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In the Delhi High Court

Case No : WP (C) No. 4453 of 2000

Ex. Gunner (GD) Suresh Kumar — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 05-07-2006

Acts Referred:
Army Act, 1950 — Section 122, 19, 43, 83, 84
Army Rules, 1954 — Rule 13, 14, 180
Defence Service Army Regulations, 1987 — Regulation 465A, 466

Citation : (2006) 134 DLT 425

Hon'ble Judges : Reva Khetrapal, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : G.K. Sharma and Rajiv Sharma, for the Appellant; Arun Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Reva Khetrapal, J.—This writ petition is directed against the order dated 21st January, 2000 discharging the petitioner from Army service under the provisions of Army Rule 13 Item No. (iii) (v) of the table annexed to the said Army Rules.

2. The facts in a nutshell are that the petitioner was enrolled in the Regiment of Artillery on 22nd August, 1995 against Unit Headquarters Quota enrolment by the Artillery Centre, Nasik Road Camp. On completion of his basic military training at the Artillery Centre, Nasik Road Camp, he was posted to 99, Field Regiment C/o 56 APO on 5th August, 1996. However, a case of malpractice in enrolment came to light in the year 1996. A court of inquiry was held to investigate the circumstances under which the alleged recruitment related malpractice took place in the Artillery Centre, Nasik Road Camp during the period 1994-1995. The General Officer Commanding, Maharashtra and Gujarat Area directed, vide para 7 (b) of his directions dated 7th July, 1997, that all cases of unauthorised recruitment/enrolment be examined and if necessary, services of such individuals be terminated administratively. Simultaneously, disciplinary

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proceedings against the persons responsible being one subedar head clerk and two hawaldar clerks were initiated by a General Court Martial. So far as the 12 persons who were allegedly recruited illegally and unauthorisedly were concerned, action was directed to be taken against them in terms of the provisions of Rule 13 (iii) (v) of the Army Rules.

3. A show cause notice was issued to the petitioner on 7th January, 2000 whereby the petitioner was called upon to show cause why his services should not be terminated on administrative grounds under the provisions of Army Rule 13 Item (iii) (v). It was mentioned in the said show cause notice that as per the details regarding enrolment of the petitioner received from the Artillery Centre, Nasik Road Camp, his name was not included in the Unit Headquarters Enrolment Board of July, 1995. The petitioner on 14th August, 2000 replied that he did not know how he had been declared as "bogus"; he had completed all rules of recruitment; completed all conditions of enrolment; on completion of training had been declared successful after qualifying requisite training test; and requested that he be permitted to continue in the service considering his performance in the Unit. On consideration of the reply of the petitioner to the show cause notice issued to him and after he was granted a personal hearing by the Commanding Officer, the Competent Authority passed an order discharging the petitioner from service, which order is impugned in the present writ petition.

4. In the course of hearing of the writ petition, it was submitted by learned Counsel for the petitioner that the discharge of the petitioner by the army authorities was illegal as the said discharge was only a follow up of the General Court Martial of Lt. Col. I.R. Gapliney, a subedar head-clerk and a hawaldar clerk, Surinder Singh of the same Artillery Training Centre (Nasik), who were caught red handed in accepting bribes for enrolment and in view of their punishment, as an exemplary punishment all the 12 jawans of the same batch were discharged from service, who were not even called as accused or witnesses in the disciplinary case. It was further submitted by counsel for the petitioner that the discharge of the petitioner for fraudulent enrolment u/s 43 of the Army Act was vocative of Section 122(iv) of the Army Act, which stipulates that no trial for fraudulent enrolment could be commenced if the person in question (not being an officer) has subsequent to the commission of the offence, served continuously in an exemplary manner for not less than 3 years with any portion of the regular Army. Our attention was also invited by the petitioner''s counsel to Regulations 465-A and 466 of the Regulations for the Army, 1987 Edn., to contend that the petitioner having put in 4 years and 5 months of exemplary service with effect from 22nd August, 1995, his discharge from the Army was not justified. For the sake of convenience, Regulations 465-A and 466 are reproduced hereunder:

465A. Assessment of General Character Officers

(a) For the purpose of IAFD-905, the General character of an officer will be graded as exemplary, very good, good, fair or indifferent as the case may be.

