

RESERVED**A.F.R.**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
COURT NO. 3

T.A. No. 1131 of 2010
Friday, this the 27th day of September 2013

“Hon’ble Mr. Justice Virendra Kumar Dixit, Judicial Member
Hon’ble Lt. Gen. B.S. Sisodia, Administrative Member”

No 5241146-F Ex Hav Shambhu Gurung s/o Sri Prem Singh Gurung, Village
& Post – Darohula, District – Zone- Mahakali (Nepal)

.....Applicant

Versus

1. The Union of India : Through Secretary Ministry of Defence, New Delhi-110011.
2. General Officer Commanding-in-Chief, Central Command, Lucknow.
3. Commandant Cum Chief Records Officer, 39 Gorkha Training Centre, Varanasi.
4. Col. J. S. Gosal, Commanding Officer 3/3 Gorkha Rifles, c/o 99 APO.
5. Chief of the Army Staff, New Delhi-110011.
6. Principal Controller of Defence Accounts (Pension), Draupadighat, Allahabad.

....Respondents

Ld. Counsel appeared for the applicant – Shri K.K. Mishra, Advocate

Ld. Counsel appeared for the respondents - Col (Retd.) B.P. Singh, Central
Government Counsel

ORDER

“Per Justice Virendra Kumar Dixit, Judicial Member”

1 This Writ Petition No. 17698 of 2007 has been received by this Tribunal by transfer from High Court of Judicature at Allahabad on 05.08.2010 and renumbered as Transferred Application No. 1131 of 2010.

2. The applicant through this Transferred Application has prayed as under :-

(a) *To issue a Writ Order or direction to the Respondents to treat the Petitioner as having continued in Colour Service till the Petitioner earns his Pensionary dues as Junior Commissioned Officer with all the consequential benefits.*

(b) *To issue a Writ of certiorari summoning the Records of the impugned illegal Premature Discharge order effective from 01 Mar 93 (FN) including Impugned Minute Sheets, affecting the Petitioner and rejection order dated 13 March 2007 (Annexure 16 refers) and quash the same ordering the Petitioner deemed continued in Colour Service till would have continued completed his services as a Junior Commissioned Officer with all the consequential benefits.*

(c) *To issue any other Writ Order or direction considered expedient and in the interests of Justice, and equity.*

(d) *Award cost.*

3. In brief, the facts of the case are that the applicant was enrolled as a recruit in the Army in 3 Gorkha Rifles on 29.07.1972. After completion of his Basic Military Training, he was posted to 3/3 Gorkha Rfiles on 09.03.1973 where he continued to serve till February 1993. He was promoted to the rank of Naik and Havildar on his own turn subsequently. The applicant had submitted an application dated 23.08.1992 directly to the Hon'ble Raksha Mantri (RM), to redress his grievances regarding his promotion to the rank of Naib Subedar with a copy to the Chief of the Army Staff (COAS). In the last week of December 1992, the applicant's application was received in the unit through Army Headquarters. An inquiry was ordered by the Commanding Officer to investigate the matter as writing a letter to the RM without proper channel was in contravention to para 59 of Regulations for the Army. On 04.01.1993, the applicant, while the above

investigations were on, had applied for premature discharge, quoting ill health of his wife. The request was initially not considered by his Commanding Officer as disciplinary case was still under investigation. The applicant was found guilty of the offence and was awarded 'Severe Reprimand' on 05.02.1993 under Section 63 of the Army Act 1950. After finalization of disciplinary case, the applicant had again submitted an application dated 05.02.1993 for voluntary discharge from service which was sanctioned by the Commanding Officer on 06.02.1993 under Rule 13 (3), item III (iv), Army Rule 1954. Subsequently, the discharge was also approved by the Officer-in-Charge Records 39 Gorkha Rifles on 12.02.1993 and discharge order was issued accordingly. After discharge from Army service, the applicant submitted a legal notice dated 11.03.1993 alleging illegal discharge from service which was rejected by Integrated Headquarters of MOD (Army) vide letter dated 16.07.1993. Aggrieved by this, the applicant filed this Transferred Application.

4. Heard, Ld. Counsel for the applicant Shri K.K.Mishra and Col. B.P. Singh (Retd), Ld. Central Govt Counsel for the respondents and perused the impugned orders and other relevant records and documents.

