Serial No.07
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP (C) No.291/2015

Date of Order: 12.03.2020

Shri Rajesh Kumar Vs. Union of India & ors

Coram:

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice

Appearance:

For the Petitioner/Appellant(s) : Mr. R Jha, Adv
For the Respondent(s) : Mr. S Thapa, Adv for R/1-5

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

ORAL:-

1. This writ petition has been filed by Shri Rajesh Kumar, who was working as Havildar Clerk in Assam Rifles, challenging the order dated 26.09.2015 whereby, he was dismissed from service, on being found guilty by the Summary Assam Rifles Court on desertion of service on 18.09.2004 (FN) till he voluntarily rejoined on 16.05.2009 (FN).

2. The petitioner joined as Clerk in Assam Rifles in the year 1992 and after completion of training, he was posted to various units. The petitioner was later on promoted to the post of Havildar Clerk in June 2001. When the petitioner was posted to 35th Assam Rifles, he took casual leave of fifteen days w.e.f. 01.09.2004 to 17.09.2004. According to the petitioner, he could not rejoin on 18.09.2004 as there were disputes between petitioner's wife and his mother and the situation had gone out of control as both of them were not prepared to live together. Under the compelling

circumstances, the petitioner could not rejoin his service. In fact, he submitted an application for discharge from service being tired of grave family problems. The petitioner has alleged that on 04.08.2009, he was called by the Commandant and directed to sign one prepared paper which the petitioner had to sign under compulsion. Thereafter on 08.09.2009, the petitioner was served with a warning letter issued by the Commandant for trial under Section 25(1) of the Assam Rifles Act, 2006 (for short the Act of 2006). He was dismissed from service vide order dated 14.09.2009.

3. The petitioner challenged the aforesaid order before this Court by filing a writ petition [WP (C) No.85 of 2014] and this Court allowed the writ petition vide judgment dated 10.12.2014 and set aside the order of dismissal dated 14.09.2009 on the ground that the Commandant was not the competent authority to pass such order by invoking Section 11(2) of the Act of 2006. He was also awarded ₹5000/- as costs. Thereafter, petitioner was reinstated in service on 13.02.2015. But subsequently he was again dismissed from service vide order dated 26.09.2015.

4. Mr. R Jha, learned counsel for the petitioner submitted that when the earlier order of dismissal dated 14.09.2009 was quashed and set aside by this Court because the Commanding Officer was not held competent authority under Section 11(2) of the Act of 2006 to dismiss the Rifleman and Havildar from service and only the Deputy Inspector General was held to be competent authority, the Commandant could not again pass the new order of dismissal. The learned Single Judge of this Court in earlier decision by relying on one Division Bench judgment of Gauhati High Court

dated 29.08.2011 in WA No.(SH)33 of 2011 and the two Division Bench Judgments of this Court passed in WA No.45 of 2014 dated 30.07.2014 and WA No.27 of 2013 dated 03.09.2014, held that the Commanding Officer of Assam Rifles was not the competent authority for dismissing the Rifleman and Havildar under Section 11(2) of the Act of 2006. Learned counsel submitted that the judgment of the Gauhati High Court relied by the learned Single Judge has been upheld by the Supreme Court by dismissing the SLP No.2164 of 2012 in ***Union of India v. Radha Shyam Prasad Yadav*** preferred by the respondents therein. Learned counsel therefore argued that the Commanding Officer was precluded from again passing the order of dismissal. Learned counsel submitted that hearing on the alleged charges against the petitioner in terms of Rule 47 of the Assam Rifle Rules was given by the Commanding Officer on 02.03.2015 whereas, the draft charge sheet to the petitioner was signed on 21.03.2015, which itself is a contradictory and therefore the charge sheet is not sustainable and the dismissal order dated 26.09.2015 is liable to be quashed and set aside. Lastly, the learned counsel again argued that the penalty of dismissal is highly disproportionate to the gravity of the charges. The petitioner ought to be awarded any lesser penalty.