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(b) An assessment of exemplary character is the highest that can be given to an officer. It will be reserved for officers, who have rendered at least ten years service in the regular Army as an officer. The of is the sole judge, whether an officer is to be granted an exemplary character, the grant being discretionary and not obligatory.

(c) In assessing an officer''s character, only entries in the conduct sheet will be taken into account.

(d) Following are the minimum standards required in each grade before an officer''s character can be assessed:

(i) Exemplary

(aa) At least ten years service in the regular Army as an officer.

(ab) No punishment by court martial.

(ac) No summary award under Army Act Sections 83 or 84.

(ii) Very Good

(aa) At least five years service in the regular Army as an officer.

(ab) No punishment by court martial.

(ac) Not more than one summary award under Army Act Sections 83 or 84.

(iii) Good

(aa) At least three years service in the regular Army as an officer.

(ab) No punishment by court martial.

(ac) Not more than two summary awards under Army Act Section 83 or Section 84.

(iv) Fair

No punishment by court martial.

(v) Indifferent

Nil

(e) The of will not award an assessment lower than that to which the officer is entitled except in the case of ''exemplary'' grading, which can be lowered by one grade if there be, in the opinion of the OC, very strong reasons for doing so. Award of a recordable censure and habitual indebtedness of an officer are examples of such reasons to be taken into account by the CO.

JCO/WOs/OR

For the purpose of IAFD-905, the general character for JCO/WOs/OR will be assessed on the basis of the guidelines given in Para 170.

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466. Exemplary Service-

(a) For the purpose of exemption from trial under Army Act, Section 122, a JCO, WO or OR will be considered as having served in an exemplary manner if at any time during his service subsequent to the commission of the offence he has had no red ink entry in his conduct sheet for a continuous period of three years.

(b) When exemption from trial on a charge of fraudulent enrolment has been earned by exemplary service in any corps, the CO of that corps will be held responsible for notifying the fact to the individual''s previous corps.

5. Learned Counsel for the respondent Mr. Arun Sharma, on the other hand, countered the aforesaid submissions by contending that the action taken in discharging the petitioner was under Army Rule 13 (iii) (v). According to him, neither Section 122 of the Army Act nor Section 43 were applicable as sought to be made out by counsel for the petitioner. Reliance was placed by him upon the ratio decidendi of the decision of the Supreme Court in Union of India and Others Vs. O. Chakradhar, , wherein the Apex Court has categorically held that where the appointments were non-est at the initial point itself, even the principals of natural justice need not be followed.

6. Elaborating the case of the respondents, counsel for the respondents submitted that a syndicate was found to be operating which was embroiled in irregular appointments and this was the basis of the convening order passed on 2nd May, 1996 convening the court of inquiry against the personnel responsible for the irregular and unauthorised appointments. A Court of Inquiry was convened by Headquarters Mumbai Sub Area vide convening order No. 527/866/ A2 dated 07 January 1997 to investigate into circumstances under which malpractice took place during the year 1994-95.

7. The directions of the General Officer Commanding, Maharashtra and Gujarat Area, on the Court of Inquiry were received vide Headquarters Maharashtra and Gujarat Area letter No. 02609/Arty/A2 dated 30th October, 1999. As per the said directions, the services of the personnel whose enrolment was found illegal/ unauthorised were to be discharged. Accordingly, Headquarters Artillery Centre, Nasik Road Camp vide letter No. 408101/CF/94-95/534/A7 dated 29 December 1999 intimated concerned authorities including Proof Experimental Establishment Balasore, Headquarters Bihar and Orissa Sub Area, Danapur for initiating necessary action as per directions of General Officer Commanding, Maharashtra and Gujarat Area. Accordingly, the Commander 24 Artillery Brigade issued show cause notice to the petitioner to discharge him from the service, which culminated in the discharge order dated 01 April, 2002.

