

(1987) 08 AHC CK 0035

In the Allahabad High Court

Case No : Writ Petition No. 4143 of 1987(Habeas Corpus)

Virendra Sharma

APPELLANT

Vs

Union of India & Others

RESPONDENT

Date of Decision : 10-08-1987

Acts Referred:

Army Act, 1950 — Section 101, 102, 106, 27, 39
Constitution of India, 1950 — Article 226

Citation : (1987) 08 AHC CK 0035

Hon'ble Judges : Kamleshwar Nath, J and D.S.Bajpai, J

Final Decision : Dismissed

Judgement

D.S. Bajpai, J.

1. Virendra Sharma, serving Captain in the Indian Army, has filed this writ petition under Article 226 of the Constitution of India for issue of a writ in the nature of habeas corpus with a further direction to the opposite parties to set the petitioner at liberty forthwith after his production before the Court. The facts of the petition have been sworn by his wife, Mrs. K. Sharma.

2. We have heard learned counsel for the petitioner and the Senior Standing Counsel for the Central Government appearing for the opposite parties.

3. Brief facts, on the basis of which the writ jurisdiction of this court has been invoked, are that the petitioner was tried by General Court Martial in 1985 and a verdict of dismissal from service was proposed to be awarded and the matter was under consideration by the Chief of the Army Staff, opposite party no. 2, for confirmation without which it could not be given effect to. The petitioner alleged that his son having met with a road accident was hospitalized in Command Hospital at Lucknow from May, 1984 to March 1985 and that he was still undergoing treatment after having become permanently handicapped physically due to amputation of his left lower foot for which he had to attend the Artificial Limb Centre. On August 20, 1985 by letter of the same date (annexure 1) the petitioner, who was at that time attached to 15 Garhwal Rifles at Jodhpur is

Rajasthan, requested the opposite party no. 2 to permit petitioner's attachment to some other Regiment of the Central Command at Lucknow, inter alia, on the ground to attend to the treatment of his son as also on the ground that his wife had fallen sick since May, 1985 and had developed some heart ailment and had also to be looked after. It is stated that in deference to the petitioner's request an order dated 22nd January, 1986 (Annexure 2) was passed directing him to be attached to 6 Maratha Light Infantry which was at that time stationed at Lucknow till the finalisation of the disciplinary case against him. Subsequently, by order dated 14th May, 1987 (Annexure 6) the petitioner was directed to be attached to 8 Infantry Brigade stationed at Bikaner in Rajasthan. This movement order was challenged by the petitioner before this court in writ petition no. 3660 of 1987 in which the petitioner, inter alia, prayed for a writ, order or direction to the opposite parties not to give effect to the said impugned order of change of attachment of the petitioner to the 8 Infantry Brigade at Bikaner. Challenge was made on several grounds. An Hon'ble Vacation Judge of this Court after hearing submissions of the learned Counsel for the petitioner, Sri S.D. Singh, who also appears for the petitioner in the present writ petition, passed a detailed order dismissing the writ petition summarily on 27.5.87. The finding recorded by the learned Judge is as follows:

?It has not been challenged before me that such movement order could not be passed against the petitioner. Learned counsel for the petitioner has argued that the petitioner made several representations against the impugned letter directing his movement from Lucknow to Bikaner but they have not been disposed of. He further contends that it would cause the petitioner much inconvenience in connection with the medical treatment of his son. It has also been argued that in case the petitioner is transferred from Lucknow to Bikaner, his application for transfer would become infructuous. I do not find any substance in these contentions advanced to quash the impugned order which is administrative in nature, A movement order cannot be quashed on the ground of convenience of a party. His stay at Lucknow has been for a sufficiently long period. The petition has no merits. It is summarily dismissed. Copy of this order be given to the learned counsel for the petitioner on payment of necessary charges, if possible by tomorrow.?

