But on the basis of the said evidence in the Court of Inquiry, a show-cause notice was issued against the appellant and to which he has given a reply and as the reply was not found satisfactory, the order of discharge was passed.

12. The learned Counsel for the respondent has relied on four judgments of the Supreme Court in order to contend that the appellant/authorities were required to further observe the Principles of Natural Justice before passing the order of discharge in respect of the respondent.

13. Reliance was first placed on the decision of the Supreme Court in the case of Ex. Naik Sardar Singh v. Union of India and Ors., reported in AIR 1992 SC 417. In the said decision the learned Judges of the Supreme Court were invoking the doctrine of proportionality in the matter of imposition of punishment on an Army Jawan who was subjected to a Court Martial proceedings. The learned Judges found that carrying of 7 extra bottles of Rum by the concerned Jawan while going to home town, while he had the valid permit to carry 5 bottles, is an offence for which punishment of three months Rigorous Imprisonment and dismissal from service is too severe. As such, the learned Judges set aside the said punishment as being violative of section 72 of the Army Act and the case was remanded to Court Martial. This Court fails to appreciate the ratio of the said judgment in the facts of this case especially when in the instant case there was no Court Martial proceeding against the respondent. Apart from that the offence lodged against the respondent, in this case, is quite serious and in the Court of Inquiry the involvement of the respondent in the racket of illegal sale of petrol became evident. As such, this case does not call for any lenient treatment in the matter of imposition of punishment.

14. The next case relied on was delivered by the Supreme Court in the case of Major Suresh Chand Mehta Vs. The Defence Secretary (U.O.I.) and others, .

Reliance was placed on paragraph 13 of the said judgment. In the said paragraph, the learned Judges held that the Court of Inquiry, as provided under Rule 177 of the Army Rules, is merely held for the purpose of collecting evidence and if so required, to report in regard to any matter which may be referred to the officer and such an inquiry is for the purpose of a preliminary investigation and cannot be equated with a trial or Court Martial.

15. In the instant case also the inquiry, which was held in respect of petitioner/respondent and in which he was given the Opportunity to cross-examine the witnesses, was also for the purpose of collection of evidence. But in the said inquiry the petitioner/respondent declined to cross-examine. Thereafter he was given a chance to give reply to show-cause which he gave and after considering his reply the order of discharge was passed. Therefore, there was no lack of opportunity of defence given to the petitioner under the rules. The ratio in paragraph 13 of the judgment in Suresh Chand does not at all support the case of the respondent. In fact, it establishes the stand taken by the appellant in this proceeding. It may also be mentioned that in the decision in Suresh Chand the Court was also dealing with a Court Martial proceeding.

16. Reliance was next placed by the learned Counsel for the respondent on the decision of the Supreme Court in the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, . The said decision of Prithi Pal Singh was also dealing with Court Martial proceedings. In this case the Court is not connected with any other Court Martial. Therefore, the decision in Prithi Pal Singh is of no assistance in the facts of this case.

17. The other decision on which the reliance was placed by the learned Counsel for the respondent was rendered by a Constitution Bench of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, . In that case the Court was dealing with the requirement of recording of reasons by an authority exercising quasi-judicial function. We are not concerned with this question here. Apart from that in the case of S. N. Mukherjee also a Court Martial proceeding was challenged. In fact, in the writ petition which was filed by S. N. Mukherjee, the finding and sentence recorded by the General Court Martial proceeding, was impugned before the Delhi High Court. In the instant case there has been no Court Martial proceedings. Therefore, the requirement of an authority, exercising quasi-judicial function, to record reasons, is not a point of issue in the present case.

18. This Court finds, in the instant case, as noted above, the petitioner was given an opportunity of hearing and cross-examining the witnesses when evidence was collected but the petitioner did not avail of that opportunity. On the basis of the evidence which was collected, he was given a chance to show-cause and he gave reply to the said show-cause and in fact a detailed reply was given and that was also considered.

19. In this connection it may be noted that the petitioner was working in the

Armed Forces and service conditions of the Armed Forces stand on a slightly different footing from those who hold civil post either under the State or Government of India. It is incorrect to equate the width of Natural Justice Principles which are made available to a person holding a civil post and a person who is working with the Armed Forces. This is required in order to achieve the twin purposes of ensuring a proper discharge of duties and maintenance of discipline in such forces. Therefore, the provisions of Army Act and the rules framed thereunder must be construed keeping these question in mind. In fact, the Constitution itself has made it clear under Article 33 of the Constitution. This aspect was considered by Supreme Court in the case of Prithi Pal Singh (supra). But this aspect of the matter has not been noticed by the learned Judge in the judgment under appeal. Therefore, the judgment of the learned Judge of the Writ Court on the broad Principles of Natural Justice, with great respect to the learned Judge, was not rendered after considering the relevant legal questions in the matter. For the reasons aforesaid, this Court is constrained to set aside the judgment under appeal.

20. The appeal is therefore allowed. The writ petition is dismissed.

21. There will be no order as to costs.

Tapan Kumar Dutt, J.

22. I agree