

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
R.K.L.D. AZAD

DATE OF JUDGMENT 09/08/1995

BENCH:
MUKHERJEE M.K. (J)
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MUKHERJEE M.K. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1996 AIR 845 1995 SCC Supl. (3) 426
1995 SCALE (4) 711

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

M.K. MUKHERJEE, J.

Special leave granted.

The two short questions that are required to be answered in these appeals are;-

(i) whether a person who is subject to the Army Act, 1950 ('Act' for short) can be dismissed from service for committing an offence under the Act even after he had retired on attaining the age of superannuation? and

(ii) whether a Junior Commissioned Officer of the Indian Army who has to his credit the minimum period of qualifying service required to earn a pension or gratuity is eligible for the same in case he is dismissed from service under the provisions of the Act? The question arises in the wake of the following undisputed facts.

While employed as a Junior Commissioned Officer in the Indian Army the respondent herein was placed under closed arrest on August 7, 1990 pending his trial by a General Court Martial for an offence under Section 64 (e) of the Act. Since the respondent was due to retire on August 31, 1990 on attaining the age of superannuation the Army authorities passed an order on August 23, 1990, extending his subjection to the Act till completion of the trial. In the trial that commenced from November 1, 1990 and ended on November 26, 1990, the respondent was convicted and the sentences imposed for the conviction were rigorous imprisonment for one year and dismissal from service. After due confirmation in accordance with Section 154 of the Act the order of conviction and sentence was promulgated on January 15, 1991.

Assailing the above order of the General Court Martial the respondent filed a writ petition in the Andhra Pradesh High Court which was heard by a learned Single Judge. The learned Judge allowed the writ petition in part by setting aside the order of dismissal of the respondent, but

upholding his conviction and sentence of rigorous imprisonment for one year. The reason which weighed with the learned Judge in setting aside the dismissal was that consequent his retirement on August 31, 1990 the question of his dismissal from service could not have arisen. According to the learned Judge the order dated August 23, 1990, whereby the respondent was to be subject to the Act till conclusion of the trial, only entitled the General Court Martial to proceed with the trial which, otherwise, would have been impermissible and illegal from the date of the respondent's retirement. Such an order under Section 123 of the Act, the learned Judge observed, could not give any statutory imprimatur to an order of dismissal passed against an officer of the Army after he had ceased to hold his post consequent upon his retirement.

As success of either of the contesting parties in the writ petition was only partial, both preferred Letters Patent Appeals in the High Court but they were dismissed and the order of the learned Single Judge was confirmed. Aggrieved thereby these appeals have been filed at the instance of the Army authorities.

Relying upon the provisions of sub-section (1) and (2) of Section 123 of the Act which read as under:

"123 Liability of offender who ceases to be subject to Act-

(1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such persons shall be tried for an offence, unless his trial commences within a period of three years after he had ceased to be subject to this Act; and in computing such period, the time during which such person has avoided arrest by absconding or concealing himself or where the institution of the proceeding in respect of the offence has been stayed by an injunction or order, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

it was contended on behalf of the appellants that a plain reading thereof made it abundantly clear that notwithstanding the fact that the respondent had ceased to be subject to the Act consequent upon his retirement, he could be tried for the offence under Section 64(e) of the Act, as it was committed before his retirement, and punished for the same in view of the deemed extension of his subjection to the Act under Section 123 of the Act. It was next contended that both the trial, and the punishment of dismissal that followed, were legal and valid as the former commenced within the period stipulated under sub-section (2) of Section 123 and the latter could be combined with the sentence of imprisonment imposed upon the respondent in view of Section 73 of the Act. In support of their contention the appellant relied upon Major (Retd.) Hari Chand Pahwa vs. Union of India & Anr. 1995 Supp (1) SCC 221.

While repudiating the above contention of the appellants by adopting the reasoning of the learned single Judge in this regard, as confirmed by the Division Bench in

the Letters Patent Appeal, the learned counsel for the respondent submitted that in case it was held that the order of dismissal of the respondent was legally sustainable still he could not be deprived of his pension and gratuity in the absence of any express embargo to that effect in the dismissal order.

In the case of Maj. (Retd.) Hari Chand Pahwa (supra) this Court while repelling the contention raised on behalf of the appellant therein that he could only be awarded a punishment of imprisonment after conviction but not also of being cashiered from the Army (which was imposed upon the appellant therein) because he had earlier retired this Court observed:

Though the appellant had retired from the Army service but by operation of sub-section (1) of Section 123 of the Army Act, he could be tried by the GCM in respect of the offences committed by him during the period of his actual service and could be committed and punished in the same manner who was subject to the Army Act could be tried and punished. The said provision clearly states that a retired person can be tried and punished for such offences as if he continued to be so subject. We, therefore, do not agree with the first contention raised by the learned counsel for the appellant and reject the same. The GCM could award any of the punishments which could be awarded by the said court under law including to be cashiered from the Army. The provisions of section 123 make no difference between an officer who is still in service and who was retired from service provided the GCM proceedings are initiated within the period of limitation provided under sub-section (2) of Section 123 of the Army Act."

As the facts of the case presented before us are on all fours with those in Hari Chand Pahwa (Supra) and as we respectfully agree with the above quoted observations, the first question must be answered in the affirmative.

Coming now to the second question we find that the grant of pension and gratuity to Junior Commissioned Officers, other Ranks and Non-Combatants (Enrolled) is regulated by Chapter III of the Pension Regulations for the Army, 1961 (Part I). Regulation 113 which comes under Section I of the above Chapter reads, after its amendment in 1967, as follows:

"113 (a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service.

In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.

(b) An individual who is discharged under the provisions of Army Act and the rules made thereunder remains eligible for pension or gratuity under these

Regulations."

In view of the plain language of the above regulation the respondent cannot lay any legal or legitimate claim for pension and gratuity on the basis of his previous service as, admittedly, he stands dismissed in accordance with Section 73 read with Section 71 of the Act. The second question must, therefore, be answered in the negative.

On the conclusions as above these appeals are allowed. The impugned judgments of the High Court so far as they held that the dismissal of the respondent was legally unsustainable are hereby set aside and the writ petition filed by the respondent is dismissed. There will be no order as to costs.

Before we part with this record we make it clear that this judgment of ours will not stand in the way of the respondent to make a representation seeking exercise of the discretionary powers of the President under Regulation 113 to grant pension or gratuity.