ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 81 of 2009

Monday this the 8th day of March, 2010

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'nble Lt. Gen. P R Gangadharan, Member (A)"

Sanjay Giri, aged about 28 years Ex. No. 2995871 L, S/o Shri Jai Narain Giri, R/o Ekta Colony, In front of Pol Factory, Vidisha (M.P)

By Legal Practitioner Shri Vikas Saksena, Advocate.

Versus

1. Union of India, through Ministry of Defence, New Delhi.

2. The Chief of Army Staff, South Block, New Delhi

3. Brigade Commander HQ 41, Infantry Brigade C/O 56 APO

4. Commanding Officer, 5 Rajput Regiment, CO 56 APO

.....Respondents

By Legal Practitioner Shri Vishnu Srivastava holding brief of Shri Syed Hussain, Central Government Counsel.

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1. The petitioner was a Sepoy in the Indian Army, He was discharged from service whereafter a movement order dated 20.08.2004 was issued. The petitioner filed Writ Petition no. 6802 of 2004 in the Lucknow Bench of the Allahabad High Court, in which he prayed for a certiorari to quash the order of his termination / discharge.

2. The facts leading to this petition may be briefly set out as follows :-

3. The petitioner was served with a show cause notice dated 05.07.2004 in which it is alleged that the petitioner was awarded more than four Red Ink entries based on the punishment orders dated 09.07.2001 u/s 48 of the Army Act wherein the petitioner was awarded 14 days imprisonment, order dated 08.03.2002 under section 39 (a) of the Army Act wherein he was awarded 14 days Imprisonment, order dated 01.07.2002 u/s 63 of the Army Act wherein he was awarded 21 days imprisonment, order dated 12.07.2003 u/s 39 (a) wherein he was awarded 21 days imprisonment, order dated 31.01.2004 u/s 39 (f) in which he was awarded 7 days imprisonment.

4. It is alleged in para 5 of the petition that a detailed reply submitted by the petitioner was not accepted by the office of Respondent no. 3 whereupon the petitioner furnished a reply dated 13.07.2004 to the show cause notice. A copy of the said reply is annexed as Annexure No. 2 to the petition wherein the petitioner has accepted his faults and has prayed for leniency. There is no mention in this reply about any previous reply.

5. We have heard Shri Vikas Saksena for the petitioner and Shri Vishnu Srivastava holding brief of Shri Syed Hussain, Central Government Counsel.

6. Ld. counsel for the petitioner submitted that the punishment which was awarded to the petitioner for the offences mentioned in the show cause notice was given in proceedings u/s 80 of the Army Act. According to the ld. Counsel, the punishment for these offences could only have been awarded by Court Martial. The basis of this submission of the Ld. Counsel is that the sentence for each of the offences of which reference has been made namely Sections 48, Section 39 (a), Section 63 and Section 39(f) can be given on conviction by a Courts Martial. The Ld. Counsel for the petitioner submitted that in view of the specific requirement in each of the sections of a conviction by Courts Martial as a precondition to the award of sentence, it was not open to the respondents to award punishment and to give Red Ink entry u/s 80 of the Army Act. In support of this contention, Ld. counsel for the petitioner relied upon the principle that where a thing is required to be done in a particular manner, it must be done in that manner or not at all and that other methods of performance are necessarily forbidden. This legal proposition stated more than a century ago in Taylor Vs. Taylor 1875 (1) Ch.D 426 is now firmly established. It was applied by the Privy Council in Nazir Ahmad Vs. Emperor AIR 1936 PC 253. Ld. counsel for the petitioner has cited in his support two decisions namely AIR 1975 SC 915 Ram Chandra Keshav Adke (dead) Vs. Govind Joti Chavare and others, and 1981 UPLBEC 336 State of U.P. and others Vs. District Judge, Varanasi and others. In both these cases Taylor Vs. Taylor has been relied upon. In our opinion, however, the submission made by the petitioner's counsel that the pre-requisite for punishment for the offences

mentioned has to be a conviction by Courts Martial does not have merit. Section 80 of the Army Act provides as Under :

Punishment of persons other than officers, junior commissioned officers and warrant officers : Subject to the provisions of section 81, a commanding Officer or such other officr as is, with the consent of the Central Government, specified by [the Chief of the Army Staff], 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 upto 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 good service and good conduct pay;

(g) severe reprimand or reprimand;

