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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of decision: 11th August 2023**

\+ W.P.(C) 6827/2007

HEMANT KUMAR ..... Petitioner

Through: Mr. Anuj P. Agarwala, Advocate (DHCLSC).

versus

GOVT. OF N.C.T. OF DELHI & ORS. ..... Respondents

Through: Ms. Latika Choudhary, Advocate.
Mr. Girwar Singh, DSO/Litigation, Delhi Home Guards Department.

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present petition filed under Articles 226 and 227 of the Constitution of India, the petitioner impugns orders dated 04.08.2003 and 04.09.2006 issued by respondents Nos. 2, 3 and 4/Directorate General of Home Guard and Civil Defence ('DG-Home Guards'), whereby the petitioner was discharged from service as a Home Guard in exercise of powers under section 6-B(1-A) of the Bombay Home Guards Act, 1947 read with Rule 10 of the Delhi Home Guards Rules 1959, essentially for breach of discipline.

2. Notice on this petition was issued on 17.09.2007. Subsequently, Rule was issued in the matter on 23.09.2008.

3. This court has heard Mr. Anuj P. Agarwala, learned counsel appearing on behalf of the petitioner; and Ms. Latika Choudhary, learned counsel appearing on behalf of respondent Nos. 2, 3 and 4. Since respondent No. 1/Government of NCT of Delhi had no role in the matter and was merely a *pro-forma* party, they choose not to file any counter-affidavit nor did they make any submissions in the course of hearing.

**Petitioner's Contentions**

4. Mr. Agarwala, learned counsel appearing for the petitioner submits that the petitioner was enrolled as a Home Guard *vide* Office Order No. 370 dated 29.05.2003 for a period of 03 years, with the enrolment expiring on 31.05.2006. He joined service in June 2003.

5. However it transpired that soon thereafter, the petitioner got embroiled in a criminal case *vide* FIR No.194/2003 dated 06.07.2003 registered at P.S.: Civil Lines filed against him by one Sanjay, alleging offences under sections 394 read with section 34 of the Indian Penal Code, 1860 ('I.P.C.'). It is important to note that, insofar as the allegation under section 394 I.P.C. (voluntarily causing hurt in committing robbery) was that the petitioner and a co-accused, in furtherance of their common intention, took away the victim's purse along with his I-card, visiting card and a wrist watch. The wallet was found to contain Rs.300/-. The petitioner was also accused of having given beatings to the victim, thereby causing him simple hurt.

6. Subsequently, upon conclusion of the trial, *vide* judgment dated 28.07.2006 rendered by the learned Metropolitan Magistrate, Delhi, the petitioner was acquitted in the matter, with the court giving him benefit of doubt.

7. In the meantime however, by way of the impugned orders, by reason of having been arrested and having served sometime in custody as an undertrial, the petitioner was discharged from service by the DG-Home Guards *vide* Office Order No. 644 dated 04.08.2003, on the basis that "*... you have involved yourself in criminal activities and with evidence on record, you have been arrested and sent to judicial custody*".

8. Upon being queried, counsel confirms that no appeal was filed against the judgment of acquittal passed in 2006, which judgment has since attained finality.

9. Upon his acquittal the petitioner submitted to the DG-Home Guards a representation dated 22.08.2006, requesting that he be reinstated since he had been acquitted; but Mr. Agarwala submits, that despite such representation, the DG-Home Guards decided not to recall the discharge order, and in fact, *vide* communication dated 04.09.2006 they took the view that there is no provision for re-enrolment as the petitioner's tenure had already expired in May, 2006.

10. Mr. Agarwala argues, that it is evident, that the impugned orders whereby the petitioner was first discharged from service and thereafter refused re-enrolment proceed on complete non-application of mind, since admittedly, the only ground for discharge was that the petitioner had been arrested as an undertrial and was in custody for a short spell, which trial finally culminated in his acquittal; and subsequently, he was refused re-enrolment simply on the basis that he had been 'convicted' in the criminal case.

