
(1995) 07 CAL CK 0010
In the Calcutta High Court
Case No : Civil Order No. 4445 (W) of 1994

Akhil Tikadar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 12-07-1995

Acts Referred:

Army Rules, 1954 — Rule 13
Citizenship Act, 1955 — Section 3

Citation : (1996) 1 ILR (Cal) 82

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Udayan Chakravarty, Sanjukta Bhattacharya and P. Das, for the Appellant; S. Sanyal, for the Respondent

Judgement

Ruma Pal, J.—The Petitioner has challenged his discharge from service by the Army. The Petitioner had been enrolled in the Army as a cook on March 2, 1982. According to the Petitioner some time in 1982 one T.K. Mookherjee belonging to the Intelligent Branch, Krishnagar came to the Petitioner's village and made enquiries about the Petitioner. It is alleged that T.K. Mookherjee demanded payment of certain monies from the Petitioner's mother illegally. According to the Petitioner cause of the dire poverty of the Petitioner's family this legal demand could not be met. Immediately wherein the Petitioner's mother was told to pay the balance sequent to Mr. Mookherjee at the address of one near Ghosh, a hotel keeper.

2. Petitioner's father met Mr. Mookherjee at Mr. Amar Gosh's hotel at which Mr. Mookherjee allegedly retired his demand. Upon being told by the Petitioner's father that he was unable to meet the demand, Mr. Mookherjee is stated to have become furious and threatened the father with dire consequences. It is said that Mr. Mookherjee caused a false verification report to be submitted to the Respondent No. 5 viz., the Collector, aid. On May 26, 1983 a discharge certificate was issued to the Petitioner. The discharge certificate reads as follows:

Discharge Certificate

Certificate

In Accordance with the Records Office Instructions No. 36/67 Army No. : 14544964-M Rank: Recruit Trade:

Cook (U) Name: Akhil Tikader discharged in consequence of being found "Unsuitable for Further the Army Service" under item IV of the table annexed to Rule 13 Army Rules 1954, after having for 1 (one) year Nil months 19 days, with colour and Nil years, Nil months, Nil days in the reserve.

Sd/-

Illegible,

NG Rama Swamy

Station: Bhopal (MP) Col.

Date: 26th May, 1983 Ofg. Commanding 3 EME Centre

3. On July 14, 1983 the Petitioner submitted a rep sanitation to the Officer-in-charge, E.M.E, recon Secundrabad. In that representation, it has been state that after completion of his training the Petitioner also with others had been asked to sign certain forms for the purpose of final posting but when the form was sign the Petitioner was told that he had been discharged from service. Upon the Petitioner enquiring from the authorities as to why he had been discharged, the authority replied that the Petitioner's Indian citizenship we suspect because of a verification report. The petition accordingly prayed for an opportunity to produce all the documents showing that he was indeed an Indian citizens and asked for reinstatement in service as early possible.

4. This representation was rejected in August 1989 in the following language by the Captain, Record Officer, on behalf of Chief E.M.E. Reader --

You have been discharged from service on the bas of adverse report received from the Civil authority by the Commandant, 3 E.M.E. Centre. As such, young case for reinstatement in service cannot be taken be this .office."

A representation was thereafter made on October 23 1983 by the Petitioner's brother to the Adjutant Genera Army Headquarters, D.H.Q., New Delhi with copies the O.I.C., E.M.E. Records, Secundrabad and 3 E.M.E Centre, Bhopal (M.P.). No reply was given to their representation. But on February 6, 1984 the discharge certificate issued and was forwarded to the Petitioner under cover of a letter dated February 6, 1984 from the O.I.C. E.M.E. records.

5. On March 11, 1984 this writ application was filed By an order dated April 19, 1984 direction were given for filing of affidavits and the matter was fixed for hearing on June 29, 1984. The Respondent authorities" filed an affidavit-in-opposition on August 31, 1987 and the matter was finally taken up for hearing

on August 31, 1987 by M. Majumdar, J. By an order dated August 31, 1987, the Superintendent of Police, Nadia was directed to produce the School Register of the School, Tarakgunj and also the School Register of Mobarakpur Primary School, Nadia. The Superintendent of Police submitted a report in which he recorded that as far as the Mobarakpur Primary School was concerned the Admission Register for the relevant period could not be traced. As far as the Tarakgunj High School was concerned the Headmaster stated that the admission register was required by the School Authorities-because of ensuing Madhyamik Examination. From time to time various orders were passed regarding the admission registers of the two Schools. It appears from the records that on October 30, 1987 the Headmaster, Tarakgunj High School has given a certificate to the effect that the Petitioner was a bona fide student of class VII in the year 1977 in the school and had been promoted to class VIII and that his date of birth was recorded in the admission register as October 20, 1963. For some period of time, the matter could not be taken up for hearing because M, Majumdar, J. was no longer sitting singly. Thereafter because of the sudden demise of M. Majumdar, J. the matter placed before U.C., Banerjee J. for hearing. The matter was heard by U.C. Banerjee, J, but was thereafter released and assigned to this Court.