8. Learned Counsel for the respondents has also drawn our attention to the decision of the Jammu and Kashmir High Court in LPA No. 18/2005 titled as Manoj Kumar Dubey v. Union of India and Ors. filed by one of the 12 persons against whom action was taken under Army Rule 13 (iii) (v) and who is a similarly situate person as the present petitioner. In the said decision, a Division

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Bench of the Jammu and Kashmir High Court in a Letters Patent Appeal against the order of the learned Single Judge dismissing the writ petition of the appellant, held as follows:

The appellant, we are satisfied, managed his enrolment by fraudulent means. The very entry of the appellant in service being fraudulent, no question of compliance with Rule 180 was involved. The fact that the appellant had secured less marks than the last candidate and that his name did not find place in the select list/reserve list, is sufficient to disentitle him to any relief against the discharge.

In the facts and circumstances of the case we are of the view that the concerned authorities of the Army should pursue the matter further and take necessary action against the persons who were instrumental in making the impugned enrolment, if not already taken. As indicated above, as per the stand of the respondents the appellant (and others) was enrolled on the basis of Rahdari certificate prepared by a Hav. Clerk, which justifies action against him and, may be, others. If the authorities are of the view that the appellant played any positive role in the matter of his enrolment, it will be open for the authorities to take further action against him, in accordance with law.

In the facts and circumstances, we find no error in the order of learned Single Judge dismissing the writ petition. The appeal is, accordingly, dismissed.

9. It is not in dispute that the facts in the present case are identical to those in the Letters Patent Appeal in the case of Manoj Kumar Dubey (supra), which was dismissed by the Jammu and Kashmir High Court. A perusal of the Board proceedings clearly shows that the petitioner could not make the grade because of being low in the order of merit, but despite the said fact which is established from the records produced by the respondents before us, the enrolment of the petitioner along with eleven other persons was managed through deceitful means. It is also clearly established from the records that the aforesaid 12 persons were not called for recording of their statements during the course of inquiry for the reason that the Court of Inquiry was of the opinion that sufficient evidence against the individuals who were involved in the malpractice was revealed during the examination of witnesses. The records further disclose that since the unauthorised enrolment of the persons was revealed and unequivocally proved, they were not called for recording of their statements during the course of enquiry for the following reasons as well:

(a) Names of the individuals were neither in the selected list nor in the reserve list in the Board proceedings of UHQ Enrolment for the month of July, 1995.

(b) Rahdari Certificate, recruit inspection card and medical documents of the above individuals were prepared by Havildar/Clerk Surender Singh and Havildar/ Clerk R.V. Rao with mala fide intention to get them enrolled on the directions of Lieutenant Colonel I.R. Gapliney, Officer Commanding 7 (RR & D) Battery, Artillery Centre, Nasik Road Camp.

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10. Besides the aforesaid court of inquiry, a fact finding enquiry to ascertain the truth and veracity of allegations of irregularity and malpractice was also initiated. Action was thereafter taken against the petitioner under Army Rule 13 (iii) (v) and while doing so, a show cause notice was issued to the petitioner, giving reasonable opportunity to the petitioner to rebut the allegations made against him. While taking action against the petitioner under Rule 13, not only the aforesaid reply of the petitioner was considered but the petitioner was afforded a personal hearing, and thereafter action was taken as envisaged under Rule 13.

11. Adverting next to the contention of counsel for the petitioner that the discharge of the petitioner under Rule 13 is misconceived on the ground that it was a fraudulent enrolment within the meaning of Section 43 of the Army Act and the action taken was vocative of Army Act, Section 122 read with Regulations 465-A and 466 of Regulations for the Army, 1987 Edn. as the offence becomes time barred after 3 years of exemplary service, whereas the petitioner had put in exactly 4 years 5 months of service with effect from 22nd August, 1995, we are wholly unable to accept the aforesaid contention for the reason that we are of the considered opinion that the action which was taken under Rule 13 was an administrative action which was taken by virtue of an administrative power vested in the competent authority. We are also of the view that there can be no dispute with the proposition that the administrative powers vested under Rule 13 are altogether different from the powers vested by the Legislature for the convening of court martial proceedings. The competent authority is vested with an option to take recourse to any of the two powers vested in it and if it is of the opinion that in the facts of a particular case action under Rule 13 is justified, no fault can be found with initiation of such action nor can it be urged that the order of convening of a court martial against the petitioner was the only recourse open to it.

12. The above view has been taken by us in our decision rendered in WP(C) No. 7117/02 Munshi v. UOI and Ors. which was a writ petition filed by one of the 12 persons who are similarly situate as the petitioner.

