

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 11.04.2012

+ **W.P.(C) No.6898/2011**

Naib Subedar R.M.Bandyopadhyay ... Petitioner

Versus

Union of India & Ors. ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.J.S.Manhas
For Respondent : Mr.Ankur Chhibber

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

1. The petitioner has sought the quashing of CO 2 Assam Rifles' award of punishment of severe reprimand dated 26th April, 2008 and another punishment of severe reprimand dated 21st August, 2008, also by CO 2 Assam Rifles.

2. Relevant facts to comprehend the disputes raised by the petitioner are that he was enrolled in the Army on 19th December, 1984 as a Graduate direct recruit Havaladar Instructor in Education Corps, AEC Education Instructors. He was deputed to various training institutes and units to impart education instructions to ORs in the Army and given them an opportunity to improve their educational qualifications.

3. The petitioner was promoted to the rank of Naib/Subedar on 1st February, 2008. According to the petitioner, under the medical regulations, he and his wife are entitled to free medical treatment in the military hospitals. In the year 1999, it was diagnosed that the petitioner and his wife are suffering from infertility, and are, therefore, required to undergo treatment by the Army Hospital (R&R) at Delhi.

4. According to the petitioner this required posting at or in proximity of Delhi. The petitioner at the material time in the year 2007 was, therefore, posted as Education JCO in Headquarter 9 Artillery Brigade, Meerut.

5. A transfer order dated 9th August, 2007 was issued transferring the petitioner to 2 Assam Rifles in Manipur. As per the transfer order, the petitioner's move had to be completed by 15th October, 2007.

6. The petitioner alleged that meanwhile he was admitted in the Military Hospital, Meerut on 19th September, 2007 for medical treatment and a surgery was performed for testicular biopsy on him on 20th September, 2007. Awaiting the report of the biopsy, the petitioner was given interim discharge on 9th October, 2007 with directions for readmission on 24th October, 2007 for further medical treatment. According to the petitioner, instead of awaiting the final discharge of the

petitioner from the Military Hospital, the movement order dated 13th October, 2007 was issued for immediate transfer of the petitioner to 2 Assam Rifles and he was struck off the strength with effect from 15th October, 2007. The petitioner was only given 6 days preparatory time and 5 days traveling time excluding Sunday to join the 2 Assam Rifles by 27th October, 2007. Since the petitioner had to get himself re-admitted to the Military Hospital, Meerut on 24th October, 2007, therefore, he informed the Assam Rifles about the same by letter dated 15th October, 2007. Along with the letter, the petitioner also produced a copy of the discharge slip of the Military Hospital, Meerut. The petitioner contended that he continued at HQ 9 Artillery Brigade between 15th to 22nd October, 2007 and it was not possible for him to comply with the movement order as he could not abandon the medical treatment contrary to the Military hospital instructions. The petitioner prayed for the postponement of the movement to 2 Assam Rifles till after the completion of the medical treatment at HQ 9 Artillery Brigade.

7. The petitioner also relied on a communication dated 22nd October, 2007 of the officiating Education Officer to 2 Assam Rifles pointing out that the petitioner is required to be re-admitted in the Military hospital, Meerut on 24th October, 2007 which was duly informed to the 2 Assam Rifles.

8. The petitioner was re-admitted to the Military Hospital, Meerut on 24th October, 2007 and was transferred to the Army Hospital (R&R), Delhi on 29th October, 2007, and after treatment he was transferred back to the Military Hospital, Meerut on 12th December, 2007. Thereafter, discharge order dated 12th December, 2007 was issued to the petitioner directing him to join the 2 Assam Rifles. The petitioner, therefore, immediately commenced the journey and reported for duty on 16th December, 2007 at Dimapur Transit Camp and reached 2 Assam Rifles on 19th December, 2007.

9. According to the petitioner, a DPC was later on held which approved the promotion of the petitioner to the rank of Subedar and in this regard reliance was placed on the order dated 27th December, 2007 directing the promotion based on inter-se seniority within the AEC cadre with effect from 1st January, 2008. This information was, however, not revealed to the petitioner who came to know about it only after one year, since he had filed an application under the Right to Information Act, 2005.

