SUPREME COURT OF INDIA

Union of India & Ors.

Vs.

Manoj Deswal & Ors.

C.A.No.5015 of 2008

(Anil R.Dave and Adarsh Kumar Goel,JJ.,)

28.10.2015

JUDGMENT

Anil R.Dave,J.,

1. Being aggrieved by the Judgment dated 17th August, 2007 delivered by the High Court of Delhi in Writ Petition © No. 8004 of 2006, this appeal has been filed by the Union of India and others.

2. The facts giving rise to the present litigation in a nut¬shell are as under:

> "Respondent no.1 was recruited and was undergoing training for being appointed to the post of Store Hand Technical (SHT) in the Army Supply Corps and he had joined his Basic Military training at Bangalore on 14 th August, 2004. Upon completion of the training but before being confirmed in service or being appointed as a soldier, he was granted annual basic leave for 28 days from 5th January, 2005 to 1st February, 2005. Thereafter, he became sick and hospitalized from 4th February to 8th February, 2005. Thereafter, he proceeded on casual leave for 15 days commencing from 24th February to 10th March, 2005 and resumed his service on 11th March, 2005 and on 12th March, 2005 he requested for voluntary discharge possibly because his mother was not keeping good health. Subsequently, on 14th March, 2005, he withdrew his request for voluntary discharge and thereafter he remained absent from the training without sanctioned leave from 2nd April, 2005 till 20th July, 2005 and resumed his duty on 21st July, 2005."

3. On 27th August, 2005 he had been discharged from service as in view of the Commanding Officer under whom he was working, he was 'unlikely to become an efficient soldier'. He had been discharged under the provisions of Army Rules, 1954 (hereinafter referred to as 'the Rules'). Before his discharge, a summary enquiry had been made as he had remained absent unauthorisedly and in the said enquiry it was found that his absence was unauthorized. Looking at the fact that Respondent no.1 had remained absent and had not resumed his duty, he was declared as deserter by an order dated 30th July, 2005.

4. In the aforestated circumstances, Respondent no.1 had challenged the validity of his order of discharge by filing the aforestated writ petition before the High Court and after hearing the concerned counsel, the High Court had allowed the writ petition by setting aside the order of discharge dated 27th August, 2005, but with liberty to the present appellants to hold a fresh enquiry against Respondent no.1. It was also provided in the judgment that payment of back wages would depend upon the final outcome of the fresh enquiry, which might be initiated against Respondent no.1.

5. Being aggrieved by the aforestated judgment, the Union of India and others have filed this appeal.

6. The learned counsel appearing for the Union of India mainly submitted that the High Court committed a serious error by setting aside the order of discharge only on the ground that Respondent no.1 had not been afforded an opportunity to defend his case before the order of discharge was passed. He further submitted that without issuance of show cause notice Respondent no.1 could have been discharged from service.

7. The learned counsel appearing for the appellants drew our attention to the fact that the order of discharge was just, legal and proper for the reason that Respondent no.1 was not likely to become a good soldier in view of his indisciplined behaviour. He further submitted that with regard to his absence, a summary enquiry had been held on 29th July, 2005 in pursuance of an order of the Commanding Officer dated 26th July, 2005. In the said inquiry, it was found that in fact Respondent no.1 had remained absent without sanctioned leave or in an unauthorized manner for 108 days and for that reason he had been declared deserter by an order dated 30th July, 2005.

8. The learned counsel also drew our attention to Rule 13 (3) of The Army Rules, 1954 (hereinafter referred to as 'the Rules') and submitted that as per the provisions of the said rule, it was open to the Commanding Officer to discharge Respondent no.1, who had not been attested as per the provisions of Sections 16 & 17 of the Army Act, 1950 (hereinafter referred to as 'the Act').

9. He further submitted that being not an attested trainee, status of Respondent no.1 was that of a probationer and the order of discharge did not contain any stigmatic remark. The order of discharge is an order of discharge simplicitor. In the interest of administration, it was not thought proper to continue Respondent no.1 as a trainee and therefore, the order of discharge had been passed, whereby Respondent no.1 had been discharged from service.

