

HIGH COURT OF JAMMU & KASHMIR AT JAMMU

LPAOW No. 439/2002, MP No. 516/2002

Date of Order: 03.09.2015

Union of India and ors.

v.

Daleep Kumar

Coram:

Hon'ble Mr. Justice, Muzaffar Hussain Attar, Judge

Hon'ble Mr. Justice B. S. Walia, Judge

Appearing counsel:

For the appellant(s) : Mr. R.S. Jamwal, CGSC.

For the Respondent(s): Mr. Rahil Raja, Advocate

i) Whether approved for reporting in
Digest/Journal/Media

ii) Whether approved for reporting in Yes
Digest/Journal

Muzaffar Hussain Attar (Oral)

The respondent-writ petitioner who at the time of inflicting of punishment upon him was holding the Rank of Hawaldar. By the punishment, his rank was reduced to the Rank of Sepoy and his services were brought to an end because he had completed his tenure of service as a Sepoy.

The punishment was awarded to the respondent-writ petitioner by the Competent Authority by treating him as a deserter.

The respondent-writ petitioner challenged the action of the Competent Authority for reducing him from the Rank of Hawaldar to the Rank of Sepoy by filing SWP No. 198/2000, inter-alia, on the ground that initially because of his domestic problem he applied for leave which was sanctioned in his favour and thereafter, he sought

for extension of leave which was also sanctioned in his favour. Thereafter he was taken seriously ill which required his hospitalization and was surgically operated upon. After recovering from ailment, he on 20th July, 1999 reported for duty, but was not allowed to enter the Unit by the Santry.

The learned writ court vide judgment dated 17th July, 2002, quashed the order of sentence whereby respondent -writ petitioner was reduced in rank. In the impugned judgment, it is provided that the petitioner would now report for duty and would start getting salary w.e.f. the date he produces copy of the order dated 17th July, 2002 before the Authority Concerned in the Centre where he was earlier posted. It was further provided that how the intervening period is to be treated would depend on the decision to be taken by the appellants.

Mr. R.S. Jamwal, learned counsel for the appellants submitted that the appellants followed the procedure prescribed under law while inflicting punishment upon the respondent-writ petitioner. Learned counsel submitted that the respondent-writ petitioner was treated as deserter and a lesser punishment, however, was inflicted upon him. Learned counsel further submitted that the procedure prescribed by the law has been strictly followed by the Disciplinary Authority in inflicting punishment upon the respondent-writ petitioner. Learned counsel further submitted that there was no requirement of conducting the inquiry inasmuch as the respondent-

writ petitioner made confessional statement. Learned counsel for the appellants relied upon the judgment of the Hon'ble Supreme Court rendered in case titled "***The Chief of Army Staff, New Delhi Verses Virendra Kumar reported as AIR 1986 SC 1060***". The learned counsel also submitted that the respondent-writ petitioner reported for duty on 23th July, 1999 on which date the Kargil War ended. Learned counsel by making this submission tried to indicate that in view of on-going war, the respondent-writ petitioner had deliberately absented from duty.

Learned counsel for the respondent-writ petitioner in support of the judgment referred to the averments made in the writ petition and submitted that reasons for his absence from duty have been specifically and sufficiently spelt out. At paragraph 4 of the writ petition, it is pleaded that after the sanctioned period of leave was over, the respondent-writ petitioner sent telegram to the Company Commander and Senior J.C.O for extension of leave initially for the reason that he had some dispute with his wife who has filed maintenance application under Section 488 Cr.P.C on 20th April, 1999 in the Court of Sub-Judge Judicial Magistrate-Kishtwar, and there were chances of out of Court settlement.

Learned counsel while referring to paragraph 5 of the writ petition submitted that on 14th May, 1999, respondent-writ petitioner fell ill as blood started passing during Urination and there was also swelling and pain of the right testicle of the respondent-writ

petitioner. It is further pleaded that in paragraph 5 of the writ petition, the respondent-writ petitioner was admitted in Sub District Hospital, Kishtwar and was surgically operated upon and was discharged on 25th May, 1999. The evidence supports this averment which is enclosed with the writ petition. It is pleaded that the respondent-writ petitioner remained under continued treatment as OPD patient and was advised bed rest upto 18th July, 1999. In paragraph 7 of the writ petition, it is pleaded that the respondent-writ petitioner reported to his Unit (12-Dogra) Regiment on 20th July, 1999, but was not allowed to enter the Unit by the Santry. It is also pleaded that on 23rd July, 1999, the respondent-writ petitioner reported to Dogra Regimental Centre Faizabad and was attached to Depot till 13th August, 1999.

The aforesaid pleadings in the writ petition have not been denied. What is stated in the reply is that these assertions were not found to be convincing. It is nowhere stated in the reply affidavit that stand taken by the respondent-writ petitioner was false and incorrect.

The respondent-writ petitioner has been treated as deserter from the day first and dealt with accordingly by the Competent Authority.

Section 38 of the Army Act 1950 refers to the deserter, while Section 39 refers to those persons, who remain absent from the

duties. If the person is declared to be a deserter, then provisions of Section 106 of the Army Act are not to be complied with, but if he is treated to be an absentee, then provisions of the Section 106 of the Army Act are to be complied with.

In order to ascertain whether the respondent-writ petitioner was a deserter or absentee from duty, the facts and circumstances of the case are to be looked into. In view of the law laid down in Virendra Kumar's case (supra), "***Animus Deserendi***" would determine whether a person is deserter or not.

It is also stated in the said judgment that the expressions '***deserter***' and '***desertion***' have not been defined in the Army Act, but the distinction between desertion and absence without leave finds place in paragraph 418 of the Artillery Records Instructions, 1981. In terms of instructions recorded in paragraph 418, a person is guilty of the absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If a person absents himself, and intends either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion.

Testing the case of respondent-writ petitioner on the aforesaid description of desertion what emerges is that the respondent-writ petitioner did not absent from duty with intention of leaving the service or for not performing particular duty, inasmuch

as, he was prevented from reporting back to his duty because of his serious ailment.

Secondly, the respondent-writ petitioner did not absent from his duty, for avoiding to perform important duty as nothing has been projected by the appellants to assume that respondent-writ petitioner wanted to avoid the particular duty. Contrary to this, respondent that cannot be accepted because he reported for duty on 20th July, 1999 and he was asked to report to Dogra Regimental Centre Faizabad on 23rd July, 1999. On 20th July, 1999, nobody knew that the Kargil War would come to an end on 23rd July, 1999. The respondent's absence from duty would not constitute ***“desertion”***.

Perusal of the record shows that the respondent-writ petitioner has not made any confessional statement, but has only made an ex-culpatory statement.

In the facts and circumstances of this case, respondent-writ petitioner cannot be treated as a deserter. As rightly held by the Learned Writ Court, his case was to be dealt with by following the procedure prescribed under Section 106 of the Army Act, 1950. The said provision has not been complied with. The order of punishment imposed upon the respondent-writ petitioner was not sustainable in law and has been rightly set aside by Learned Writ Court.

For our above recorded reasons, we find no merit in this appeal, which is, accordingly, dismissed.

(B. S. Walia)
Judge

(Muzaffar Hussain Attar)
Judge

Jammu
03.09.2015
Ram Krishan