(h) fine up to fourteen days' pay in any one month;

(i) penal deductions under clause (g) of section 91;

7. If the interpretation made by the Ld. counsel for the petitioner is accepted Section 80 would be rendered redundant. The reason is that the requirement of **conviction by Court Martial'** occurs in each of the offences punishable under the Army Act starting from section 34 to 69. Section 80 also provides for punishment of persons other than officers, JCOs and Warrant Officers for offences under the Act in the manner prescribed. Now if punishment for every offence under the Army Act is to be awarded only on conviction by Courts Martial section 80 would never come into play and would

be redundant. Section 80 would therefore have to harmonized with Sections 34 to 69 because it is well settled that the Court should avoid an interpretation which makes a statutory provision redundant. The Rules under the Army Act prescribe the manner in which the punishment under Section 80 is to be awarded. While all personnel subject to the Army Act can be tried by Courts Martial, the power under Section 80 can be exercised only in respect of soldiers other than officers JCO's and warrant Offices. The punishments that can be awarded under Section 80 are much less severe. On a harmonious construction of the provisions of Section 34 to 69 on the one hand with Section 80 it is clear that offences under the Act can also be proceeded with under Section 80 but the provisions of Section 80 can be used for awarding punishments where the Commanding Officer is of the view that less severe punishment would meet the ends of justice and a full trial by Courts Martial is unnecessary. In our opinion, the scheme of the Army Act is quite clear and that if the Commanding Officer is satisfied that the offence is not so grave and lessor punishment can be imposed he need not resort to set in motion the machinery of trial by Courts Martial but may resort to the procedure provided u/s 80 of the Army Act which is speedier.

8. Ld. counsel for the petitioner then submitted that the punishment which was awarded to the petitioner for each of the offences shown in the show cause notice was not justified and the proper procedure was not followed. This submission also, in our opinion does not have much weight. The punishments were awarded in the year 2001, 2002, 2003 and 2004 and have become final as they were not challenged by the petitioner. Secondly, in respect of each of the

offences mentioned in the show cause notice the petitioner had pleaded guilty. This is evident from para 6 of the Counter Affidavit and Annexure 5.

9. Ld. counsel for the petitioner has taken us through Annexure SA -2 of the supplementary affidavit filed today in which the procedure for ordering the discharge has been laid down. Ld. Counsel for the petitioner submits that although it is open to the respondents to waive the show cause notice, but in this case that has not been done and the show cause notice was in fact given to the petitioner and if the respondents chose to issue show cause, it was incumbent upon them to hold a full fledged enquiry consisting of examination of witnesses and right to cross examine etc. It was submitted that the petitioner had given reply to the show cause notice and it was incumbent upon the authorities to deal with the reply to the show cause notice before discharging the petition.er The submission of the Ld. counsel for the petitioner is that principles of natural justice have not been complied with and that no reasons have been given in the order. A copy of the reply has been filed by the petitioner as Annexure 2 to the petition. The petitioner has accepted his faults and has prayed for leniency. There is nothing on merits in the reply which may have required consideration. Ld. Central Government Counsel has placed reliance upon a decision of a Ld. Single Judge (Hon'ble D P Singh, J) of the Lucknow Bench of the Allahabad High Court in Writ Petition No. 772 (SS) of 1997, Gautam Parsad Vs. Union of India and Ors. wherein it has been held that it is open to Parliament to restrict the fundamental rights of Army personnel in view of Art. 33 of the Constitution and the Principles of Natural Justice have been applied in limited manner in the Army Act and Rules and that it is not

necessary for the respondents to hold a regular and full – fledged enquiry when an order of discharge under Army Rule 13(3) III (V) is passed and it is sufficient compliance of the rules that a show cause notice is given. Section 22 of the Army Act provides that any person subject to the Act may be retired, released or discharged in the manner as may be prescribed. An order of discharge under Rule 13(3) III (v) is not a punishment. In Union of India Vs. Corp AK Bakshi and Another (1996) 3 Supreme Court Cases 65 the Apex Court while considering a similar provision under the Air Forces Rules namely Rule 15(2)(g)(ii) observed "This action for his discharge is not by way of punishment for the misconduct for which he has already been punished. The basic idea underlying the policy of discharge is that the recurring nature of punishments for misconduct imposed on an airman renders him unsuitable for further retention in the Air Force. Suitability for retention in the Air Force has to be determined on the basis of record of service. The punishments that have been imposed earlier being part of the record of service have to be taken into consideration for the purpose of deciding whether such person is suitable for retention in the Air Force. The discharge in such circumstances is therefore discharge falling under Rule 15(2)(g)(ii) and it can not be held to be termination of service by way of punishment for misconduct falling under Rule 18 of the Rules."

