ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 214 of 2010
[Writ Petition No. 41099 of 1999]

Thursday the 11th day of November, 2010

"Hon'ble Mr. Justice A.N. Varma, Member (J)
Hon'nble Lt. Gen. R.K. Chhabra, Member (A)"

Shiv Dayal Pandey (15398167H/ST), Son of Late Sudarshan Pandey, Resident of Vajidpur (Rampur), Post : Dalan Chhapara, District : Ballia.

Applicant

By Legal Practitioner Shri K.C Ghildiyal, Advocate.

Versus

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

2. The Chief of the Army Staff, Sena Bhawan, New Delhi.

3. Commanding Officer, Technical Training Regiment, 1 Signal Training Centre, Jabalpur (M.P.).

4. General Staff Adhikari 1/GSO 1, Kirtey Pramukh Signal Adhikari for Signal Officer-in-Chief.

Respondents

By Legal Practitioner Shri Raj Kumar Singh, Advocate, Central Government Counsel.

ORDER

"Hon'ble Lt. Gen. R.K. Chhabra"

1. This case has come before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, 2007 from Allahabad High Court at Allahabad.

2. The applicant was enrolled in the Indian Army on 01.05.1996. He was discharged from Service on 01.11.1998 under Army Rule 13(3) Item IV on the grounds of "unlikely to make efficient soldier". Copy of Dishcharge Certificate is at Annexure 3.

3. As per paragraphs 6 and 7 of the writ petition, during the training period the applicant was granted six days leave on "urgent" grounds, however, despite having been promised extension of leave, no such extension was granted and he overstayed his leave by 22 days. He was punished with 21 days rigorous imprisonment (RI) for this offence. During the said punishment, he was not allowed to attend training and consequently failed in the First Semester. No second chance was given to him. He was also relegated to the junior course.

4. The applicant again applied for 10 days leave for his sister's marriage in May 1998. However, during the leave period his grandfather expired leaving him no choice but to once again seek extension of leave. No reply was received from the respondents in response to his request for extension. He overstayed leave by 16 days and was awarded 28 days RI for this offence. On 09.09.1998, the applicant was asked to sign application for voluntary discharge which he refused.

5. On 11.10.1998, he was served with a show cause notice (Annexure 1) explaining the events leading to the two punishments, failure to clear tests, relegation on academic grounds, requirement for the applicant to sign discharge documents and for refusal to sign discharge documents. He submitted reply (Mercy Petition) to the show cause notice within two days as required therein. However, much to the surprise of the applicant he was discharged from service with effect from 01.11.1998.

6. The applicant moved a representation to the Chief of the Army Staff on 16.01.1999 (Annexure 5) which was rejected by Respondent No. 4 on 04.03.1999 (Annexure 6). He again submitted a supplementary representation on 29.05.1999, however, no response was received. Aggrieved by inaction on part of the respondents, the applicant filed Writ Pettion no 41099 of 1999.

7. The applicant has prayed for the following reliefs:-

"i. issue a writ, order or direction in the nature of certiorari quashing the rder dated 31.10.1998, 4.3.99 and 29.5.99 (Annexures 4, 6 and 7).

ii. issue a writ, order or direction in the nature of mandamus commanding the Respondents to restore in service to the petitioner and give all benefits of service as the petitioner's service is continue from 31.10.1998.

iii. issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

iv. award the cost of the petition."

8. We have heard Shri Shri K.C Ghildiyal, Learned Counsel for the applicant as also Shri Raj Kumar Singh, Senior Central Government Counsel for Respondents.

9. Learned Counsel for the Applicant vehemently argued that the show cause notice served upon the applicant is not a show cause notice for discharge in the real sense of the word. The notice did not seek applicant to show cause as to why his services should not be terminated and as such it did not afford him an opportunity to defend himself which is against the tenets of principles of natural justice.

10. He further argued that even if it is assumed that the said notice was indeed a show cause notice, it can at best be described as "post decisional show cause notice" ie a notice where decision to terminate the services of the applicant had already been made.

