

(2008) 08 GAU CK 0071

In the Gauhati High Court

Case No : Writ Appeal No. 62 of 2003 in Civil Rule No. 478 of 1999

Union of India (UOI) and Others

APPELLANT

Vs

Satya Narayan Yadav

RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Army Act, 1950 — Section 104, 105, 106, 38, 39
Army Rules, 1954 — Rule 183

Citation : (2010) 3 GLR 298 : (2009) 1 GLT 582

Hon'ble Judges : Mutum B.K. Singh, J;B.K. Sharma, J

Bench : Division Bench

Advocate : A. Lodh, for the Appellant; B. Das and S. Das, for the Respondent

Final Decision : Allowed

Judgement

1. By means of this appeal preferred by the respondents in the writ petition, the judgment and order dated 21.3.2003 passed by the learned Single Judge in the writ petition being, Civil Rule No. 478/1999 has been put to challenge.

2. The sole respondent herein as the writ petitioner filed the aforesaid writ petition (Civil Rule No. 478/1999), which appears to have been renumbered as WP(C) No. 15/2003 after restoration.

3. The petitioner filed the writ petition in 1999 Challenging the orders pertaining to his desertion from service. The petitioner entered into the services of the Assam Rifles in the year 1985 (30.9.1985) as Rifleman. He was deputed to serve under National Security Guard for some time in Delhi and was repatriated on 29.6.1991. On his repatriation, the petitioner instead of joining his duty in the allotted Unit, proceeded on leave for a month, as according to him, at that point of time he was ailing due to the injury sustained in an accident.

4. The petitioner was granted leave and was issued a Railway Warrant for his journey from Delhi to Siclhar. According to the petitioner, he had deposited the kits, etc., on his repatriation from National Security Guard. It was the case of the

writ petition that since he was ailing intermittently, he would not resume duties, but made representation to the authorities.

5. Further case of the petitioner is that, during his absence from duty, he was never asked by the authorities/unit or by any other authority of the Assam Rifles, directing to him to resume duties. It was stated that his representations were never, acknowledged, not to speak of disposal of the same. In the circumstances, the petitioner approached the Director General of Police, Tripura (not the authority of Assam Rifles), who by his Annexure-E letter dated 28.2.1995 requested an official of the Assam Rifles to, do the needful in the matter towards readjusting the petitioner to working life. In the letter, it was indicated that the petitioner could not join his duties after June 1991 due to various reasons and that he faced various domestic problems.

6. After the aforesaid letter dated 28.2.1995, the Commandant informed the Director General of Police, Tripura, by his letter dated 21.3.1995 (Annexure-F) that the petitioner has already been declared deserter on 4.9.1991 and was struck off from the unit strength. By the said letter it was also informed that it would be better for the petitioner to approach the Pay and Accounts office at Shillong to settle his service dues.

7. After the aforesaid communication dated 21.3.1995, the petitioner was intimated by Annexure-G, H, I and J communication dated 12.4.1995, 6.5.1995, 30.12.1998 and 13.4.1999 respectively, conveying the fact of the petitioner being declared as deserter with effect from 4.9.1991. By the first letter dated 12.4.1995, the petitioner was directed to deposit his identity card. By the second letter dated 6.5.1995 he was once again reminded to deposit the identity card bearing the particular machine No. By the third letter dated 30.12.1998, the petitioner was reminded of the earlier communication relating to declaring him a deserter. The communication was made in reference to the further application submitted by the petitioner on 8.12.1998. The fourth communication dated 13.4.1999 was also issued in reference to the further representation made by the petitioner intimating that the desertion from service was an offence as per the provisions of Assam Rifles Act and Army Act. He was further intimated that his request for payment of terminal balance of pay and allowances could not be made being not covered by rules.

8. After the aforesaid communication dated 13.4.1999, the petitioner filed the writ petition on 4.9.1999, i.e., after about 8 years of desertion assailing the decisions contained in the said communications. The respondents in their counter affidavit denied the contentions raised in the writ petition. It was denied that the petitioner was ill due to injuries he had allegedly sustained. It was specifically stated that the petitioner never intimated the authorities about his such illness. However, it was admitted that the petitioner was granted leave for limited period, which he overstayed for years together. The petitioner was to rejoin the unit on 3.9.1991 and accordingly, signal was issued while extending leave.