5. Learned Counsel for the applicant has submitted that on 04.01.1993, under the pressure of the CO, the applicant submitted an application for of discharge, on the ground of his wife's ill health. In the meantime, the applicant got a copy of a letter written by his wife on 21.01.1993 to Director General, Infantry, Army HQ requesting him to direct the authorities in the unit to cancel the contemplated discharge of the applicant. This letter was received by the Director General Infantry on or before 25.02.1993, as is evident from the letter of Records dated 13.03.1993 attached with SRA.

6. It is further submitted that the applicant also wrote a letter to the Commandant, 39 Gorkha Training Centre (GTC), with a copy to Records, 39 GTC on 06.01.1993 and to the General Officer Commanding-in-Chief, Eastern Command, requesting them to get his discharge cancelled. On 05.02.1993, the applicant was served with a charge sheet and was awarded sentence of Severe Reprimand. There upon, he was again forced to sign another application for discharge from service on compassionate grounds, which the applicant had no choice but to sign. The discharge was finalized within 2 days and got approved from Records on 12.02.1993. Realizing that the unit authorities were all set to send applicant on discharge against his WILL, the applicant wrote letters and telegrams to the Commander Sub Area Allahabad, GOC-in-C, Headquarters Central Command (letter dated 15.02.1993), the COAS, letter dated 16.02.1993, telegram dated 18.02.1993 and also to Director General Infantry, Army Headquarters vide letter dated 20.02.1993. On 28.02.1993, in the discharge parade, the applicant also made a request to the concerned authority for cancellation of his discharge which had been admitted by the respondents in the Counter Affidavit, but without any result and finally the applicant was discharged from the service on 01.03.1993. It is also submitted that since the applicant had withdrawn his offer for premature retirement before the same was accepted, on the contrary, the respondents has accepted the discharge with immediate effect. The applicant had every right to withdraw his offer of premature retirement before it may take effect. In support of his argument, Ld. Counsel has cited the decisions of the Hon'ble Supreme Court in the case of Punjab and Sindh Bank Versus Mohinder Pal Singh, case No 8476 of 2002, Shambhu Murari Sinha vs Project and Development India : Civil appeal No 2639 of 1999, arising out of SLP (civil) No 14645 of 1999 decided on 14.04.2000.

7. On the other hand, Ld. Counsel for the respondents submitted that premature discharge of the applicant was rightly sanctioned based on his own request vide his application dated 05.02.1993. The request for cancellation of discharge once sanctioned may be considered by an authority superior to the officer who sanctioned the discharge under the provisions of Army Rule 11 (2), but was not necessary that it must be cancelled. As the applicant's discharge at his own request was sanctioned by his Commanding Officer, it could only be considered by the next formation Commander under whose jurisdiction his unit was placed at that time, before he was finally SOS from the Army and no other Army authority. Further, no record of the applicant having applied for cancellation of his discharge through his Commanding Officer was available. It is also submitted that Photocopies of application/telegram separately addressed to various authorities were received alongwith CMWP No. 3201/1994 i.e. after his Struck of Strength from Army. On the applicant's verbal request for cancellation of his discharge while on discharge drill at Depot Company 39 GTC, the case was explained to his satisfaction.

8. It is further reiterated that although the applicant had cleared the promotion cadre from Havildar to Naib Subedar, however, he did not possess all the requisite qualifications to become a Junior Commissioned Officer on 05.12.1992 as his misdemeanor of 23.08.1992 had come to light and investigations were carried out against him for an offence under Army Act Section 63. The applicant was not entitled for consideration for further promotion with effect from 05 December, 1992. The promotion of personnel who were junior to the applicant were withheld pending finalization of investigations against him. Promotions papers of two juniors of the applicant were processed by the unit on 26.05.1993 i.e. only after finalization of the applicant's disciplinary case wherein he was found ineligible due to the award of punishment '**Severe Reprimand**' on 05.02.1993.

9. It is further submitted that since the entire records reveal that the applicant was not coerced to sign his application for discharge and also that the provisions of Army Rule 22 (I) were duly complied with during his summary trial and the applicant was convicted by summary trial and awarded 'Severe Reprimand', he was found unfit for promotion and consequently the persons junior to him were promoted. Ld. Counsel for the respondents concludes his arguments with the submission that the impugned orders are in accordance with the rules and regulations and as there is no merit in the case hence it deserves to be dismissed with the costs.