10. The petitioner had not joined the Assam Rifles strictly in accordance with the movement order and at the time he had been wrongly advised that the two days of unaccounted period could be regularized after trial for absence without leave under Section 39 of the Army Act. In this regard, reliance was placed on the AEC Records

Panchmarhi dated 28th March, 2008 wherein the said advice had been tendered. According to the petitioner, the said advice was absurd and perverted and a consequence of misreading the rules and regulations as there is no absence without leave.

11. However, the CO 2 Assam Rifles on 16th April, 2008 ordered the recording of the summary of evidence, and in the summary trial under Section 85 of the Army Act CO 2, Assam Rifles awarded punishment of severe reprimand to the petitioner by order dated 26th April, 2008.

12. There was also another case of absence on evening roll call, in which case the petitioner was again awarded punishment of severe reprimand after summary trial under Section 85 of the Army Act by order dated 21st August, 2008. On account of severe reprimand awarded by CO 2, Assam Rifles on 26th April, 2008 and 21st August, 2008, the petitioner was not promoted entailing the filing of a statutory complaint dated 8th April, 2009 against the award of the two punishments of severe reprimand. The petitioner, in the meantime, was issued an order for retirement on his superannuation on 31st December, 2010.

13. Since the petitioner was not promoted, he challenged the action of not promoting him by filing an O.A No.20/2010 before the Armed Forces Tribunal, Calcutta Bench seeking the grant of the promotion to

the rank of Subedar with effect from 1st January, 2008. In the meantime, the statutory complaint filed by the petitioner was dismissed by the Chief of Army Staff by his order dated 25th January, 2011. The petitioner also challenged the orders of severe reprimand dated 26th April, 2008 and 21st August, 2008 by filing a writ petition being CWP No.17345W/2010 before the High Court of Calcutta. In the original application filed by the petitioner seeking the quashing of the cancellation of his promotion by order dated 7th January, 2009 it was held that the Tribunal is not in a position to comment or adjudicate on the disciplinary aspect resulting in summary punishment (severe reprimand) awarded to the petitioner on 26th April, 2008 more so because another writ petition was also pending in respect of the same matter before the High Court of Calcutta. The Tribunal, therefore, held that the petitioner's promotion order dated 27th December, 2007 could not have been brought to effect as the promotion order was received by the 2 Assam Rifles on 10th January, 2008 while the petitioner was not present in the unit being away on earned leave from 7th January, 2008 to 10th March, 2008 and the disciplinary case under investigation was pending on 24th October, 2007 for an offence under the Army Act under Section 39 (absence without leave from 22nd to 24th October, 2007) and since severe reprimand was awarded to the petitioner through the summary trial by the CO 2, Assam Rifles thus debarring him for promotion in accordance with the policy on the subject as contained in the Army Headquarter letter dated 10th October, 1997.

14. Considering the facts and circumstances, the Armed Forces Tribunal, Calcutta held that normal superannuation of the petitioner in the rank of Naib Subedar be carried out as per discharge orders vide AEC Records letter dated 25th September, 2009 and in case the writ petition with Hon'ble Calcutta High Court (W.P No.17354W/10) filed by the petitioner is disposed of in the petitioner's favor then the petitioner shall be deemed to be promoted to the rank of Subedar with effect from 1st January, 2008 (the date when he was originally ordered to be promoted but denied on account of disciplinary proceedings for being absent without leave for 2 days) without any claim of arrears of pay and allowances on the principle of no work, no pay. It was further held that in case the writ petition by the Calcutta High Court is decided after 31st December, 2010 (petitioner's present date of retirement) he shall have no claim to any arrears of pay and allowances and his last pay will be fixed notionally in the rank of Subedar for the purpose of refixing his pensionary benefits and in that eventuality the petitioner shall be eligible only to arrears of pension and any other connected pensionary benefits.