4. Thereafter, the petitioner avers that he made representations to the authorities and, while he was awaiting reply to the above noted representations, it was at about 19.30 A.M. that the opposite parties 4 and 5, Major R.J. Sharma and Major Satpal Singh of the 3 Jat Regiment, Central Command at Lucknow, without any warrant of arrest or detention illegally arrested the petitioner from his residence in Lucknow and it is said that the petitioner's wife was informed that the petitioner would be taken to Bikaner for which place he was directed to move under the movement order of 14th May, 1987. The authority of the opposite parties to shift the petitioner from Lucknow to the 8 Infantry Brigade at Bikaner on the strength of the movement Order has been assailed. By order dated 20th June, 1987, one of us sitting as Vacation Judge directed the petitioner

to be enlarged no bail no furnishing two sureties and a personal bond in the amount of Rs. 10.000 each to the satisfaction of the General Officer Commanding, Central Command, Lucknow. The fact is that the petitioner was enlarged though it was disputed by the learned counsel for the petitioner that there was no restraint on his movement at Bikaner and that he could not come and attend the proceedings of this Court at Lucknow. Counter and rejoinder affidavits have been filed and while admitting that the Army Act (Central Act XLVI of 1950), hereinafter to be referred to as the Act, applied to the petitioner, he urged that under subsec. (1) of section 101 of the said Act which is as under:

?101... Custody of Offenders (1) any person subject to .. . this Act who is charged with an offence may be taken into military custody.

(2) Any such person may be ordered into military custody by any superior officer.

(3) An officer may order into military custody any officer, though he may be of a higher rank, engaged in a quarrel, affray or disorder.?

a person to whom the Act applies and who is charged with an offence can only be taken into custody and the petitioner not having been charged, he could not be taken in custody and the arrest could only be made after a trial has been ordered since the said section appeared under Chapter IX which deals with arrest and proceedings before trial. The learned counsel further submitted that in terms of section 102 of the said act which provides for duty of commanding officer in regard to detention the said commanding officer could not detain a charged officer in custody for more than 48 hours after the committal of such person into custody is reported to him. Section 102 which is relevant is reproduced as below:

?102. Duty of commanding officer in regard to detention (1) It shall be the duty of every commanding officer to take care that a person under his command when charged with an offence is not detained in custody for more than fortyeight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having regard to the public service.

(2) The case of every person, being detained in custody beyond a period of fortyeight hours, and the reason thereof, shall be reported by the commanding officer to the general or other officer to whom application would be made to convene a general or district courtmartial for the trial of the person charged.

(3) In reckoning the period of fortyeight" hours specified in subsection (1), Sundays and other Public Holidays shall be excluded.

(4) Subject to the provisions of this Act, The Central Government may make rules providing for the manner in which and the period for which any person subject to this Act may be taken into and detained in military custody, pending the trial by any competent authority for any offence committed by him.?

5. Learned counsel further drew our attention to the provisions of section 106 of

the Act which is as under:

§106. Inquiry into absence without leave (1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessities; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the courtmartial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

which deals with inquiry by a court of inquiry in the event of absence of an officer from duty without due authority for a period of 30 days. On the basis of provisions contained in the sections the learned counsel for the petitioner (submitted that the detention of the petitioner was illegal & unlawful add that lie was entitled to issue of a writ of habeas corpus. We are unable to subscribe to this view since section 39 of the Act which is as under:

"39. Absence without leave Any person subject to this who commits any of the following offences, that is to say,

(a) absents himself without leave; or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise of duty; or

(e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place, prohibited by any general local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there;

shall, on conviction by courtmartial, be liable to suffer imprisonment for a term

which may extend to three years or such less punishment as is in this Act mentioned.?

provides that absence from duty without leave is an offence which on conviction is liable to the award of a sentence of imprisonment for three years and the petitioner having remained absent from duty without leave from 20th May 1987 when he was directed to comply with the movement order of 14th May, 1987 even after the expiry of joining period of thirty days till 25.6.87 when he was taken into custody, has prima facie committed an offence under section 39 and was liable to be taken into custody under section 101 of the Act and proceedings as envisaged under Sections 102 and 106 in setting up of a formal court of inquiry had to followed. The submission that the petitioner could not be taken into custody without inquiry having been started by the Court of inquiry is devoid of force since the court of inquiry, as in the scheme of Chapter IX, under which section 106 too also, is to follow procedure laid down in the proceedings starting from section 101.