10. The learned counsel relied upon the judgments delivered by this Court *in Ram Sunder Ram v. Union of India*[1] and *Union of India v. Dipak Kumar Santra*[2] so as to substantiate his case, that if an enquiry is made and thereafter, a non attested trainee is discharged, it is not necessary to issue a notice calling upon him to show cause as to why his services should not be terminated. According to him, Respondent no.1 had remained unauthorisedly absent, which was an act of indiscipline and the said fact had been established in the court of enquiry

held on 29th July, 2005. He had also been declared deserter. Moreover, as he had not been given regular appointment as a solider, being like a probationer, it was open to the Commanding Officer of Respondent no.1 to discharge him from service as per the provisions of Rule 13(3) of the Rules.

11. He, therefore, submitted that the impugned judgment delivered by the High Court is improper and unjust and therefore, it deserved to be set aside.

12. On the other hand, the learned counsel appearing for Respondent no.1 forcefully submitted that there was not only violation of the principle of natural justice but certain provisions of the Rules had also been violated by the appellants while passing the order of discharge and therefore, the High Court was absolutely right when it quashed and set aside the order of discharge.

13. The learned counsel for Respondent no.1 submitted that by not issuing show cause notice there was fragrant violation of the principles of natural justice. Moreover, the officer who could have passed the order of discharge was the Lt. General and Director General of Supplies and Transport and not the Commanding Officer. He further submitted that there is virtually no difference between attested and non-attested solider and he also submitted that Respondent no.1 had, in fact, not remained absent for 108 days. The said finding arrived at by the court of enquiry was incorrect and therefore, also the resultant order of discharge was bad in law. He, therefore, submitted that the impugned judgment is just, legal and proper and therefore, the appeal deserved dismissal.

14. Upon hearing the leaned counsel, we are of the view that the High Court committed an error by setting aside the order of discharge and therefore, the appeal deserves to be allowed.

15. It is an admitted fact that Respondent no.1 had not been attested. Certain formalities are required to be done for being attested as per the provisions of Section 17 of the Act and admittedly the said formalities had not been done. The status of Respondent no. 1 was just like a probationer, whose service could be terminated without holding any enquiry. In spite of the fact that service of Respondent no.1 could have been terminated without holding any enquiry, an enquiry had been held on 29th July, 2005 and it was found that Respondent no.1 had remained absent for 108 days without any sanctioned leave. The said act is an act of gross indiscipline. Absence of Respondent no.1, being a finding of fact, we would not like to interfere with the same especially when after holding the said enquiry Respondent no.1 had also been declared deserter.

16. A person who remained absent unauthorisedly and who was declared deserter can never turn out to be a good soldier and as per the provisions of Rule 13(3) of the Rules, it is very clear that the Commanding Officer can discharge non attested person enrolled under the Act. The Commanding Officer, as per the provisions of Rule 13(3) of the Rules, had satisfied himself about the fact that Respondent no.1 had remained absent without sanctioned leave and had been declared deserter and therefore, he was unlikely to become an efficient solider.

In the circumstances, we do not find any fault with his decision about discharging Respondent no.1 from service.

17. We have perused the judgments referred to by the learned counsel for the appellants and we are in respectful agreement with the view expressed by this Court to the effect that no special notice is required to be given before discharge of a person who is not attested, especially in view of the fact that a court of enquiry had already been held on 29th July, 2005 and Respondent no.1 had been declared deserter by an order dated 30th July, 2005.

18. The learned counsel appearing for Respondent no.1 relied upon certain judgments and made an effort to submit that the Lt. General and the Director General of Supplies and Transport was the only officer who was competent to discharge Respondent no.1. We are not in agreement with the said submissions in view of the fact that Table IV of Rule 13(3) clearly prescribes that the Commanding Officer, under whom the non attested person is working, can discharge him from service. It is an admitted fact that the impugned order of discharge had been passed by the Commanding Officer concerned, under whom Respondent no.1 was working and the said Commanding Officer had satisfied himself about the fact that Respondent no.1 was not likely to become an efficient soldier.

19. So as to satisfy ourselves, we had called for the original record and on perusal of the original record, we have found that the court of enquiry had been held and Respondent no.1 had also been declared deserter. In the circumstances, we are of the view that the order passed by the Commanding Officer dated 27th August, 2005 is just, legal and proper. The judgments cited by the learned counsel for Respondent no.1 do not appear to be relevant and applicable to the facts of the case on hand and therefore, we do not think it necessary to discuss the same.

20. In view of the aforestated facts, the High Court should not have quashed and set aside the said order of discharge which had been passed in accordance with law and therefore, we set aside the impugned judgment delivered by the High Court. The appeal stands disposed of as allowed with no order as to costs.