

**THE HIGH COURT OF MEGHALAYA
AT SHILLONG.**

W.P.(C) No. 361 of 2011

No. 2501555H, Rfn/WC
Shri Vijay Kumar,
S/o Shri Bihari Lal,
R/o Village – Khabal,
P.O. Katholi, Tehsil- Jawali,
District – Kangra,
Himachal Pradesh

: : : : : Writ Petitioner

-Vrs-

1. The Union of India, represented
By the Secretary, Ministry of Home Affairs,
New Delhi.
- 2 The Director General,
Assam Rifles,
Laitkor, Shillong-793010,
Meghalaya
3. The Inspector General,
Assam Rifles,
C/o 99 A.P.O.
4. The Commandant,
25th Battalion, Assam Rifles,
C/o 99 A.P.O.

: : : : : Respondents

**BEFORE
THE HON'BLE MR JUSTICE SR SEN**

For the Petitioner : Mr. R. Jha, Advocate

For the Respondent s : Mr. S. C. Shyam, Sr. Advocate

Date of hearing : **26.02.2014**

Date of Judgment & Order : **26.02.2014**

JUDGMENT AND ORDER (ORAL)

The instant writ petition is directed against the impugned dismissal order dated 14.08.2002 at Annexure-II page 18.

2. The petitioner's case in a nutshell is that:

“ This Writ petition has been filed by the petitioner under Article 226 of the constitution of India for issuance of a Writ of Mandamus for setting aside the impugned order of Discharge Quashing the impugned Order No 1.20001/ Rec-2002/ Discp /29 dated 14th August 2002 issued by the Commandant, 25th Assam Rifles, whereby the petitioner has been discharge from service on the ground of being incorrigible offender soldier after incurring 4 red in entries , being arbitrary, illegal and unconstitutional , declaring Clause 6 of the Record Office Instruction 4 of 1999 issued by the Respondent as illegal and violative of Article 14, 16 and 21 of the constitution of India and thereafter stuck down the same; direction to the respondents to re-instate the Petitioner is service with all consequential benefits alongwith areas and interest thereupon or alternatively direction to the Respondent to grant pensionary benefit i.e., Extra Ordinary Pension as stipulated under Central Civil Services (Pension) Rules, 1972 in exercise of inherent power vested in this Hon'ble Court;

The factual matrix of the instant case is that the petitioner was enrolled in Assam Rifles on 6th July 1992 and he was discharged by the Respondent No 4 on 14th August 2002 on the ground of incurring red ink entries in the service record under the provision of Clause 6 of ROI 4/99.

The petitioner failing which approached the Hon'ble Himachal High Court and the Respondent after agitating the point of jurisdiction had to withdraw the petition and challenge the same before this Hon'ble Court.

Hence this writ petition challenging the same and being highly illegal arbitrary, and without application of mind as well as in violation o f principles of natural justice”.

3. The learned counsel, Mr. R. Jha appearing for and on behalf of the petitioner submits that, the petitioner has been dismissed from the service only on the ground of getting 4 red ink entries in his ACR/Dossier. The learned counsel further submits that the only fault is that the petitioner remain absent on some occasions without leave for which he has already been given punishment such as

R.I of 21 days and 28 days respectively, and finally he has been dismissed from the service.

The learned counsel further contended that if the respondent is not at all willing to retain the petitioner in service, he may be given his pensionary benefits so that he can survive with his family and children. The learned counsel also further contended that the offence leveled against the petitioner does not bring him within the parameter of incorrigible offender, as such court may pass any order for the ends of justice.

The learned counsel to support his submission relied in the case of ***Balwant Singh vrs Union of India & Ors. reported in Meghalaya Judgments (Page-110) (2013) 1 MJ 110. (Division Bench)*** and the judgment passed by this High Court in ***WP(C) (SH) No. 307 of 2011 in the case of Rupesh Suryavanshi vrs Union of India & Ors***

4. On the other hand, the learned Sr. counsel, Mr. S.C. Shyam appearing for and on behalf of the respondent submits that the petitioner remain absent without leave which amounts to indiscipline and he continued in spite of warning. Besides that, he has been dismissed from the service in the year 2002, but he remain silent for all those years, and now approach this court for justice which shows that he has not taken the matter seriously.

The learned Sr. counsel also further contended that the petitioner has been removed after following all the procedures. So, writ petition may be dismissed. In reply to the submission advanced by the learned Sr. counsel, Mr. R. Jha contended that the petitioner has moved the writ petition bearing No. CWP No. 1001 of 2005 in Shimla High Court, but the same was dismissed with a liberty to file afresh and he had filed the writ petition there in consultation with the lawyers. Thereafter, he could not approach this court due to financial constraint, and after gathering some money by way of earning as labourer, he has approached this court.