9. As regards the plea of the petitioner that he was never intimidated by the authorities to rejoin duties, the respondents in their counter affidavit rightly stated that there was no such obligation on the part of the respondents and that it was the duty of the petitioner to resume duty on expiry of leave. As regards the plea of the petitioner that he had submitted representations (Annexure-C and D), the respondents denied the same stating that no such representations were ever received from the petitioner.

10. It is in the aforesaid circumstances, when the petitioner did not rejoin his duties on expiry of leave, he was declared deserter. It was also contended that even after declaring the petitioner as deserter, and striking off his name from the strength of the unit, his lien in service was maintained and if the petitioner wanted to rejoin duties he was at liberty to do so subject to facing proceedings as the provisions of law on the charge of desertion which is always considered to be serious offence.

11. In the rejoinder affidavit filed by the petitioner the petitioner contended that since he was in continuous service under the Assam Rifles, he was entitled to pay and allowances from 4.9.1991. However, nothing was stated as to what prevented him from rejoining the duty. There was also no reply to the plea of the respondents that his lien in service was maintained and that he was at liberty to rejoin duty subject to facing proceeding as per rules.

12. The learned Single Judge while allowing the writ petition, issued direction for payment of 25% of the back wages from the date of declaring him a deserter, the proclamation towards declaring the petitioner to be a deserter was set aside. According to the learned Single Judge, there was violation of the principles of natural justice being not provided the petitioner with opportunity of being heard before declaring him a deserter. Being aggrieved the respondents filed the instant writ appeal. Be it stated here that the impugned judgment is under order of stay.

13. We have heard Mr. A. Lodh, learned CGSC, appearing for the appellants as well as Mr. B. Das, learned senior counsel assisted by Ms. S. Das, learned Counsel for the respondent/writ petitioner. We have also considered the materials available on records. The only ground on which the learned Single Judge has set aside the declaration of desertion is that the petitioner was denied reasonable opportunity of being heard. According to the learned Single Judge there was nothing to indicate that any notice requiring participation of the petitioner in the proceeding initiated for declaring him deserter had ever been served on him.

14. It is on record that Annexure-R/4 radio message dated 5.10.1991 was transmitted to the jurisdictional police authorities as well as the home address of the petitioner. By the said radio message intimation sent was that the petitioner had overstayed leave and failed to rejoin duty at transmit camp, Silchar and accordingly, he should be apprehended and on apprehension the Assam Rifle Unit should be informed for further action. Annexure-R/5 relates to the proceeding

towards declaring the petitioner deserter. The learned Single Judge was of the opinion that since there was no token of receipt of the radio message, it was not the case of service of the radio message on the petitioner. Likewise in respect of the proceeding also, the learned Single Judge held that since the petitioner was not intimated of the same, the proceeding was illegal.

15. Although in paragraph 9 of the writ petition, the petitioner stated that he was not provided with any opportunity of being heard before declaring him deserter, which according him was a punishment, but the respondents dealing with such contention of the petitioner stated in their counter affidavit that the petitioner did not report for duty nor made any attempt to inform his whereabouts to the unit or the respondents. In the rejoinder affidavit filed by the writ petitioner, there was no whisper relating to non-receipt of any notice pertaining to the declaration of desertion. In fact, in the rejoinder affidavit, the petitioner except dealing with paragraphs 1, 2 and 3 of the counter affidavit, did not deal with none of the paragraphs running from 1 to 17. In paragraph 13 of the counter affidavit, it was contended by the respondents that although the petitioner was declared deserter and his name was struck off from the strength of the unit, but his lien in service was still maintained and that the petitioner was at liberty to join the service subject to facing the proceedings as per law. In the rejoinder affidavit, there was no response to the same.

16. The fact that the petitioner remained absent after expiry of leave with effect from 3.9.1991 is an admitted position. Only explanation furnished in the writ petition was that the petitioner could not resume his duties because of purported illness. In his purported representations dated 26.7.1991 (Annexure-C) and dated NIL (Annexure-D) (typed copies unlike other documents annexed to the writ petition which are photocopies), the petitioner purportedly prayed for three months extension of leave with effect from 29.7.1991. The respondents have denied existence of these representations. Even assuming, that the petitioner had made the said two representations, there was no explanation as to why he did not report for duty upon expiry of three months with effect from 29.7.1991. After long absence for about 4 years, he approached the Director General of Police, Tripura, who was admittedly not his authority. By Annexure-E letter dated 28.2.1995, the case of the petitioner was espoused by the Director General of Police stating the reasons for absence as "various reasons" and "domestic problems". It was never stated that the petitioner was ill for such a long period.