6. At the hearing today the Petitioner has argued that the discharge of the Petitioner was bad ; first because it was not in keeping with the relevant Army Rules in this regard viz. Rule 13 III(iv). Secondly, it is submitted that the Petitioner had never requested for being discharged and had signed certain documents without being aware of the contents which was being treated by the Respondents requested being discharge. The intention of the Petitioner was never to be discharged from the Army. According to the Petitioner, this is evident from the conduct of the Petitioner in making repeated representations to the Army authorities at the relevant time. Thirdly, it is submitted that the discharge was on the basis of an adverse report, a copy of which had not been made available to the Petitioner. According to the Petitioner this was not only in violation of the principle of natural justice but also vitiated by mala fides as the report had been prepared at the instance of an officer against whom specific allegations of mala fide had been made. Fourthly, it is submitted that the two allegations-of which the alleged adverse report had been submitted to the authorities were, in any event, baseless. The Petitioner had ample material to show that there was no occasion for any adverse report to be submitted to the Petitioner. Finally, it is submitted that admittedly the Petitioner was born in India in 1963 and therefore on the basis of Section 3 of the Indian Citizenship Act the Petitioner was an" Indian citizen by birth.

7. The Respondents have produced the records available before the Court. It has been argued by the Learned Counsel appearing, for the Respondents that the discharge of the Petitioner had been made on the ground of the Petitioner's willingness to be so discharged. It is said that the Petitioner had submitted a form in the prescribed manner asking for discharge on June 6, 1983 and

accordingly the Petitioner had been discharged. Secondly, it is submitted that when the Petitioner applied for reinstatement he was not reinstated because of the adverse report against him. According to the Respondents, the adverse report submitted by the Civil authorities was (a) that the Petitioner's father had come over from Bangladesh illegally in 1962 and thus there was suspicion regarding the Petitioner's citizenship ; (b) ;he Petitioner had described himself as single at the: me of enrolment whereas, in fact, he was married. This was also found on the basis of the Civil report on the verification roll.

8. Having heard the submissions of the parties, I am of the view that the impugned order of discharge cannot be sustained. Rule 13 of the Army Rules, 1954 (hereinafter referred to as the "Rules") provides, inter alia, that each of the authorities specified in column 3 of the Table appended to Rule 13 shall be the competent authority to discharge from service a person subject to the Army Act, 1950 as specified in column 1 of the Table on the grounds specified in column 2. The action as far as the Petitioner's concerned has been taken under this Rule. The Petitioner has been treated as a person enrolled under the Act who had been attested. The grounds of discharge relied on by the Respondents as being applicable to the Petitioner's case is contained in Rule III (iv) which reads as follows:

At his own request before fulfilling the conditions of his enrolment.

Under the column "manner of discharge" it has been stated:

The Commanding Officer will exercise the power only when he is satisfied as to the desirability of sanctioning the application and the strength of the unit will not thereby be unduly reduced.

9. It appears to this Court that a person like the Petitioner may be discharged at his own request only in the following circumstances - (i) before fulfilling the condition of his enrolment; (ii) at his own request; and (iii) upon the Commanding Officer forming the requisite satisfaction regarding the desirability of sanctioning the application as provided in column 4.

In this case, the discharge certificate records that the" Petitioner has been discharged because he is unsuitable for further Army service. The desirability for further army service was determined on the basis of the adverse report from the Civil authorities as stated in the letter dated August 1983.

10. From the records as produced by the Respondents which have been scrutinised by this Court that no cop[^] of this adverse report of the Civil authorities appears. Indeed, a copy of the original verification roll which is on the records does not contain any such endorsement. It appears from the correspondence that despite every effort no verification roll containing the remarks of the civil verifying authorities could be traced. The absence of the verification report is singularly unfortunate having regard to the fact that the Petitioner has been discharged on the basis of such report.