5. On perusal of the impugned dismissal order dated 14.08.2002 it appears that the petitioner was dismissed on the ground of receiving 4 red ink entries. In my view, before placing red ink entries in the ACR or dossier whatever the case may be, the petitioner should have been given the opportunity to be heard and what compelled him to remain absent from the duties without leave should have been considered.

I have perused the file produced before me wherein, it appears from the show cause notice dated 28th June 2002, 28th June 1999, 29th March 2000 and 14th September 2000 it appears that 21 days and 28 days R.I was imposed

respectively. I did not find that the petitioner has pleaded guilty against the charge prepared by the respondent nor the signature of the petitioner in the said order. Therefore, I find that the red ink entries as well as the award of punishment is arbitrary in nature and not in conformity with the principle of natural justice.

6. From the show cause notice dated 28th June 2002, it appears that the said show cause notice was issued much after punishment awarded Annexure-R/3 annexed with affidavit-in-opposition by the respondent wherein, Clause-24 'dismissal' has defined as follows:

"24. A Commandant may dismiss any member of the Assam Rifles below the rank of Jemadar.

The word 'dismissal' should be restricted to the case of an officer removed with disgrace. In other cases 'removal' is the proper word to be used. A "dismissed" officer may not be re-employed.

Dismissal is the last resource, and should not ordinarily be ordered until all other means of punishment have been tried and failed. For incorrigible offenders; confirmed bad characters, confirmed drunkards, for offences involving moral disgrace, fraud and dishonesty, continued and willful disobedience or neglect, it is generally the only appropriate punishment".

7. On perusal of Clause-24, it appears to me that dismissal is the last resource and it should not be ordinarily ordered until all other means is exhausted. Incorrigible offenders as per Clause-24 means a confirmed bad character, confirmed drunkards, offences involving moral disgrace, fraud and dishonesty as well as continuous willful disobedience or neglect. Clause-24 also speaks that, dismissal of any of the employee from the service is discretionary. Therefore, since dismissal power is a discretionary one by virtue of the word 'May', the said power needs to be exercised very cautiously and judiciously keeping in mind that a mere dismissal may create havoc and hazards to the life of the person affected by such dismissal order.

8. In the case of ***Balwant Singh vrs Union of India & Ors. reported in Meghalaya Judgments (Page-110) (2013) 1 MJ 110. (Division Bench) it is observed as follows:***

"15. After tracing out the source of the power for the penalty to clause 5 of the ROI, we should now consider the nature and

gravity of the four violations for which, the red ink entries were recorded. To appreciate this aspect a comparison of the red ink entries recorded against another Assam Rifles Personnel (Josh Nedum Joseph) whose case is referred to by the learned Government Counsel, may be in order. It is seen that in the case of Jose Nedum Joseph (who had filed WP(C) No. 2009/1999 where this court altered the punishment of dismissal with an order of discharged and which decision was eventually upheld by the Apex Court), the violations related to cheating, indiscipline where the safety of the unit was compromised and insubordination. If we compare this with the four violations of the present delinquent, it becomes apparent that 3 charges of the intoxication and 1 overstaying can't be considered in the same class of serious offence more particularly when, the violation did not jeopardize the security of the Unit".

9. Besides that, this court also relied on the said judgment, while disposing the WP(C) (SH) No. 307 of 2011. I am of the opinion that a person cannot be punished twice for the same offence. Article 20 of the Constitution of India which clearly speaks out that, ***"No person shall be prosecuted and punished for the same offence more than once"***. But, in this case in hand, it appears that the petitioner was put on rigorous imprisonment on the same ground and subsequently, has been dismissed from the service.

10. The learned Sr. counsel, Mr. S.C. Shyam for the respondent submitted that the principle of double jeopardy or Article 20 of the Constitution of India is not applicable where the Army Personnel's are involved, but I do not agree that because, no law can supersede the provision or basic principle of the Constitution.

11. For the reasons discussed above, I find that the impugned dismissal order dated 14.08.2002 is bad in law and against the principle of natural justice. Hence, it has no legs to stand to survive. Accordingly, it is hereby set aside with a direction to the respondent to re-instate the petitioner within a month, and petitioner to approach the authority concerned.

12. Court Master is directed to keep the photo copies of the offence report of the petitioner in the court file for future reference if any.

13. With these observations and directions, the matter stands disposed of. No order as to costs.

JUDGE

D. Nary