11. Counsel has drawn attention to section 6-B (1) and (1-A) of the Bombay Home Guards Act 1947 (as applicable to the National Capital

Territory of Delhi) (the 'Act'), which prescribes that the punishment of discharge may be meted-out to a Home Guard, in the following words :

> "*(6-B). Punishment of members of neglect of duty, etc. –*
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> *(1) The Commandant shall have the authority to suspend, reduce (sic, remove) or dismiss or fine, to an amount not exceeding fifty rupees, any member of the Home Guards, under his control if such member, without reasonable cause, on being called out under section 4 neglects or refuses to obey such order or to discharge his functions and duties as a member of Home Guards or to obey such any lawful order or direction given to him for the performance of his functions and duties or is guilty of any breach of discipline or misconduct. The Commandant shall also have the authority to dismiss any member of the Home Guards on the ground of conduct which has led to his* ***conviction*** *on a criminal charge. The Commandant General shall have the like authority in respect of any member of the Home Guards appointed to a post under his immediate control.*
>
> *(1-A) Notwithstanding anything contained in this Act, the Commandant shall have the authority to discharge any member of the Home Guards at any time subject to such conditions as may be prescribed, if, in the opinion of the Commandant the services of such member are no longer required. The Commandant General shall have the like authority in respect of any member of the Home Guards appointed to a post under his immediate control."*
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> (emphasis supplied)

12. Counsel further draws attention to Rule 10 of the Delhi Home Guards Rules 1959 (the 'Rules') which reads as follows :

> "***10. Conditions subject to which power of discharge may be exercised*** *– No member of the Home Guards shall be discharged under sub-section (1-A) of section (6-B)* ***unless*** *the Commandant or the Commandant General, as the case may be, is satisfied that such member has committed an* ***act detrimental to the good order, welfare or discipline*** *of the Home Guards Organization."*
>
> (emphasis supplied)

13. Mr. Agarwala submits, that the petitioner's discharge was not in accordance with the scope and mandate of section 6-B(1) or (1-A) or Rule 10, inasmuch as there is no allegation of that the petitioner had neglected or refused to obey any order; or to discharge any function or duty; or to obey any lawful order or direction given to him; or that he is guilty of any breach of discipline or misconduct, as contemplated in section 6-B(1). It is argued that, even if the petitioner was to have been discharged on the ground that his services were no longer required under section 6-B(1-A), Rule 10 stipulates a further condition that discharge under section 6-B(1-A) could not have been done *unless* the Commandant or the Commandant General was satisfied that the petitioner had committed an act detrimental to the good order, welfare or discipline of the organisation. It is urged that a perusal of the impugned orders will show that no such ground has been cited, muchless is any such ground made-out at all.

14. It is accordingly submitted that the only ground on which the petitioner has been discharged, is that in the understanding of the DG-Home Guards, the petitioner has been convicted of a criminal offence, which is wholly and factually untrue.

15. Counsel further submits that, while dealing with the petitioner's case, the principles of natural justice have also been violated inasmuch as the so-called show-cause notice dated 15.07.2003 was issued to the petitioner while he was in jail; and though the petitioner did attempt to respond to that notice by way of a communication dated 23.07.2003, neither was that an effective reply nor was the petitioner afforded a hearing before the order of discharge was passed.

16. The essence of Mr. Agarwala's argument is that the action of the DG-Home Guards is arbitrary since it suffers from complete non-application of mind, as is evident from a bare perusal of the order of discharge, which order proceeds *only* on the basis that the petitioner has been *convicted* in the criminal trial, which is factually incorrect.

17. Counsel further submits that in view of the above, as things stand today, the petitioner is not even entitled to apply for re-enrolment, purportedly by reason of clause 2(iii) appearing under the head 'Appointment of discharged Home Guard Volunteers (Re-enrolment)' of the Policy Guidelines for Enrolment/Re-enrolment and Discharge of Members of Home Guards in Delhi dated 13/18.04.2000 (the 'Re-enrolment Policy'), which reads as under :

> *"(iii) Those Home Guard Volunteers who have been discharged on disciplinary grounds i.e. misbehaviour, insubordination, malpractices etc. and found medically unfit under section 6-B of the Bombay Home Guards Act and Rule 10 and Rule 8 of the Delhi Home Guard Rules, will under no circumstances be eligible for fresh appointment/re-enrolment as a Home Guard Volunteer."*
>
> (emphasis supplied)

18. Counsel submits however, that on a bare reading of the aforesaid clause 2(iii), it is seen that the petitioner does not attract any of the disqualifications stipulated therein, since he was not discharged on disciplinary grounds or on medical grounds; and should therefore be allowed to at least apply for 're-enrolment' or be considered for a 'fresh appointment'.

