

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TA No. 121 of 2010

Tuesday this the 31st day of August, 2010

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P.R. Gangadharan, Member (A)”

Surendra Lal S/o Late Munshi Lal R/o
Hempura Post Office Sahara, Police
Station Bichhawan, District : Mainpuri.

By Legal Practitioner Shri P N
Chaturvedi, Advocate.

..... Applicant

Versus

1. The Union of India through its Ministry of Defence, Government of India, New Delhi.
2. Chief Record Officer, Record Office, Bombay Engineer Group, Kirkee, Pune-2.
3. Commanding Officer 411 Independent Para Piled Company, C/o 56, APO.
4. Chief of the Army Staff Army Head Quarter, New Delhi.

.....Respondents

5. C.D.A. (Pension), Allahabad.

By Legal Practitioner Shri K D Nag, Sr.
Standing Counsel .

ORDER

“Hon’ble Mr. Justice Janardan Sahai”

1. The petitioner was a Naib Subedar in the Indian Army. During his service he was tried for an offence u/s 302 of the Indian Penal Code and was convicted by the Additional Sessions Court, Mainpuri on 02.05.2000. The petitioner preferred an appeal in the High Court which is stated to be still pending. On 04.05.2000 he was granted bail by the High Court and it is stated by the learned counsel that after grant of bail, he continued to serve. However, he was dismissed by an order dated 30.01.2001. The copy of the dismissal order is Annexure 9 to the petition. The case of the petitioner is that the sentence awarded by the Sessions Court was suspended by the High Court by an order dated 23.03.2001 in the Appeal filed by the petitioner. The petitioner filed a Writ Petition No. 6618 of 2001 in the High Court of Allahabad for quashing the order of dismissal dated 30.01.2001 as also for a direction to give the entire retiral benefits including monthly pension as admissible in accordance with law. After establishment of the Armed Forces Tribunal the petition has been transferred to the Tribunal in view of the provisions of Section 34 of the Armed Forces Tribunal Act, 2007.

2. Ld. counsel for the petitioner has challenged the order of dismissal on the ground that before the order was passed, no opportunity was given to the petitioner. Section 20 of the Army Act confers power upon the Chief of the Army Staff and certain other

officers to pass an order of dismissal. Rule 17 of the Army Rules reads as follows :

“17. Dismissal or removal by Chief of the Army Staff and by other officers : Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court martial, no person shall be dismissed or removed under subsection (1) or sub section (3) of section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service.

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government”

3. It is apparent from the aforesaid rule that the opportunity of hearing and show cause is required to be given in all cases

except where the order of dismissal or removal is passed on the ground of conduct which has led to the conviction of the employee by a criminal court or a court martial. The petitioner's case comes under the exception clause

4. It is submitted by the Ld. counsel for the petitioner that the order of conviction has been suspended by the High Court. That however would have no effect upon the validity of the dismissal order which was passed on 30.01.2001 whereas the order of suspension of execution of sentence was passed by the High Court long thereafter on 21st March, 2001 and on the date the dismissal order was passed there was no stay order. The fact that the petitioner was granted bail on 04.05.2000 also would not take away the power of the military authority to pass an order of dismissal because grant of bail is not a stay of the conviction. Therefore, we do not find any merit in this contention of the Ld. counsel for the petitioner.

5. The other submission made by the Ld. Counsel for the petitioner is in respect of grant of retiral benefits. It is submitted that it is only for a conduct after retirement of the individual that an order for withholding pension can be passed. Reliance has been placed by the Ld. counsel for the petitioner upon the decision of the Allahabad High Court in the case of Uma Shankar Bharti V. Chief Controller of Defence Accounts 1994 (2) LBESR 761 which has interpreted Regulation 4 of the Pension Regulations for the Army 1961

which provides withholding or withdrawal of pension on the conviction of the pensioner. The Division Bench held that the conviction of a 'pensioner' would mean conviction after retirement and not conviction when the employee is serving. We have gone through this decision. From the facts stated in the judgment it is not clear whether any order of dismissal had been passed in that case. Learned counsel for the petitioner however submitted that para 423 of the Regulations was invoked by the respondents in the Counter affidavit and that Regulation contemplates an order of punishment in disciplinary proceedings which would mean that the petitioner in that case had been dismissed. Be that as it may. Even assuming that in that case an order of dismissal from service had been passed one of the questions which would require consideration is about the effect of Regulation 113 of the Pension Regulations for the Army which reads as follows :

“113 (a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.

(b) An individual who is removed from service under Army Act, Section 20, may be considered for the grant of pension/gratuity at the rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. The competent authority may, however, make, if considered necessary, any reduction in the amount of pension/gratuity on the merits of each case.