6. Learned counsel further submitted that he had not been given any duty after completion of the court martial and he was only under a direction to report on all working days to show his presence at the station since the dismissal order is pending confirmation before the Chief of the Army Staff. The fact, however remains that the petitioner still continues to be on the strength of the Indian Army holding a responsible rank and he is drawing his full salary and allowances from the exchequer but under the well established doctrine that it is always open for a master to take work from a servant or not, the petitioner has been directed only to report at the station daily but he is being paid his salary. May be, because the extreme punishment of dismissal from service has been proposed for him he has not been assigned any specific duties to perform. In as far as pendency of confirmation of the verdict of Court Martial by the Chief of the Army Staff is concerned, the opposite parties are not to blame for the same, since the very proceedings of the Court Martial in which the verdict of dismissal has been proposed recommending dismissal from service are under challenge in writ petition no. 88 of 1985 filed by the petitioner in the High Court of Rajasthan which is still pending and in which the court has ordered:

?Meanwhile the confirmation of the proposed punishment against the petitioner shall not be made.?

This interim order is still in force. The petitioner further tried to delay the disposal of the writ petition by moving a transfer petition being Civil Miscellaneous. Transfer petition No. 386 of 1986 before the Hon'ble Supreme Court of India under Article 139 A (2) of the Constitution praying for transfer of the said writ petition pending before the Rajasthan High Court to this Court at Lucknow and in which notice has been issued by their Lordships of the Supreme Court. Even though a notice has only been issued on the transfer petition and stay application, the matter remains pending before the Rajasthan High Court and the Chief of the Army Staff is under restraint from considering the verdict of

the Court Martial for dismissal of the petitioner which might otherwise have been decided.

7. Another point urged was that the order transferring the petitioner from 15 Garhwal Rifles at Jodhpur to 6 Maratha Light Infantry at Lucknow dated 22nd January, 1986 (annexure 2) having been passed under the orders of the Chief of the Army Staff, the said order could not be modified by ; movement .order dated 14th May, 1987 (annexure 6) attaching the petitioner to 8 infantry Brigade at Bikaner. The petitioner's counsel submitted that the order annexure 2, v. as in pursuance of the request of the petitioner addressed to the Chief of the Army Staff, vide annexure 1, and the said order, annexure 2, directed placement of the petitioner at Lucknow till the finalisation of the disciplinary case against Mm and the learned counsel as such submitted that annexure 6 firstly not having been passed under the orders of the Chief of the Army Staff could not supersede annexure 2 and even otherwise the Chief of the Army Staff having once directed posting of the petitioner at Lucknow till finalisation of the disciplinary case against him, he could not be shifted by order, annexure 6, to Bikaner since the disciplinary proceedings were still pending. We have perused the order contained in annexure 6 and we find that the submission of the learned counsel is without force inasmuch as two orders have been issued by the Army Headquarters Adjutant General's Branch under the Directions of the Additional Director General, Discipline and Vigilance, It is significant to note that there is no mention in annexure 2 about the letter of the petitioner to the Chief of the Army Staff and the Chief of the Army Staff having taken any action, much less having ordered attachment of the petitioner at Lucknow till the finalisation of the disciplinary inquiry. The contention to the effect that the order is vitiated on this account is devoid of force and is rejected. Even otherwise, the earlier writ petition no. 3660 of 1987 having been dismissed summarily by this Court, the movement order is no longer open to challenge.

8. Since on a perusal of the affidavits exchanged we are of the view that the petitioner is not under any undue restraint and has also not been denied opportunity to attend this Court for which he was directed to apply for casual leave and proceed to Lucknow which he refused, no case for issue of a writ of habeas corpus is made out.

9. Our attention has also been drawn by the learned Senior Standing Counsel for the Central Government to the provisions of Section 27 of the Army Act which is as under:

27. Remedy of aggrieved officers Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such manner as may from time to time be specified by the proper authority.

10. A perusal of this Section leaves no doubt that the petitioner who considers

himself to be an officer wronged by an act of commanding officer or any officer whomsoever he might name can on making a due application get redress from his commanding officer or the Central Government depending on the status of the officer by whom he alleges to have been wronged. This being a statutory, efficacious and speedy alternative remedy, the petitioner cannot approach this court without exhausting the same.

11. It appears that all these safeguards have been provided under the Army Act to uphold the high traditions of discipline, dedication to duty and obedience by the armed personnel which have always been cherished and upheld by the Indian Army.

12. Without expressing any opinion on the conduct of the petitioner, we find no force in the writ petition and we dismiss it with costs to the opposite parties which we fix at Rs. 500.