

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 8th April, 2011

+ W.P.(C) No. 3711/2010

TEIN SINGH DAHIYA Petitioner
Through: Mr.S.S.Pandey with
Mr.Santosh Kumar,
Advocates.
versus

UOI & ORS. Respondents
Through: Mr.Ashwani Bhardwaj,
Advocate for Mr.Jitender
Chaudhary, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The undisputed fact is that the petitioner was enrolled in the Indian Army on 9.3.1987 as a Havildar Clerk (GD) and after completing Basic Training was paid salary in acting rank of Havildar w.e.f. 23.06.1988 with ante-dated seniority effective from 26.03.1988.

2. Deputed as a Clerk in the Quarter Master Section of 7015 Combined Workshop EME, on 29.07.1988, the petitioner was assigned additional duties as Coy Clerk of Recovery Company on 13.06.1990. Having become due for grant of substantive rank of Havildar w.e.f. 1.3.1990, petitioner was granted said substantive rank on 8.7.1990.

3. In August 1990, the Commanding Officer of 7015 Combined Workshop EME summarily tried the petitioner for an offence punishable under Section 41 of the Army Act and for unexplainable reasons awarded punishment of reduction to the rank of Sepoy, little realizing that a penalty of reduction in rank cannot be given effect to when a person has earned no promotion.

4. Realizing that the penalty levied was incapable of being given effect to, inasmuch as a direct entrant to a post cannot be reduced to a rank of a lower post, rather than substitute the penalty with such penalty which was capable of being inflicted upon, the respondents let the matter rest as it was.

5. The result was that the petitioner continued to receive salary and work as a Havildar; in the acting rank thereof. He continued to receive salary as a Havildar till the respondents superannuated the petitioner on 31.10.2009 and proceeded to recover ₹88,936/- from the final dues payable to the petitioner on the ground that while reducing the petitioner to a post of Sepoy inadvertently higher wages in the rank of Havildar was paid to him.

6. The petitioner has a two-fold grievance. Firstly, of ₹88,936/- being deducted from the dues payable to him and second of not being granted extension in service of two years.

7. Suffice would it be to state that as per the extension policy dated 21.9.1998 petitioner would be entitled to serve for another two years if he had no Red Ink Entry entered in his service book. A Black Ink Entry would have enabled him

for service being extended for two years.

8. In a nutshell, what the petitioner claims is that the penalty in question is non-est. It was rightly not given effect to. For the reason it was never given effect to, the petitioner never exercised his rights to question the same. Even otherwise, the penalty cannot be given effect to. No person can be visited with the penalty of being reduced in rank to a post lower than at which the person entered. At best, punishment entered has to be treated as a Black Ink Entry. This is what the petitioner urges.

9. Let us have a look to the counter affidavit filed.

10. In the brief facts, in para 1, it is stated that the petitioner was enrolled in the Army Corps as a direct entry Havildar and after successful completion of Military Training was promoted to the rank of paid acting Havildar.

11. Learned counsel for the respondents expresses regret at the use of the expression "promoted" in the counter affidavit and concedes that it is a deliberate attempt to lay ground to the fact that the petitioner entered service in a lower post and thus penalty of reduction in rank could be inflicted. Counsel concedes that under the Indian Army, persons are given an acting rank for a while to see whether they are worth of the rank held and upon proof of worthiness are confirmed against the rank. Thus, the question of anyone being promoted from the rank of paid Havildar to a Havildar does not arise.

12. Learned counsel for the respondent further concedes that in para 2 of the counter affidavit filed it is wrongly pleaded that as a result of the penalty the petitioner was

reverted to the substantive rank of Sepoy.