19. On being queried as to why an appeal was not preferred under section 6-B(3) of the Act, Mr. Agarwala submits that in the circumstances that obtained at the relevant time, namely that the petitioner was facing a

criminal trial and based on the communications exchanged with the DG-Home Guards, the petitioner was advised that any appeal within the department would have been inefficacious; urging that the court should exercise its extraordinary powers under Article 226 of the Constitution to come to the aid of the petitioner, who is otherwise blameless.

20. Attention in this behalf is also drawn by Mr. Agarwala to the decision of the Supreme Court in ***Godrej Sara Lee Ltd. vs. Excise & Taxation Officers***[1], which explains the scope and ambit of the extraordinary powers of the High Court under Article 226 of the Constitution.

21. Counsel for the petitioner also cites a decision of a Co-ordinate Bench of the Andhra Pradesh High Court in ***V. Sadasiva vs. State of Andhra Pradesh***[2] in which the High Court held that the removal/termination of a Home Guard on the basis of registration of a crime (which ended in acquittal), was illegal, observing that there was possibility of false implication in criminal cases. In this case the Home Guard was directed to be reinstated.

## Respondent's Contentions

22. On the other hand, Ms. Latika Choudhary, learned counsel appearing for the DG-Home Guards submits that, for one, the petitioner cannot seek re-enrolment as a Home Guard once it is seen that he was involved in a criminal case, since the Home Guards are a disciplined and uniformed force. Besides, Ms. Choudhary contends, that the petitioner's enrolment in Home Guard was, in any case only for a

[1] 2023 SCC OnLine SC 95

[2] 2021 SCC OnLine AP 984 cf. paras 57 and 118

period of 03 years, which expired by efflux of time in May 2006; and there is accordingly no scope for re-enrolment.

23. Counsel further submits, that the petitioner was acquitted in the criminal trial, *only affording to him benefit of doubt*, since some of the witnesses had turned hostile. Such acquittal, it is submitted, points to the fact that the petitioner's behaviour is not conducive to good order and discipline in a uniformed force.

24. Counsel also disputes that the act of discharging the petitioner was either arbitrary; or that it suffered from non-application of mind; or that the petitioner was not afforded an opportunity of hearing; or that there has been any breach of the principles of natural justice.

**Discussion & Conclusions**

25. Having gone through the record, and after carefully considering the rival submissions made by learned counsel for the parties, what weighs with the court are the following considerations :

25.1. Though it is true that the petitioner was implicated in a criminal case, at the end of the trial, he was acquitted by giving to him benefit of doubt, since some of the prosecution witnesses had turned hostile. It must be noticed that the trial court must have duly considered the evidence of *all* the witnesses, including ones who did not turn hostile, and must thereupon have come to the conclusion that the allegations levelled against the petitioner were not proved beyond reasonable doubt, which is what impelled the trial court to acquit the petitioner, even though extending the benefit of doubt;

25.2. It is also undisputed that though the petitioner did spend a short spell of time in custody, that was only as an *undertrial* and never as a *convict*;

25.3. That being the case, there is merit in the petitioner's contention that on a plain reading of discharge order dated 04.08.2003, it is apparent that the petitioner was not discharged by way of punishment on any of the grounds set-out in section 6-B(1) or (1-A) or Rule 10, inasmuch as there is no allegation that the petitioner had neglected or refused to obey any order or to discharge any function or duty; or that he did not obey any lawful order or direction given to him; or that he was found guilty of any breach of discipline or misconduct, as contemplated in those provisions. There is no allegation that any proceedings were conducted by the DG-Home Guards against the petitioner on any disciplinary grounds under their rules or regulations;

25.4. Furthermore, it is also seen that Rule 10 mandates that if the petitioner was to be discharged on the ground that his services were no longer required under section 6-B(1-A), that could not have been done *unless* the Commandant or the Commandant General was satisfied that the petitioner had committed an act detrimental to the *good order, welfare or discipline* of the organisation. There is however, no whisper of any such allegation or charge to that effect in the discharge order, except the mere rote reference to Rule 10 and Section 6-B;

25.5. The *one and only* ground on which the petitioner has been discharged *vide* order dated 04.08.2003, and on which he has been denied re-enrolment *vide* order dated 04.09.2006, is, that in the

understanding of the concerned authorities, the petitioner has been *convicted* for a criminal offence. *That is plainly untrue;*