11. He submitted that as per existing instructions on the subject, it is the Commanding Officer only who can sanction discharge of a person under the Army Act. By referring the matter to the higher Headquarters, the Commanding Officer has absolved himself of this responsibility and as such it was not him but Commandant, 1 Signal Training Centre who sanctioned the discharge which is manifestly illegal. He argued that not only applicant's discharge has not been sanctioned by the Commanding Officer but also there is no material on record to show application of mind by him in reaching the conclusion that the applicant

actually deserved to be discharged from service under Army Rule 13(3) Item IV on the grounds of "unlikely to make efficient soldier". He further argued that even if under the provisions of the said Army Rule, there is no requirement of following a procedure to show cause, not doing so was against the spirit of natural justice and fair play.

12. Learned Counsel for the applicant relied upon judgment of Hon'ble Division Bench of Delhi High Court in the case of Sheel Kr. Roy versus Secretary, Ministry of Defence & Ors reported in 2007 AIR SCW. On the strength of paragraph 19 of the said judgment reproduced hereinunder, the learned Counsel tried to demonstrate the aspect of "double jeopardy" and award of more than one punishment for the same offence:

> *"19. We although agree with the learned Additional Solicitor General that it is legally permissible to award more than one punishment in terms of Section 71 of the Act but we may notice that Section 39(a) specifically deals with the misconduct in respect of absence without leave. It is one thing to say that legally it is permissible to impose more than one punishments but then also it is another thing that in exercising the said power all attending situations which fell for consideration by the punishing authority in regard to the quantum thereof would not be taken into consideration. It is clear that the Commanding Officer in the Summary Court Martial proceedings failed to take into consideration the relevant fact and, thus, committed an error apparent on the face of the*

record. We are also of the opinion that in a case of this nature, imposition of both punishment of rigorous imprisonment for six years as also dismissal from service was wholly arbitrary in nature. It is also vitiated in law as all relevant facts were not taken into consideration."

13. Learned Counsel for the applicant also relied upon judgment of Hon'ble Apex Court in the case of HL Trehan and Others versus Union of India & Others reported in (1989) 1 Supreme Court 76.

"The post decisional opportunity of hearing does not subserve the rules of natural justice. Once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. (Paras 12 and 13)."

14. On the strength of the aforesaid judgment, the leaned counsel submitted that the show cause notice issued by Respondent No 3

amounted to post decisional opportunity of hearing and as such was clearly in violation of the tenets of principles of natural justice.

15. He further relied upon another judgment of Hon'ble Division Bench of the Apex Court in the case of DK Yadav versus JMA Industries reported in (1993) 3 Supreme Court Cases 259. To support his contention regarding providing reasonable opportunity to a person to present his case and the authority in turn should act fairly, justly and reasonably as also the respondents need to give a very serious thought before depriving a person of livelihood, he relied on paragraphs 7 to 12 reproduced below:

"7. The principal question is whether the impugned action is violative of principles of natural justice. In A.K. Kraipak v. Union of India a Constitution Bench of this Court held that the distinction between quasi-judicial and administrative order has gradually become thin. Now it is totally eclipsed and obliterated. The aim of the rule of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules operate in the area not covered by law validly made or expressly excluded as held in Col. J.N. Sinha v. Union of India. It is settled law that certified standing orders have statutory force which do not expressly exclude the application of the principles of natural justice. Conversely the Act made exceptions for the application of principles of natural justice by necessary implication from specific provisions in the Act like Sections 25-F; 25-FF; 25-FFF etc. the need for temporary hands

to cope with sudden and temporary spurt of work demands appointment temporarily to a service of such temporary workmen to meet such exigencies and as soon as the work or service is completed, the need to dispense with the services may arise. In that situation, on compliance with the provisions of Section 25-F resort could be had to retrench the employees in conformity therewith. Particular statute or statutory rules or orders having statutory flavor may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies.

2. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

3. It is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case

and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill v. Chief Election Commissioner the Constitution Bench held that 'civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th edn., page 1487 defines civil rights are such as belong to every citizen of the state or country ……… they include ……. Rights capable of being enforced or redressed in a civil action ……… In State of Orissa v. (Miss) Binapani Dei this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principle s of natural justice.

4. In State of W.B. v. Anwar Ali Sarkar per majority, a seven-Judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In Maneka Gandhi v. Union of India another Bench of

seven Judges held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

5. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil

consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see whey it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

6. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of

arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable."

16. Learned counsel for the respondents in opposition vehemently argued that the applicant was very weak in studies from the very beginning of training and that he failed in three papers in the final test conducted in March 1997. After being imparted extra coaching, he passed in retest and was promoted to attend Class III training. He failed yet again in July and September 1997 and March 1998. He was given retest on all occasions and somehow managed to pass. However, due to his inability to pass test and not keep up with the course, he had to be relegated for 19 weeks as against maximum permissible 12 weeks under the existing policy on the subject.