5. Per contra, Mr. S Thapa, learned counsel for the respondent-Union of India opposed the prayer of the petitioner and submitted that the earlier order of dismissal of the petitioner was passed by the Commanding Officer in purported of power conferred by Section 11(2) of the Act of 2006 as an administrative action without conducting any Summary Assam Rifles

Court. In fact, the petitioner was granted fifteen days casual leave including two days interfix w.e.f. 01.09.2004 to 17.09.2004 to proceed to his home when he was at Tamenglong (Manipur). The petitioner did not give any such reason for his domestic problems before proceeding on leave as he is now claiming. Thereafter, the petitioner forwarded a letter for requesting premature discharge from service but he was informed that he is required to first rejoin duty and then to apply for discharge. The petitioner neither applied for extension of leave nor intimated his whereabouts to his unit till he rejoined voluntarily on 16.05.2009 after a desertion of 4 years, 7 months and 28 days. He was therefore declared as deserter w.e.f. 18.09.2004. When the order of dismissal dated 14.09.2009 was quashed and set aside by this Court, liberty was granted to the respondent-Union of India to take appropriate decision in its wisdom against the petitioner after reinstatement. Therefore, after reinstatement of the petitioner, *de novo* proceeding was initiated against him as per HQ IGAR(S) Order No.1551/A-Discp/362312X/35 AR/15/42 10.01.2015. The petitioner was tried by the Summary Assam Rifles Court on 26.09.2015 and awarded dismissal from service. It is argued that under Section 96 of the Act of 2006, the petitioner having been found guilty of desertion from service under Section 25(1) of the Act of 2006 was dismissed from service. It is contended that the Commanding Officer is the competent authority under Section 92(1) of the Act of 2006 to try the offence of the petitioner under the Act of 2006 on approval of higher HQs. The entire proceedings were carried out under the Act of 2006 and the Rules framed therein. Learned counsel also argued that

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the petitioner has an alternative remedy of appeal against the order of dismissal but instead of availing such remedy, he has directly filed a writ petition before this Court which is therefore liable to be dismissed as not maintainable

6. I have given my anxious consideration to the rival submissions and perused the material on record.

7. This writ petition has after admission for hearing remained pending for last five years. This Court therefore does not deem it appropriate to relegate the petitioner to the remedy of appeal and would instead prefer to decide the matter on merits.

8. In so far as the earlier judgment of this Court is concerned, the writ petition was allowed by this Court by relying on the two Division Bench Judgments of this Court, which were based on the Division Bench judgment of the Gauhati High Court dated 29.08.2011 passed in WA No.(SH)33 of 2011, holding that the Commanding Officer is not the competent authority to remove Rifleman and Havildar by invoking Section 11(2) of the Act of 2006. Bu this Court while quashing the earlier dismissal order dated 14.09.2009 left it to the wisdom of the respondents to take appropriate decision about the petitioner after his reinstatement. It was therefore that after the petitioner was reinstated in service, he was served with a *de novo* proceeding as per HQ IGAR(S) Order No.1551/A-Discp/362312X/35 AR/15/42 10.01.2015. Charge sheet was served to the petitioner on 21.03.2015 and the Summary Assam Rifles Court found the

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charge of desertion under Section 25(1) of the Act of 2006 proved against the petitioner.

9. It may be noticed that the petitioner failed to give any justification for his prolonged absence from duty for a period of 4 years 7 months and 28 days. Reason of such a prolonged absence given by the petitioner is hardly convincing and does not inspire confidence. He was required to rejoin his duty immediately after completing of casual leave of fifteen days. The petitioner however instead of rejoining duty, submitted application seeking voluntarily retirement which could not be considered by the respondent-Union of India because he was required to first rejoin duty and then apply for discharge. Neither the petitioner applied for extension of leave nor did he inform about his whereabouts to the unit till he rejoined voluntarily on 16.05.2009. In the facts of the case, it also cannot be said that penalty of dismissal from service is disproportionate because the petitioner belongs to a disciplined force i.e. Assam Rifles and maintain highest discipline. The total period of absence is so high that fully justify the penalty of dismissal. The petitioner therefore cannot be allowed to state that the penalty of dismissal is disproportionate to the gravity of the charges against him.

10. In view of the above discussions, I do not find any merit in this writ petition and is accordingly dismissed.

(Mohammad Rafiq)
Chief Justice

Meghalaya
12.03.2020
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