13. Let us reproduce the averments made in the para 2 of the counter affidavit for the reason we find the same to be self-contradictory. They read as under :

“That on 11 July 1990, while serving with 7015 EME Bn, the individual was sentenced to “Deprivation of Acting rank by reducing to substantive rank” for an officer committed by him under Army Act Section 41 by the then Commanding Officer 7015 comb Wksp and (02E) part II Order No 02E/063/0001/1990. Accordingly the individual was reverted to the substantive rank of Sepoy. However since the individual was a direct entry Havildar, he was again promoted to the rank of paid acting Havildar with effect from 11 July 1993. The individual was screened by a duly constituted screening Board held at EME records during 10 July 2007, however he was not granted extension of service being not eligible for grant of extension of two years of service as he was not meeting the disciplinary criteria in terms of Para 2(d) (ii) of Appendix ‘A’ and Annexure to Appendix ‘A’ of Integrated HQ if MoD (Army) letter No B/33098/AG/PS-2 (c) dated 21 September 1998.”

14. We are surprised that in the second sentence of the paragraph it is pleaded: *“Accordingly the individual was reverted to the substantive rank of Sepoy.”* Soon thereafter in the very next sentence it is pleaded : *“However since the*

individual was a direct entry Havildar, he was again promoted to the rank of paid acting Havildar with effect from 11 July 1993."

15. There is a contradiction in the second and third sentence of the paragraph. Admitting, all throughout the petitioner received salary in the rank of Havildar, but in para 6 to 9 of the counter affidavit it is stated that this was erroneous. Thereafter, it is sought to be justified that ₹88,936/- were liable to be recovered inasmuch as this was the excess amount received by the petitioner as Havildar.

16. The pleadings in the counter affidavit read a very sorry picture of the affairs in the legal department of the Indian Army and we expect better standards from the office of the Judge Advocate General.

17. Be that as it may, the position therefore would be, that learned counsel for the respondent concedes that petitioner is a direct entry in the rank of Havildar and thus could not be visited with the penalty of reduction in rank. Counsel concedes that the penalty levied is incapable of being inflicted.

18. Counsel requests that the department be permitted to levy an appropriate penalty.

19. It is too late in the day for the department to levy an appropriate penalty. The wrong committed in 1990 cannot be permitted to be corrected after 21 years. That apart, whatever would be the penalty levied it would have to be a penalty equivalent to or less than the penalty of reduction in rank. In such scenario the petitioner would certainly be entitled to a refund of ₹88,936/- illegally deducted from the

terminal dues paid to him. It is not in dispute that a Black Ink Entry would not debar the petitioner to have his service extended by two years. Thus, even we were to permit the respondents to levy penalty other than that of a reduction in rank, as of today, the penalty which could be levied would be that of a reprimand or a warning i.e. a Black Ink Entry which would not come in the way of the petitioner to have his service extended by two years.

20. We would have appreciated the respondents to have taken corrective action when file was taken up pertaining to petitioner's service be extended by two years. At that stage the department realized that the penalty levied upon the petitioner in the year 1990 was not given effect to. It realized that the penalty was incapable of being given effect to. Yet, in spite of such realization, the respondents chose to act illegally by treating the penalty as operative and deducting ₹88,936/- on the ground that this was the excess amount paid to the petitioner who otherwise was required to be reduced in rank, an act or action which law did not permit.

21. Thus, the petitioner would be entitled to a declaration from this Court that he would be entitled to serve for another two years i.e. up to 31.10.2011.

22. Since the petitioner has been held entitled to serve till 31.10.2011 we dispose of the writ petition directing the respondents to forthwith reinstate the petitioner as a Havildar and permit the petitioner to serve as a Havildar till 31.10.2011. We declare that no amount is liable to be deducted from the dues payable to the petitioner. Since we

are reinstating the petitioner, the question of his receiving the balance terminal dues at this stage does not arise and thus we direct that the terminal dues paid to the petitioner would be returned by him to the department upon the department simultaneously reinstating the petitioner. Needless to state, when the petitioner would finally superannuate terminal dues will be paid to him and no money, much less than ₹88,936/- would be deducted on the ground that in the past excess salary was paid to the petitioner. Petitioner would be entitled to back wages and benefit of continuity in service.

23. The petitioner would be entitled to costs in sum of ₹5,500/-.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

APRIL 08, 2011
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