17. He further submitted that while on one hand, the applicant was weak in studies, on the other, he asked for leave on two occasions and overstayed granted leave on both the occasions resulting in the applicant being awarded 21 and 28 days RI respectively. Thus, he not only missed training on account of granted and overstayed leave but also due to being confined to the Quarter Guard (prison cell) as punishment for the aforesaid offences.

18. Learned counsel argued that there being no further scope of relegation, the Commanding Officer was constrained to discharge the applicant under Army Rule 13(3) Item IV on the grounds of "Unlikely to become efficient soldier".

19. Having considered rival arguments at length. There is essentially no dispute with regard to the initial unfolding of events and subsequent aspects relating to the applicant being weak in studies and practical. It has also been well established that the applicant was given extra coaching and retests to enable him to pass the test on more than three occasions.

20. The Commanding Officer was supportive and considerate in that he tried to help out the applicant at various stages through guidance, retests and granting him leave despite the applicant being weak in studies. However, the applicant failed to stand up to the trust reposed by the Commanding Officer in him and refused to work harder and come up to the desired standards despite being given every opportunity to do so.

21. Basic Military Training and Technical Training is formative training for recruits which is conducted as per a time bound programme with little scope for failing time and again, missing training beyond permissible limits (absence of leave for any reason including sickness). It is foundation stone on which subsequent professional and operational efficiency of a soldier is built. A weak foundation means weak building. During training period, to be seeking leave of absence for personal reasons is sacrilege; overstaying granted leave an anathema.

22. The applicant was not only extremely weak in studies and practical work, it is evident to us that he did not wholeheartedly devote himself adequately to basic and technical training so that he could come up to the desired standards.

He sought leave for "not so compassionate reasons" on two occasions and overstayed the same on both the occasions without caring about the adverse consequences of his actions. Throughout the Commanding Officer gave him adequate opportunity to mend his ways and show improvement. Being visited by two punsihment in the very formative years of the applicant's training also goes to show the type of soldier he would have made in the subsequent service, had he been retained in service. It will be be well worth to highlight the fact that a soldier is liable to be discharges from service under Army Rule 13.......... for four or more red ink entries. In the instant case, the applicant had already incurred two red ink entries in a short span of less than two years.

23. A detailed show cause notice was served to the applicant outlining the circumstances leading to his impending discharge. The applicant, for the reasons best known to him chose not to give reasons for not discharging him from service under the provisions of the Army Rule 13(3) Item IV on the grounds of “unlikely to make efficient soldier” but instead submitted a Mercy petition. Therefore the Commanding Officer gave reasonable opportunity to the applicant to defend his case and the authority (the Commanding Officer) in turn acted fairly, justly and reasonably as also he gave a very serious thought before depriving a person of livelihood. Thus the actions of the the Commanding Officer were not in contravention to the proposition in the case of DK Yadav (Supra).

24. We are also of the view that reference to the higher HQ ie 1 STC by the Commanding Officer does not tantamount to post decisional opportunity of hearing and as such does not in any way vitiates the principles of natural justice as in the case of HL Trehan (Supra).

25. We also find that there is no applicability of the proposition as in the case of Sheel Kr. Roy (Supra) and therefore the question of "double jeopardy" and award of more than one punishment for the same offence does not arise.

26. We also do not find any merit in the applicant's insinuation that the Commanding Officer did not apply his mind to the case. The applicant was enrolled in 1996 and discharged in 1998. For nearly two long years the Commanding Officer monitored the performance of the applicant, organized extra coaching, gave him opportunity to appear in retests, granted leave to him twice on humanitarian grounds, referred the matter to higher HQ for advice, issued show cause notice, etc. We fail to understand that if this not application of mind, what is it that that would constitute application of mind. Through out this episode the Commanding Officer acted with maturity and sense of empathy.

27. We do not find any illegality or infirmity in the applicant being discharged from service under the provisions of Army Rule 13(3) Item IV on the grounds of "unlikely to make efficient soldier". The petition being devoid of merits accordingly is dismissed.

28. No order however as to costs.

(Lt. Gen. R.K. Chhabra) (Member (A)	(Justice A.N. Varma) (Member (J)

Dwi/NKS