

(2008) 08 DEL CK 0035

In the Delhi High Court

Case No : Writ Petition (C) No. 1549 of 1997

Ex. HAV. Army Education Corps Rajesh Kumar

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-08-2008

Acts Referred:

Army Rules, 1954 — Rule 106

Central Civil Services (Temporary Service) Rules, 1965 — Rule 5

Constitution of India, 1950 — Article 226

Citation : (2008) 106 DRJ 411

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Ramji Srinivasan, Harsh Kaushik and Anshu Mahajan, for the Appellant; Gaurav Duggal and Ruchi Sindhwani, for R-3, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The petitioner was enrolled in the Army Education Corps on 03.06.1992. The petitioner had already filled in a application form on 29.05.1992 for the post of Sub Inspector in Delhi Police but this fact was apparently not disclosed by the petitioner while enrolling with the Army. The petitioner while undergoing training received a call for the written examination to be held for recruitment to the post of Sub Inspector in the Delhi Police on 26.07.1992 (which was a Sunday) and claims that with the prior permission of the Subedar Major In Charge of his company/unit, he went to write the examination at New Delhi. There is however nothing on record to show such a permission having been obtained by the petitioner. The petitioner claims to have again applied for leave to appear in the interview and physical endurance test, which was recommended by the Company Commander. The petitioner left the station on 18.02.1993 and joined back on 25.02.1993 after appearing for the said test. The stand of the Army is that the petitioner absented himself from the duty from 19.02.2003 to 23.02.2003 for a period of four days and on re-joining pleaded guilty to the offence of absence from duty without leave. The petitioner

was awarded a punishment of seven days fine by the Officer commanding the troops and the petitioner accepted the said punishment without any further challenge.

2. The petitioner successfully completed the military training at AEC Training College and Center and a posting order was issued whereby the petitioner was to fill up the existing vacancy of AEC Instructor at 12 J&K Rifles. The petitioner was issued a movement order dated 20.07.1993 with a free railway warrant whereby he was dispatched on 27.07.1993 with the instructions to report to Adjutant 12 J&K Rifles on 31.07.1993. The petitioner, however, pleaded that he had been declared successful in the examination to the recruitment to Delhi Police on 03.06.1993 and had applied for discharge to the Commandant, AEC on compassionate grounds as his family genuinely required his presence and the post of Sub Inspector with the Delhi Police carried a substantially higher pay scale. This application is stated to have been recommended by the Company Commandant and the petitioner claims that he was orally informed about the decision to discharge him though no formal order was issued to him. It is once again noticed at this stage that from the records of the respondents as also as per the affidavits nothing has been found to show that the petitioner had ever made such a request with the respondents.

3. It is an undisputed position that the petitioner did not join the duty with the 12 J&K Rifles, which unit is stated to have kept the vacancy unfilled and waited for the petitioner to join the duty till 31.07.1993 where after a Court of Inquiry was set up which recorded the evidence and found that the petitioner had illegally absented himself without leave from 31.07.2003 (fore noon) onwards. The petitioner was thereafter declared a deserter. The petitioner, on the basis of the period spent on the strength of the Army was entitled to draw a salary of Rs. 18,180/- whereas the petitioner had drawn an amount of Rs. 18,500/- and thus an excess amount of Rs. 320/- had been paid to the petitioner. Since the petitioner was deserter and untraceable, his mother was intimated and the mother of the petitioner deposited the amount through Treasury Receipt on 07.08.1996. The account of the petitioner was finally closed.

4. The SHO, Inderpuri is stated to have asked the Army to furnish the particulars of the petitioner vide letter dated 28.06.1996 as the petitioner had remained unapprehended. Thus the particulars of the petitioner were forwarded by the Army with a request to the concerned authorities to apprehend the petitioner as a Army deserter and hand him over to the nearest military station. Despite the reminders sent to the Delhi Police, there was no result. Thus in terms of the administrative decision of the Army as per Letter dated 11.03.1980 (as amended on 24.02.1987), the petitioner was dismissed from the Army with effect from 31.07.1996. The said administrative decision required that if a deserter was not apprehended within a stipulated period of three years from the peace area and within a stipulated period of ten years in case of desertion from the field area, he would be dismissed from service. The petitioner had deserted from the unit

located in a peace area with effect from 31.07.1993 and thus on expiry of three years" period, the petitioner was dismissed from service.