10. The rules and regulations are guidelines and must be judiciously applied and implemented, keeping in mind, the honour and welfare of all ranks in the Armed Forces. Problems in taking up a case with the higher authority for cancelling the illegal discharge order can not be accepted as a valid ground for denying the legitimate entitlement to any of the Armed Forces personnel who are known for their sacrificed young hood for the good cause of the Nation. We fully endorse and appreciate the plea and concern of the applicant.

11. From a perusal of relevant documents on record, it appears that the respondents had passed the impugned order without considering the fact, rules and regulations in its entirety. If the applicant had submitted his application for cancellation of his premature discharge to his higher authority in the chain of command well before it was accepted and date of actual release from service of the applicant, his case could have been considered in accordance with the rules and regulations and law of the land.

In the case of Balram Gupta vs. Union of India and Another reported in 1997 (Supp) Supreme Court Cases 228, in para 10 and 13 of the judgement, Hon'ble Apex Court has held –

“10. This question arose in the case of one Shri Satish Chandra, then a Judge in the High Court of Allahabad in Union of India vs. Gopal Chandra Mishra. There the second respondent Shri Satish Chandra wrote to the President of India, on May 7, 1977, intimating his resignation from the office of judge of the Allahabad High court, with effect from August 1, 1977. On July 15, 1977, he again wrote to the President, revoking his earlier communication, and commenced deciding matters in court from July 16, 1977. On August 1, 1977 the first respondent Shri Misra, an advocate of the said High Court filed a writ petition under Article 226 of the Constitution contending that the resignation of Shri Satish Chandra having been duly communicated to the President of India in accordance with Article 217 (1) Proviso (a) of the Constitution was final and irrevocable, and that the continuance of said Shri Satish Chandra as a Judge of the High Court thereafter, was an usurpation of public office. The High Court allowed the petition holding that Shri Satish Chandra was not competent to revoke his resignation letter. On appeal this Court held that the resigning office necessarily involved relinquishment of the office which implied cessation or termination of, or cutting as under from the office. A complete and effective act of resigning office is one which severs the link of the resigner with his office and terminates its tenure. In the context of Article 217 (1) this assumes the character of a decisive test, because the expression “resign his office” occurs in a proviso which excepts or qualifies the substantive clause fixing the office tenure of a Judge up to the age of 62 years. It was further reiterated that in the absence of a legal, contractual or constitutional bar, an intimation in writing sent to the appropriate authority by an incumbent, of his intention or proposal to resign his office/post from a future specified date, can be withdrawn by him at any time before it becomes effective i.e.,

before it effects termination of the tenure of the office/post, or employment. This general rule equally applies to government servants and constitutional functionaries, this Court reiterated. The other peculiar essence of Article 217 which was discussed need not detain us in the facts of this case. On the principle of general law the offer to relinquishment could have been withdrawn by the appellant before the date it became effective if sub rule (4) of Rule 48 (A) was not there.”

“13. We hold, therefore, that there was no valid reason for with holding the permission by the respondent. We hold further that there has been compliance with the guidelines because the appellant has indicated that there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one’s future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways “to ease out” uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees.

In the case of J.N. Srivastava vs. Union of India and Another reported in (1998) 9 Supreme Court Cases 559, in para 3 of the judgement, Hon'ble Apex Court has held-

“3. The short question is whether the appellant was entitled to withdraw his voluntary retirement notice of three months submitted by him on 03.10.1989 which was to come into effect from 31.01.1990. It is true that this proposal was accepted by the authorities on 2.11.1989. But thereafter before 31.1.1990 was reached, the appellant wrote a letter to withdraw his voluntary retirement proposal. This letter is dated 11.12.1989. The said request permitting him to withdraw the voluntary retirement proposal was not accepted by the respondents by communication dated 26.12.1989. The appellant, therefore, went to the Tribunal but the Tribunal give him no relief and took the view that the voluntary retirement had come into force on 31.1.1990 and the appellant had given up the charge of the post as per his memo relinquishing the charge and consequently, he was stopped from withdrawing his voluntary retirement notice. In our view the said reasoning of the Tribunal cannot be sustained on the facts of the case. It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement.