13. In the said decision this Court has clearly held that when a power is vested in the authority to be exercised and if the said power is exercised in accordance with the rules, the said order cannot be faulted. In a matter like this, two courses were open to the Competent Authority one was trial by a General Court Martial and the other was to take action as envisaged under Rule 13. It is well settled that when two options are open, it is always the choice of the competent authority to choose one of them, and if the competent authority chooses to proceed against the petitioner under Rule 13, no objection could be taken against the aforesaid decision taken by the competent authority.

14. In this view of the matter, clearly it is not open to learned Counsel for the petitioner to press into service the provisions of Section 122 of the Army Act which are applicable only to a person who is being tried by a Court Martial, nor can it be said that the provisions of Regulations 465-A/466 of Regulations of the

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Army, 1987 Edn. are applicable which pertain to exemption from trial u/s 122 of the Army Act. It would be appropriate at this juncture to refer to the decision of the Supreme Court reported in Union of India and Others Vs. Harjeet Singh Sandhu etc., In the said case it was held that though Section 122 of the Army Act prescribes a period of limitation for the commencement of Court Martial proceedings, the Parliament in its wisdom has chosen not to provide any bar or limitation on the exercise of power u/s 19 read with Rule 14. On a parity of reasoning it would in our opinion, be proper to hold that the provisions of Section 122 would be inapplicable to the exercise of administrative power under Rule 13 of the Army Rules.

15. Reliance placed by counsel for the petitioner on Section 43 of the Army Act is also clearly misplaced as the said Section pertains to fraudulent enrolment in the following two cases:

(a) Without having obtained a regular discharge from the corps or department to which he belongs, or otherwise fulfilled the conditions enabling him to enrol or enter, enrols himself in, or enters the same or any other corps or department or any part of the naval or air forces of India or the Territorial Army; or

(b) is concerned in the enrolment in any part of the Forces of any person when he knows or has reason to believe such person to be so circumstanced that by enrolling he commits an offence against this Act.

16. The instant case is clearly not one of fraudulent enrolment as elucidated by Clauses (a) and (b) of Section 43 of the Act. By no stretch of imagination, it can be said that the petitioner had enrolled himself without having obtained a regular discharge from the corp or department to which he belonged as envisaged in Section 43, Clause (a). Clause (b) if also not attracted, inasmuch as the said Clause is on the face of it applicable to persons concerned with or involved in carrying out the enrolment procedure, and not to the person or persons being enrolled. In other words, it applies to persons indulging in malpractice in enrolment, such as those against whom in the instant case a court of enquiry was held and a Court Martial ordered.

17. So far as the contention of learned Counsel for the respondents that no such powers can be exercised under Rule 13 is concerned, a bare look at the provisions of the said Rules would indicate that the authorities are empowered to authorise discharge of an employee under five different classes of discharge, which are clearly delineated under Rule 13 (iii) of the Army Rules,clause (i) to (v).

18. In the instant case the relevant clause is Clause (v) of Sub-rule (iii) of Rule 13 which provides for discharge in the case of regular appointments. The said rule envisages administrative action of the concerned authorities by issuance of show cause notice in all other cases of discharge, i.e., other than those specified in Clauses (i) to (iv). The manner of discharge is also subsequently laid down, being that the Brigadier or Sub-Area Commander before ordering the discharge shall, if the circumstances of the case permit, give to the person, whose

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discharge is contemplated, an opportunity to show cause against the contemplated discharge. In the case in hand the manner of discharge was strictly adhered to, inasmuch as a notice to show cause was given to the petitioner and his reply was considered by the Competent Authority along with records before passing of the order of his discharge. The said show cause notice was issued by the Brigadier Commander and the services of the petitioner were thereafter discharged by the Brigadier Commander. These facts are clearly mentioned in the counter affidavit of the respondents and are manifested by the records. An attested copy of the relevant documents including the order of discharge duly signed by the Commander dated 28th March, 2002 are also placed on record by the respondents to show that the provisions of Clause (v) of sub Rule (iii) of Rule 13 were adhered to in letter and spirit.

19. We, Therefore, find no merit in this writ petition. The same is accordingly dismissed.

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