17. In response to the said communication dated 28.2.1995, and in response to the further application made by the petitioner himself, the fact of declaring the petitioner a deserter with effect from 4.9.1991 was intimated. The petitioner was also requested to deposit his identity card, which he never did. As regards the payment of dues etc he was advised to meet the appropriate authority. It was outrageous on the part of the petitioner to claim salary even for the long period of absence.

18. The very fact that the petitioner remained unauthorizedly absent from duty

for long about 4 years itself speaks of his desertion of duty. In such circumstances, there was nothing wrong in declaring him a deserter. As has been held by the Apex Court in Channabasappa Basappa Happali Vs. The State of Mysore, there is no distinction between admission of fact and admission of guilt. As in the instant case. In that case also the police officer remained absent without leave. His prayer for extension of leave was not granted. Thereafter, charge was framed against him. From the materials on record, it appeared that the petitioner did not take part in the enquiry. It was contended that the enquiry was in breach of the principles of natural justice. The Apex Court noticing that the fact of remaining unauthorisedly absent being an admitted one there was no violation of the principles of natural justice. It was observed, thus:

...We do not see any distinction between admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing else. If a police officer remains absent without leave and also resorts to fast as a demonstration against the action of the superior officer, the indiscipline is fully established. The learned Single Judge in the High Court was right when he laid down that the plea amounted to a plea of guilty on the facts, on which the petitioner was charged and we are in full agreement with the observations of the learned Single Judge.

19. In the instant case also, the fact speaks for itself. At the first instance, the petitioner overstayed the leave and thereafter all throughout remained absent, which is almost a period of 4 years. This being the position, nothing more was required to be established that he deserted the unit of Assam Rifles. The plea of violation of principles of natural justice will have to be considered in that context. Needless to say that natural justice is not based on any straightjacket formula. It cannot be stretched that far, in which, nothing could be established beyond what has been established even without any notice.

20. Section 91(a) of the Army Act provides for penal deduction of all pay and allowances for every day of absence either on desertion or without leave. Section 106 provides for holding enquiry in case of absence from duty without the authority for a period of 30 days. Further, if a person declared absent does not afterwards surrender or if not apprehended, he shall, for the purposes of the Act be deemed to be a deserter. Rule 183 of the Army Rules, provides the methodology for holding the court of Inquiry u/s 106. Such Court of Inquiry is conducted only when the army personnel remains absent, as in the instant case. Sections 104 and 105 of the Act, provide for arrest of the personnel by the civil authorities and furnishing of written information/ desertion to such civil authorities. A deserter may be arrested by the civil authorities for his production to the unit. Desertion itself is a serious offence as indicated in Section 38 and 39 of the Act.

21. The petitioner was declared a deserter with effect from 4.9.1991 and by now it is almost 17 years. The petitioner never attempted to rejoin service about which the respondents/appellants stated in paragraph 13 of their counter

affidavit. It was categorically stated that the petitioner was at liberty to rejoin service as even after declaring him a deserter, his lien was maintained in the service. Admittedly, the petitioner did not make any such attempt. Thus, there is no question of setting aside and quashing the decision of the respondents/appellants declaring the petitioner a deserter. There is also no question of payment of any back wages to the petitioner.

22. It escaped the notice of the learned Single Judge that a proceeding relating to desertion is initiated when the person remained unauthorisedly absent. The petitioner could successfully avoid his apprehension for about 4 weeks. He also did not make any effort to rejoin service. He suddenly woke up in 1995 and that too approaching the Director General of Police, Tripura, who was not his controlling authority. Long 8 years after the declaring him a deserter and even in reality also remaining absent for long 8 years, the petitioner filed the writ petition as if the respondents/appellants were at his mercy. Such conduct on the part of the petitioner was unbecoming of a member of the disciplined force.

23. The learned Single Judge having failed to consider all the above aspects of the matter and having confined only to the purported violation of the principles of natural justice, which was a misplaced one passed the impugned judgment and order.

24. For all the aforesaid reasons, we have no hesitation to set aside and quash the impugned judgment and order dated 21.3.2003 passed in Civil Rule No. 478/1999. Consequently, the writ appeal is allowed and the writ petition is dismissed.

25. Writ appeal is allowed, leaving the parties to bear their own costs.