In the case of Shambhu Murari Sinha vs. Project & Development India Ltd and Another reported in (2002) 3 Supreme Court Cases 437, in para 13, 18 and 19 of the judgement, Hon'ble Apex Court has held-

“13. In Nand Keshwar Prasad vs. Indian Farmers Fertilizers Coop. Ltd. In paragraph 11, this Court reiterated that it is open to the

employee concerned to withdraw letter of resignation before the date indicated in the notice of voluntary retirement. It was also observed therein: "It appears to us that the law is well settled by this Court in a number of decisions that unless controlled by condition of service or the statutory provisions, the retirement mentioned in the letter of resignation must take effect from the date mentioned therein and such date cannot be advanced by accepting the resignation from an earlier date when the employee concerned did not intend to retire from such earlier date."

18. *Coming to the case in hand the letter of acceptance was a conditional one inasmuch as, though option of the appellant for the voluntary retirement under the Scheme was accepted but it was stated that the 'release memo alongwith detailed particulars would follow'. Before the appellant was actually released from the service, he withdrew his option for voluntary retirement by sending two letters dated 7.8.1997 and 24.9.1997, but there was no response from the respondent. By office memorandum dated 25.09.1997 the appellant was released from the service and that too from the next day. It is not disputed that the appellant was paid his salaries etc. till his date of actual release i.e. 26.9.1997, and, therefore, the jural relationship of employee and employer between the appellant and the respondents did not come to an end on the date of acceptance of the voluntary retirement and the said relationship continued till 26.09.1997. The appellant admittedly sent two letter withdrawing his voluntary retirement before his actual date of release from service. Therefore, in view of the settled position of the law and the terms of the letter of acceptance, the appellant had locus poenitentiae to withdraw his*

proposal for voluntary retirement before the relationship of employer and employee came to an end.”

“19. We, therefore, hold that the respondent could not have refused to accept the resignation of the appellant as it was sent before the jural relationship of employee and employer came to an end..

12. In view of the aforesaid citations, it is well settled law of the land that if the applicant had submitted his application for withdrawal of his premature discharge to his higher authority in the chain of command well before the effective date of retirement, his case should have been considered in accordance with the rules and regulations and law of the land. In the instant case, it transpires from the perusal of records that the applicant has submitted his request for withdrawal of his premature retirement application and before it was accepted by the respondents. **Moreover, the applicant has sent several letters and telegrams to the respondents and original postal receipts of the telegrams and registered letters have been annexed by the applicant for which the respondents have been granted several opportunities to answer whether these letters and telegrams were received by the respondents but The respondents have failed to produce any satisfactory response in this regard. At the last opportunity, Ld. Counsel for the respondents ultimately expressed his inability and stated that receipts of the said letters and telegrams by the respondents could not be confirmed. Under the facts and circumstances of the case, presumption of receipt of the aforesaid letters and telegrams by the respondents goes in favour of the applicant.**

13. In view of the facts and circumstances of the case, we are of the considered view that the applicant has submitted his application to withdraw his application for premature retirement well before the effective date of retirement. The applicant

has every legal right to withdraw his application for voluntarily retirement before the relationship between employer and employee came to an end. The impugned order of discharge is unjust, arbitrary and against the settled position of law and thus liable to be quashed. The T.A. deserves to be allowed and the applicant is entitled to rejoin his duties and other benefits during the period he was out from the service.

14. Thus in the result, the T.A **succeeds and is allowed** with costs. The impugned premature discharge order effective from 01.03.1993 including Minute Sheet affecting the applicant is set aside. The applicant shall be entitled to re-join his duties and he shall be paid all his salaries and other benefits during the period he was out from the service. Ld. Counsel for the respondents has stated that by this time, the applicant might have retired from service on attaining the age of superannuation, if that be so, he shall be paid full salary, allowances and other benefits in accordance with law for the entire period he was out of service till the date of his retirement and thereafter he shall be entitled to get all retiral benefits counting the above period as he was in his service. The respondents are directed to comply the order within three months from the date of production of a certified copy of this order before the authority concerned.

(Lt. Gen B.S. Sisodia)
Administrative Member

(Justice V.K. Dixit)
Judicial Member

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