11. Even assuming the Petitioner had signed the application for release, his mere application would not be sufficient. The satisfaction of the Commanding Officer was the necessary prerequisite to the discharge of the Petitioner. It needs repetition that when a challenge is thrown to the formation of the satisfaction, it is incumbent on the concerned authorities to produce the material on the basis of which such satisfaction has been arrived at. In the absence of the material there can be no assessment of the validity of the conclusion arrived at by the concerned authorities.

12. The circumstances in which the Civil investigation was held have been specifically stated by the Petitioner in detail in his petition (vide para 7). In the affidavit-in-opposition the Respondents have merely tatted that they had no knowledge of the same. This is to denial. If the statement of the Petitioner is taken as correct then the report on the basis of which the Commanding Officer formed his satisfaction is doubly jused.

13. The other aspect of the matter is the aspect of latural justice. The Petitioner was not being discharged ;implicate. He was being discharged on the ground that he had incorrectly mentioned his marital status as well as his status as an Indian citizen. This is discharge with a stigma and the Respondents were bound to have given the Petitioner an opportunity of being heard and after supplying him a copy of the report. (Samsher Singh v. State of Punjab and Ors. AIR 1974 S.C. 219. Even on the. merits, the basis of the satisfaction of the Commanding Officer, if any, cannot be sustained. The Petitioner has annexed to the petition diverse documents in support of the fact that he was" an Indian citizen.

14. The genuineness of the documents having been called in question by the Respondents. These documents include a certificate issued by the Headmaster, Tarakgunj High School, Nadia, a certificate of the Prodhan of the local Gram Panchyat, a certificate of the Head Teacher of Mobarakpur Primary School, a document showing that the Petitioner's father had purchased land in India, a document showing that the cases had been paid by the Petitioner's father to the local Government, an extract of the Voters' lists for the year 1981. In addition, the Petitioner has filed a supple monetary affidavit annexing a Xerox copy of a migration certificate issued by the Government of West Bengal Department of Refugee, Relief & Rehabilitation to the Petitioner's father on August 16, 1954. All the original documents were produced before this Court.

15. Furthermore, even according to the Respondents the Petitioner's father had come to India 1962 (vide para 9), the Respondents have never disputed that the Petitioner was, in fact, born in 1963.nor have they disputed the Petitioner's categorical averment in para. 1 of the petition that he was born in India. As such u/s 3 of the Citizenship Act, 1955 the Petitioner being a person born in India after January 26, 1950 and not being subjected to any exception as provided in that section has a statutorily recognized right of being a citizen of this country.

16. Even regarding the marital status of the Petitioner there is no material to

show that the Petitioner was married when he was enrolled. The affidavit-in-opposition also does not specify the date on which the Petitioner was allegedly married according to the Respondents. In the circumstances aforesaid, it must be held that the original discharge of the Petitioner not being supported by any valid satisfaction of the Commanding Officer cannot be sustained. For the same reasons enumerated above, the rejection of" the Petitioner's, representation is also vitiated.

17. It may be noted that it was only after the Petitioner filed the writ application in March 1984 that Petitioner was sought to be paid his "finalised accounts" on April 10, 1984. This factor, therefore, cannot be a material consideration in any event for determining the question whether the Petitioner had been validly discharged or whether the order of discharge should be set aside or not. For the reasons aforesaid, the writ application is allowed and the impugned order of discharge is set aside and quashed.

18. For the purpose of determination what consequential relief should be granted to the Petitioner apart from the reinstatement by way of arrears of salary etc. the matter is kept pending till next week when the Respondent authorities will produce what according to them would be the consequences of the Petitioner's being reinstated in service in terms of money with full back wages and the position of the Petitioner by way of seniority.

18A. In any event, the Respondents will reinstate the Petitioner and not later than two weeks from date. The reinstatement will be without prejudice to the question regarding arrears of salary etc.

19. Learned Counsel appearing on behalf of the Respondents authorities has produced the particulars of the pay and total salary which might have been obtained by the Petitioner from June. 6, 1983 to June 21, 1995. No contrary calculation has been brought by the Petitioner, who accepts the calculation given by the Respondents. In my view, the total salary on the basis that he has been in service at the rates specified in Clause 4(b) of the letter written by the Major Senior Records Officer dated June 23, 1995, a copy of-which has been handed over to Court. However, as far as arrears of pay, D.A., I.R.A. and Class of pay are concerned, the Petitioner will be paid the same calculated from the date on which the writ petition was filed viz. March 11, 1984. Such arrears shall be paid to the Petitioner within twelve weeks from date. It is recorded that Respondents have already placed the Petitioner as cook class. Accordingly, the writ petition is disposed of without any order as to costs.