15. The writ petition filed by the petitioner against the orders dated 26th April, 2008 and 21st August, 2008 of severe reprimand by CO 2, Assam Rifles before the Calcutta High Court was dismissed by order dated 20th April, 2011 wherein it was held that considering the place of

occurrence and the incident as also the address of Commandant, 2 Assam Rifles, Pin Code 932002, C/C 99 APO, the Court at Calcutta does not have any territorial jurisdiction.

16. After the dismissal of the writ petition seeking the quashing of the severe reprimand orders dated 26th April, 2008 and 21st August, 2008 by the Calcutta High Court by order dated 20th April, 2011 on the ground that it did not have any territorial jurisdiction the present writ petition has been filed by the petitioner contending, inter-alia, that the petitioner was faced with the impossibility of performing two conflicting directions of the military hospital directing him to get admitted on 24th October, 2007 and the order of HQ 9 Artillery Brigade affecting the immediate transfer to 2 Assam Rifles. The petitioner contended that the offence of severe reprimand was not made out against the petitioner. The petitioner further contended that the severe reprimand orders are arbitrary, illegal and based on no evidence and had been passed by ignoring the directions of the Military Hospital to re-admit the petitioner on 24th October, 2007. The petitioner also placed reliance on the Medical Service Regulation 489 holding that the Commanding Officer of the Military Hospital is the Commanding Officer of all the patients and that the petitioner was a patient in the military hospital at the material time, therefore, the direction of the Military Hospital Commanding officer could not have been ignored. The petitioner contended that he had informed both HQ 9 Artillery Brigade and new unit 2 Assam Rifles

about his readmission to the Military Hospital, Meerut on 24th October, 2007 and so no lapse on his part was made out and consequently, the petitioner could not be tried for the offence of remaining absent without leave under Section 39 of the Army Act. Regarding the severe reprimand dated 21st August, 2008, the petitioner contended that the petitioner was an Education JCO on deputation at the material time, and that he has no command and control responsibility at evening roll call, nor was he required to attend evening roll call unless specifically notified. The petitioner averred that he was posted at Battalion Headquarter situated at Mullachin whereas the alleged occurrence had taken place at Kholen about 25 kms at "A" company location where he had gone temporarily for map reading classes for the men of his company. According to the petitioner, there was no PT parade on 9th August, 2008 which was Saturday and therefore, the punishment of severe reprimand could not have been inflicted on the petitioner. The petitioner also relied on the record of 2 Assam Rifles to contend that the punishment of severe reprimand dated 21st August, 2008 could not be awarded to him in view of the facts and circumstances. The petitioner, however, did not aver in the writ petition as to how the High Court at New Delhi would have jurisdiction in respect of quashing of the severe reprimand dated 26th April, 2008 and 21st August, 2008 awarded by, admittedly by Assam Rifles.

17. The writ petition is contested by the respondents who have filed a counter affidavit dated 6th February, 2012 contending, inter-alia, that the petitioner was posted at Headquarter 9 Artillery Brigade, Meerut from 14th November, 2004 to 14th October, 2007, and on completion of the normal peace tenure of three years he was posted to 2 Assam Rifles located in Eastern Command (field) by letter dated 9th August, 2007 with instructions to carry out the move by 15th October, 2007. On the physical arrival of his reliever JC-802437N Subedar Krishan Kumar, the petitioner was admitted to the Military Hospital on 19th September, 2010 and he was discharged on 9th October, 2010. Since the reliever of the petitioner had already reported on 11th September, 2007, further retention of the petitioner in HQ 9 Artillery Brigade, Meerut was irregular in terms of Army order AO 25/2001/MP and consequently, the petitioner was struck off the strength from HQ 9, Artillery Brigade with effect from 15th October, 2007 and placed at permanent posting to 2 Assam Rifles vide HQ 9 and movement order No.CFN:307603/XX/A/Camp dated 13th October, 2007 with 6 days of preparatory leave excluding Sunday and journey period.