(c) An individual who is discharged under the provision of Army Act and the rules made thereunder remains eligible for pension or gratuity under these Regulations.”

In the case of Uma Shankar Bharati the Division Bench has not considered the impact of Rule 113. Regulation 113(a) applies to cases of dismissal and it does not draw any distinction on the point whether the dismissed was a result of conviction by a criminal court or for charges proved in a departmental enquiry. Regulation 113 would apply in the case of dismissed. If the Learned Judges of the Division Bench in Uma Shankar Bharti meant to hold that even in a case of dismissal from service of the employee based on his conviction by a criminal court his pension cannot be withheld we would say that the decision is per incuriam as attention of the Learned Judges was not drawn to Regulation 113. Regulation 113 applies to an employee dismissed from service irrespective of the fact whether he was convicted by a criminal court or dismissed for other misconduct as a result of disciplinary proceedings. The two Regulations operate in different fields. The Apex Court in Union of India & Others Vs. Subedar Ram Narain and Others 1998 (8) Supreme Court Cases 52 has dealt with this question and has held in paras 9, 10 and 11 of its judgment as follows:

“9. The first sentence of Regulation 113 (a) clearly provides that an individual who is dismissed under the provisions of the Army Act is ineligible for pension or gratuity in respect of all previous service. In other words, a person like the respondent to whom Section 113 (a) applies will not be entitled to receive any

pension on an order of his dismissal being passed Clause (b) of Section 113 makes a distinction in the case of a person who is discharged, and not dismissed, under the provisions of the Army Act. In the case of discharge, a person remains eligible for pension or gratuity under the said regulation. The latter part of Section 113(a) provides that in exceptional cases, the President may at his discretion, grant service pension or gratuity at a rate not exceeding that for which an individual would have otherwise qualified had he been discharged, and not dismissed, on the same day. Reading Regulation 113, it is clear that in the case of a junior commissioned officer or a person belonging to another rank or a non-combatant (enrolled) he would become ineligible for grant of pension or gratuity on the passing of an order of dismissal. The disentitlement to pensionary benefits is the normal result of a dismissal order. But the President may, in exceptional cases, at his discretion, order the grant of pension. Therefore, if no order is passed by the President, then the result is that the dismissed junior commissioned officer remains disentitled to pension or gratuity.

10. *The terms of Regulation 16(a) are clearly different from Regulation 113(a). According to Regulation 16(a), when an officer as defined in Section 3 (xviii) of the Army Act, 1950, is cashiered or dismissed or removed from service, then the President has the discretion of either forfeiting his pension or ordering that he be granted pension at a lesser rate. The dismissal, removal etc.*

of a commissioned officer does not, in other words, automatically result in the forfeiture or lessening of his pension. Power is, however, given to the President that in such a case he may either direct the forfeiture of the officer's pension or reduction in the rate thereof. Major Sodhi case was one which dealt with the question of forfeiture of a commissioned officer's pension on his being dismissed from service. It is in the context of Regulation 16(a) that it was observed that as no order was passed under the said Regulation, therefore, the officer concerned would be entitled to the receipt of full amount of pension or gratuity which would normally be payable to him.

11. The question with regard to forfeiture of pension in the case of a junior commissioned officer to whom the provisions of Regulations 113 applied came up for consideration before this Court in Union of India V. R.K.L.D. Azad. After referring to Regulation 113(a), this Court at P. 429 observed as follows : (SCC para 11).

11. In view of the plain language of the above regulation the respondent cannot lay any legal or legitimate claim for pension and gratuity on the basis of his previous service as, admittedly, he stands dismissed in accordance with Section 73 read with Section 71 of the Act. The second question must, therefore, be answered in the negative."

Regulation 16 of the Pension Regulations 1961 applies in the case of Officers whereas Regulations 113 applies in the Case of Personnel

Below Officers Rank (PBOR). Under Regulation 16 there is discretion vested in the President of India to sanction or not pension even in case where the dismissal order has been passed. Regulation 113 has however been interpreted by the Apex Court to mean that in case of dismissal unless there is an order of payment of pension by the President of India, pension would not be payable to the individual. There is no order of the President sanctioning pension in this case. The petitioner therefore is not entitled for pension.

It is submitted by the Ld. Counsel for the petitioner that the petitioner may be permitted to make an application before the President of India under the Pension Regulations, for grant of pensionary benefits. It is not necessary for us to express any opinion upon the point for it is open to the petitioner to make any appropriate application before the competent authority and if such an application is made it would be decided in accordance with law. We do not find any merit in this Transferred Application which is dismissed.

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

(Justice Janardan Sahai)
Member (J)

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