5. The petitioner in the meantime had joined the Delhi Police as a Sub Inspector on 10.02.1994 and after completing his basic training was allocated to the South West District vide an order dated 05.05.1995. A complaint was received in the office of the DCP South West District dated 12.04.1996 from one Sh. R.P.Singh, CBI, Lodhi Road to the effect that the petitioner was a Army deserter who had been successful in joining the Delhi Police as a Sub Inspector rather than suffering the consequences of desertion from the Army. An inquiry into this behalf was thus conducted by the Delhi Police and it was confirmed that the petitioner was an Army deserter with effect from 31.07.1993 with his home address disclosed as of District Rohtak. The attestation form filled by the petitioner on 20.08.1993 in his own handwriting was scrutinized and it was found that against Column No. 10 which related to information about a candidate's previous employment at any time, the petitioner had written "NA". The petitioner had thus concealed the factum of his previous employment with Army and as per conditions stipulated in the appointment letter issued by the Delhi Police read with the Rule 5(i) of CCS (Temporary Services) Rules, 1965 ("the said Rules" for short), the petitioner was liable to be terminated from the service. A decision was thus taken to terminate the services of the petitioner under the provisions of Rule 5(i) of the said Rules. The representation of the petitioner against the order of termination was rejected by the Commissioner of Police, Delhi on 10.06.1997 and the petitioner was duly informed. The petitioner has thereafter filed the present writ petition seeking quashing of the orders declaring him a deserter and requiring the Army to treat the petitioner as discharged from service with effect from 31.07.1993. A further relief claimed is for quashing the order passed by the Delhi Police terminating the services of the petitioner.

6. Learned senior counsel for the petitioner contends that the impugned decisions are arbitrary and illegal and the punishment given to the petitioner, in any case, is disproportionate to the offence as the petitioner has been deprived of both serving the Army and the Delhi Police. It is thus submitted that at best there was a technical defect in the petitioner leaving the Army without sanction (though the same was disputed) and thus the petitioner should not be dismissed from Delhi Police. Learned Counsel claims that the petitioner had, in fact, submitted an application for being discharged though he does not have a receipted copy of the same and but for the lapse of time, his case could have been processed for such discharge. There was nothing against the petitioner when he was serving the Army or the Delhi Police and thus grave prejudice had been caused to the petitioner by depriving him of the opportunity to serve the Delhi Police.

7. The original records had been called to appreciate as to how the petitioner dealt with the aspect of his recruitment with Delhi Police while he was in the Army. The records show that the petitioner at any stage of his joining the Army

never disclosed the factum of his having applied with the Delhi Police. There is nothing on record to show that the petitioner took the examination for recruitment to the post of Sub Inspector with the Delhi Police after obtaining permission from the Army. The examination for recruitment to the post of Sub Inspector with the Delhi Police was incidentally held on a Sunday. Not only that, there is no application on record of the petitioner for grant of leave in respect of the period when he went to take the examination for recruitment to the post of Sub Inspector with the Delhi Police.

8. On the other hand, the petitioner was treated as absent from leave and was punished for the same which punishment he accepted. The petitioner, even at that stage did not disclose that he had gone to take the examination with the Delhi Police.

9. The claim of the petitioner of having sought such discharge from the Army is also belied as there is once again nothing on the original records of the petitioner produced by the Army to show such an application was ever made by the petitioner. The petitioner was issued a movement order to join the 12 J&K Rifles but instead of joining the same, the petitioner deserted the Army. The petitioner could not be apprehended and, after a Court of Inquiry, was held to be a deserter and on expiry of a period of three years was dismissed from service.

10. It is not even disputed by learned Counsel for the petitioner that the petitioner does not have any discharge order. The petitioner is an educated man and can hardly be expected to presume that there could be a discharge from the Army without any formal discharge orders being issued to him.

11. The story set up by the petitioner of an assumption by the petitioner of his being discharged is also belied. This is for the reason that when the petitioner joined the Delhi Police, against the relevant column seeking information about his past employment, the petitioner filled in "NA". If the petitioner was under a misconceived notion of his discharge, he would have mentioned the factum of his enrolment with the Army coupled with his discharge. The petitioner neither mentioned the factum of enrolment with the Army nor the discharge. The aforesaid facts show that the petitioner had been concealing material facts repeatedly from the Army and the Delhi Police while seeking enrolment.

12. Learned senior counsel for the petitioner also seeks to challenge the manner of conduct of the Court of Inquiry where the petitioner was declared a deserter. An endeavour is made to take advantage of mis-description inasmuch as the petitioner has been referred to as a Sepoy instead of Havaldar, which is no consequence. The petitioner claims that the Court of Inquiry could not have been held in 12 J&K Rifles as the petitioner never joined the said Unit and the petitioner could not have been absent without leave from 31.07.1993 when the movement order dated 20.07.1993 granted the petitioner leave for 9 days with effect from 27.07.1993 which would require the petitioner to join the said Unit by 04.08.1993.