18. The petitioner, however, knowingly absented himself without leave with effect from 22nd October, 2007 upto 24th October, 2007 and consequently, the summary of evidence was recorded. In the summary of evidence, the petitioner took the stand that he felt severe pain on 23rd October, 2007 at 0100 hours so he discontinued his journey at

Gorakhpur and stayed at Gorakhpur Railway Station throughout the night on 23rd/24th October, 2007 and boarded Katihar-Amritsar Express on next day afternoon for Delhi. The respondents contended that the petitioner being an experienced JCO with 23 years of service should have got himself admitted in the service hospital at Gorakhpur, however, he waited at the platform at Gorakhpur Railway Station till next day afternoon and returned to Delhi on his own. The respondents also contended that the petitioner had not produced any proof of his undertaking the journey from Meerut to Gorakhpur and back during the period of 21st October, 2007 to 24th October, 2007 and consequently, the plea of the petitioner was found to be concocted by him to avoid the disciplinary action for his unauthorized absence from duty. After getting admitted at the Army Hospital, Meerut on 24th October, 2007 he was transferred to the Army Hospital (R&R) at New Delhi and was discharged, and later on, he reported to his new unit 2 Assam Rifles on 19th December, 2007. It is on the findings of the summary of evidence that the petitioner was tried summarily and awarded severe reprimand by Col.K.Bhushan, SC, SM, Commandant, 2 Assam Rifles on 26th April, 2008 under Section 39(a) of the Army Act for being absent without leave from 22nd October, 2007 to 24th October, 2007.

19. The respondents contended that the petitioner was tried summarily again and awarded severe reprimand by Col.K.Bhushan, SC,

SM, Commandant, 2 Assam Rifles on 21st August, 2008 under Section 39(d) of the Army Act for being absent at the time fixed at the place appointed for duty. Regarding the severe reprimand dated 21st August, 2008, the respondents disclosed that the petitioner on 8th August, 2008 had failed to appear without sufficient cause at 1800 hrs in the Roll Call Parade Ground, the place appointed for roll call parade and again on 9th August, 2008 he failed without sufficient cause to appear at 0600 hrs for the physical training parade ground, the place appointed for physical training parade and in the circumstances, the punishment awarded to the petitioner is just and appropriate.

20. The learned counsel for the respondents, Mr.Chhibber contended that though the plea of jurisdiction has not been taken by the respondents in the counter affidavit, however, from the facts and circumstances as alleged by the petitioner, the Courts at Delhi do not have jurisdiction as the petitioner is challenging the severe reprimand orders dated 26th April, 2008 and 21st August, 2008 passed by the CO 2, Assam Rifles. The respondents further contended that the statutory petition of the petitioner was dismissed by the Chief of Army Staff by order dated 5th January, 2011 which has not been impugned in the present writ petition. The learned counsel for the respondents also relied on a decision of the Division Bench of this Court in 135 (2006) DLT 414 titled as 'Ex.Rect/GD Vinod Kumar Vs. Union of India & Ors.' holding that Article 226(2) of the Constitution of India restricts

principles of territorial jurisdiction only to cause of action. It was held that if the cause of action or any part thereof in its minutest form is absent, Court may not have territorial jurisdiction only on the basis of the residence/location of the parties concerned as the provisions of CPC are not applicable to writ jurisdiction in the strict sense.

21. The petitioner had filed a rejoinder dated 19th March, 2012 reiterating the pleas and contentions raised by the petitioner in the writ petition. The petitioner, however, did not disclose as to how the Courts at Delhi will have jurisdiction on the present matter, as the petitioner has been seeking the quashing of orders passed by CO 2, Assam Rifles dated 26th April, 2008 and 21st August, 2008. The Calcutta High Court had already dismissed the writ petition of the petitioner on the ground that the Courts at Calcutta do not have jurisdiction as the petitioner had been seeking quashing of severe reprimand orders passed by Assam Rifles at Guwahati, Assam.