25.6. It is also not disputed that the order of acquittal passed in 2006 has not been appealed and has since attained finality;

25.7. In our criminal jurisprudence, a criminal proceeding may end either in *discharge*, or *acquittal*, or *conviction*. The reason for discharge or acquittal is of no relevance, especially in relation to actions taken by other authorities based on such result. It would be unjust and illegal for the DG-Home Guards to read '*acquittal*' to mean '*conviction*' and to base the petitioner's discharge from service on that reading. To add to this, is the fact that the petitioner was in any case charged principally with the offence of voluntarily causing hurt while committing robbery, under section 394 IPC, for having allegedly robbed the victim of a purse containing Rs.300/- and a wrist watch and causing simple hurt. The factual aspect of the gravity of the offence charged, *or the triviality thereof,* needs no further elaboration. The petitioner was acquitted even of that charge. After all, what more could the petitioner have done except to have himself acquitted at the trial.

26. On another note, this court also observes that for a cause of action that arose sometime in 2006, the petitioner was diligent enough to file the present writ petition in 2007; but the matter has remained pending ever since. In these circumstances, in the opinion of this court, it would be a travesty of justice, at this late stage, to turn the petitioner away by rejecting his petition on the ground that he had an appellate remedy available under section 6-B(3) of the Act, which he ought to have invoked within 30 days of the cause of action arising, instead of filing

the present petition. It may be noticed that the petitioner was discharged in 2003; his enrolment as a home guard expired by efflux of time in 2006; and he was acquitted in the criminal trial in 2006; and therefore, even at the time when he could say that he had been acquitted, 3 years had already elapsed from the date of his discharge. Accordingly, the appellate remedy was time-barred and wholly inefficacious even at the time the petitioner was acquitted.

27. On this aspect, this court also reminds itself of the scope and ambit of the powers of the High Court under Article 226 as expatiated by the Supreme Court in *Godrej Sara Lee Ltd. vs. Excise & Taxation Officer* (supra) where the Supreme Court has observed as follows:

> *"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which*

*the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.*

*"5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh v. Mohd. Nooh) had the occasion to observe as follows:*

> *"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule*

> *of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.*
>
> ***"
>
> *"6. At the end of the last century, this Court in paragraph 15 of the its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:*
>
> *(i) where the writ petition seeks enforcement of any of the fundamental rights;*
>
> *(ii) where there is violation of principles of natural justice;*
>
> *(iii) where the order or the proceedings are wholly without jurisdiction; or*
>
> *(iv) where the vires of an Act is challenged."*

(emphasis supplied)

28. In the circumstances, this court would be loath to rejecting the present petition or refusing to exercise its extraordinary jurisdiction under Article 226 of the Constitution.

29. Though there is perhaps another debatable aspect of the matter, namely the 'past record' of a person seeking employment/enrolment in a uniformed force such as the Home Guards, on a plain reading of section 6-B(1) and (1-A) of the Bombay Home Guards Act 1947 and Rule 10 of the Delhi Home Guards Rules 1959, it is clear that no ground was made-out to discharge the petitioner under any of those provisions. Discharging the petitioner on the ground that he had been involved in criminal activities was also clearly misplaced inasmuch the petitioner was subsequently acquitted by a competent court after a full dressed trial, which acquittal was never challenged.

30. Furthermore, upon being queried, it has been clarified by both counsel that the petitioner, who is now about 41 years of age, is still 'eligible' to apply afresh for enrolment as a Home Guard, subject of course to fulfilling other requirements and criteria.

31. In the circumstances obtaining in the matter, and without delving any further into the aforesaid debatable aspect, in the opinion of this court, the correct course of action is to disposed-of the present petition with a short direction to the DG-Home Guards, that *if* the petitioner applies for *fresh enrolment* as a Home Guard, his application be considered on merits, in accordance with applicable rules and regulations, making it clear that his discharge based on the proceedings in criminal case No. 98/2 arising from FIR No.194/2003 dated 06.07.2003 registered at P.S.: Civil Lines, Delhi will *not* be treated as an impediment to his application being considered.

32. The writ petition is disposed of in the above terms.

33. Pending applications, if any, also stand disposed-of.

**ANUP JAIRAM BHAMBHANI, J**

**AUGUST 11, 2023/***uj*

**(Released on : 22nd August 2023)**