10. Five Red Ink entries have been given to the petitioner for the offences referred to above. In our opinion there was sufficient material in this case upon which the Army Authorities could have discharged the petitioner.

11. The next contention advanced by the Ld. counsel for the petitioner is that even though there is sanction of the Brigade Commander in respect of the discharge of the petitioner but there is no formal order and the Brigade Commander was required to pass a detailed formal order in the matter. The show cause notice in this case contains the reasons why the termination of services of the petitioner was proposed. The show cause notice was issued by the Brigade Commander. The material disclosed therein was sufficient. Nothing was said in the reply thereto. In view of the fact that the discharge of the petitioner has been sanctioned by the competent authority the Brigade Commander it can not be said that there is any illegality in the discharge of the petitioner in the facts of this case.

12. The last contention of the petitioner's Counsel is that the petitioner was not served with a discharge order or discharge certificate as required by Section 23 and Rule 12 of the Army Rules and hence he has not been discharged. Section 23 ordains that a person dismissed, removed, discharged, retired, released from service shall be furnished by his Commanding Officer with a certificate setting forth (a) the authority terminating his service (b) the cause for such termination and (c) the full period of his service. Rule 12 provides that the discharge certificate may either be delivered personally by the Commanding Officer or sent by registered post. In support of the contention reliance was placed upon a Single Bench decision of the Uttaranchal High Court in Jeet Bahadur Chand Vs. Union of India and others 2006 (5) ALJ 122. In our opinion this contention too does not have merit. In para 3 of the Counter Affidavit it is stated that the petitioner was locally discharged from service vide Unit Part II Order No.

0/264/2004 dated 20 August 2004, ~~along with~~ the copy of that order however has not been annexed with the Counter Affidavit. The facts of Jeet Bahadur Chand case are distinguishable. It was held by the Uttaranchal High Court in para 5 of the Reports of that case that "after the show cause notice and receipt of last reply the department has not passed any order of discharge as required under the Army Rules, 1954". In para 7 of the Reports it was found that there is nothing in the pleadings to indicate that the discharge order was sent. In the present case the discharge has been sanctioned by the Brigade Commander and the original printed form on which it was sanctioned has been produced by the Central Government Counsel before us. It is also stated in para 3 of the Counter Affidavit that the petitioner was locally discharged and reference of the Part II order dated 20 August 2004 has been given. Moreover, it appears that Rule 18 of the Army Rules which directly deals with the subject about the date the discharge becomes effective was not brought to the notice of the Uttaranchal High Court. Rule 18 provides that the authority competent to order discharge may specify a date in future on which the discharge would be effective and if no date is specified the discharge shall take effect from the date on which the discharge was duly authorised or from the date the discharged person ceases to perform Military duty whichever is later. The petitioner has annexed a copy of the Movement Order dated 20.08.2004 as Annexure 3 of the petition. It contains a recital that the petitioner is undesirable and being locally discharged under Rule 13(3) III (v). The authority for the Movement order mentioned therein is HQ 41 Infantry Brigade letter date 19.07.2004 and 'our' (Rajput Regiment) letter dated 20.08.2004. The date of departure is mentioned therein as

20.08.2004. The Original order sanctioning discharge which contains the specimen signature of the petitioner has also been produced. The order does not mention the date from which discharge is to be effective. Discharge would in view of Rule 18 be effective from the date of departure of the petitioner and he had ceased to perform duty in view of the Movement Order. Although in view of the language of Section 23 it is mandatory for the officer to furnish a discharge certificate but the Act does not provide that order of discharge, dismissal, removal, retirement, release shall be communicated by a discharge certificate. The discharge as we have noticed becomes effective in the situation covered by Rule 18. The date which may be mentioned in the order sanctioning discharge, the date of the officer ceasing to perform duty and the date when he is furnished with a discharge certificate could be different especially when a discharge certificate is sent by registered post. Rule 18 already discussed above covers the subject when discharge becomes effective.

13. We, therefore, do not find any merit in this petition.

14. The petition is dismissed.

(Lt. Gen. P R Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

RPS/-