22. This Court has heard the learned counsel for the parties and has also perused the writ petition and other documents annexed with the petition and the counter affidavit and rejoinder affidavit. This is not disputed and cannot be disputed by the learned counsel for the petitioner that he has challenged the severe reprimand orders dated 26th April, 2008 and 21st August, 2008 passed by the CO 2, Assam Rifles. The learned counsel for the petitioner is also unable to dispute

that the orders passed by the CO 2, Assam Rifles were not passed in Delhi and were passed by the Commandant, of Assam Rifles in Assam.

23. This is not disputed that the petitioner had filed a previous writ petition, being CWP No.17354(W)/2010, titled as 'Naib Subedar Radha Madhab Bandyopadhyay Vs. Union of India & Ors.' in Calcutta High Court which was dismissed on account of the Court at Calcutta not having jurisdiction by order dated 20th April, 2011. In the said writ petition, the petitioner had impleaded General Assam Rifles, General Officer Commanding in Chief Eastern Command and Commandant 2, Assam Rifles besides respondent Nos.1 to 3, Union of India, The Chief of Army Staff and Officer in Charge, Army Educational Corps Records. The learned counsel is unable to explain as to how the General Assam Rifles, General Officer Commanding in Chief Eastern Command and Commandant, 2 Assam Rifles who were impleaded in the earlier writ petition challenging the severe reprimand orders will not be necessary parties in the present writ petition as well which also seeks the similar relief of quashing the orders of severe reprimand passed by the Commandant, 2 Assam Rifles. Admittedly, for challenging the orders dated 26th April, 2008 and 21st August, 2008 passed by the CO 2, Assam Rifles, no cause of action in any manner has arisen at New Delhi.

24. The petitioner after retirement is not a resident of Delhi. As held by a Division Bench of this Court in Ex.Rect/GD Vinod Kumar (Supra) the Court will not have territorial jurisdiction only on the basis of residence/location of the party if any cause of action or any part thereof in its minutest form is not present.

25. The petitioner has not challenged the order passed on his statutory complaint by Chief of Army Staff by order dated 5th January, 2011, however, that will also not give the jurisdiction to this Court on the basis of the principles enunciated by a full bench of this Court in the case of Sterling Agro Industries Ltd v. Union of India & Ors, W.P(C) No.6570/2010 decided on 1st August, 2011. In the said decision, in para 33 a Full Bench of 5 Judges of this Court had held as under:-

“33. In view of the aforesaid analysis, we are inclined to modify the findings and conclusions of the Full Bench in New India Assurance Company Limited (supra) and proceed to state our conclusions in seriatim as follows:

(a) The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be accepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of forum conveniens.

(b) Even if a miniscule part of cause of action arises within the jurisdiction of this Court, a writ petition would be maintainable before this Court, however, the

cause of action has to be understood as per the ratio laid down in the case of Alchemist Ltd. (supra).

(c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

(d) The conclusion that where the appellate or revisional authority is located constitutes the place of forum conveniens as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the facts in question.

(e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a mala fide manner is too restricted / constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of mala fide alone.

(f) While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra).

(g) The conclusion of the earlier decision of the Full Bench in New India Assurance Company Limited (supra) that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens is not correct.

(h) Any decision of this Court contrary to the conclusions enumerated hereinabove stands overruled.”

26. It was categorically held that where the appellate authority or Revisional authority is located will not constitute the place of forum conveniens and it will vary from case to case and would depend upon the lis in question. The petitioner has not challenged the order passed on his statutory complaint by the Chief of Army Staff dated 5th January, 2011 and has only challenged the orders passed by the Commandant, 2 Assam Rifles and admittedly the orders were not passed at Delhi. In the circumstances, no cause of action or any part thereof has arisen within the territorial jurisdiction of this Court in respect of two orders of severe reprimand passed by the Assam Rifles.

27. In the totality of facts and circumstances and for the foregoing reasons, the writ petition is, therefore, dismissed as not maintainable, as this Court does not have jurisdiction in the facts and circumstances as alleged by the petitioner. The petitioner shall, however, be entitled to challenge the orders of severe reprimands if he is so advised in accordance with law before the appropriate Court having jurisdiction in the matter. With these directions the writ petition is disposed of.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

APRIL 11, 2012
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