13. In our considered view, these are meaningless pleas for the reason that it is not in dispute that the petitioner was given a movement order with a free railway warrant to join the 12 J&K Rifles. The petitioner had to join the 12 J&K Rifles and thus the inquiry was rightly held by that Unit. It is undisputed that the petitioner did not join the duty but instead absented himself and subsequently joined the Delhi Police because in the meantime he had been recruited for the post of Sub Inspector with the Delhi Police. The Army records also show that the inquiry with regard to declaring the petitioner's absence from service was conducted in accordance with Rule 106 of the Army Act, 1950 which is not required to be done if the incumbent is present. The said Section for the sake of reference is reproduced below:

106. Inquiry into absence without leave - 1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessities; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.

2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for purposes of this Act, be deemed to be a deserter.

14. Learned Counsel for the petitioner also claims that the petitioner never had a fair opportunity to defend himself in the Court of Inquiry. The petitioner is himself to blame for the same as he never joined the proceedings and had absented himself from duty. It is not the case of the petitioner that he had at any stage subsequently sought to inform the Army or sought to join the duty. It is not even the case of the petitioner that he ever received a discharge order which would entitle him to presume that he had been discharged from the Army. We find no breach of the provisions of either the Army Act or the Rules there under.

15. Learned senior counsel for the petitioner also seeks to contend that the decision of the Delhi Police under Rule 5(i) of the said Rules was illegal as once allegations were made about the aspect of desertion of the petitioner from the Army, a regular inquiry ought to have been held and the petitioner should have been given an opportunity to defend himself. Learned Counsel in this behalf relied upon a recent judgment of the Apex Court in *Nehru Yuva Kendra Sangathan Vs. Mehbub Alam Laskar*, . In the said case, the services of a probationer had been terminated due to financial irregularity. The inquiry had been conducted behind his back. A representation had been made by the probationer, which was ultimately disposed of. It was observed that when the

foundation for an order of termination of a probationer is not the unsatisfactory performance on the part of the employee but overt acts amounting to misconduct, an opportunity of hearing to the concerned employee is imperative. Thus although an order terminating a probationer would appear to be innocuous on its face, the same would be vitiated if in effect and substance it is found to be stigmatic in nature. It was, however, observed that mere holding a preliminary inquiry where an explanation is called for from an employee, if followed by an innocuous order of discharge, may not be held to be punitive in nature but not when it is founded on a finding of misconduct. One of the important facts which was taken note of by the Apex Court was of discrimination and the conduct of the petitioner which was found to be bona fide.

16. Learned Counsel also referred to the judgment of a Division Bench of this Court in Director, Directorate of Economics and Statistics, Govt. of NCT of Delhi and Another Vs. Shahid Khan and Another, where once again it was held that the termination of services based on misconduct obligated the respondents to initiate departmental proceedings against the offending officer. A reference has also been made to the judgment in WP(C)6672/2000 Raj Kumar v. Union of India and Ors. and other connected matters decided on 18.10.2001 by a Division Bench of this Court. The matter pertained to the recruitment through a special drive for constables in Delhi Police in Saharanpur and Rampur Districts of UP. On scrutiny carried out subsequently, the registration cards of as many as 73 candidates including the petitioners were not found in order. Further verification showed discrepancies which resulted in termination of the candidates under Rule 5 of the said Rules. The termination orders were quashed by the CAT giving directions to the respondents to hold a regular inquiry. The inquiry was carried out which also resulted in adverse orders in case of some of the affected parties. The main point canvassed was of discrimination meted out to the petitioners vis-à-vis other colleagues who had been re-instated. It is thus a plea of discrimination which found favour.

17. In the aforesaid context, learned senior counsel for the petitioner sought to produce a circular of the Delhi Police dated 24.02.1998 which was in continuation of an earlier Circular dated 24.07.1997 regarding dealing with cases of concealment of facts about involvement of candidates in criminal cases or giving wrong information at the time of filling up application forms as well as attestation forms or submitting forged/bogus documents for recruitment in Delhi Police. The circular stated that all such cases were required to be decided by issuing proper show cause notices to the candidates and action should be taken under Rule 5 of the said Rules.

18. We are however of the considered view that the aforesaid judgments do not apply to the facts of the present case. Sh. Raj Kumar v. Union of India and Ors's case (supra) is predicated on a plea of discrimination which has no application in the present case. No doubt, the other judgments in the cases of Nehru Yuva Kendra Sangathan v. Mehbub Alam Laskar's case (supra) and Director,

Directorate of Economics and Statistics, Govt of NCT of Delhi and Anr.v. Shahid Khan and Anr's case (supra) propounded a proposition that where the probationer is terminated really on account of misconduct, an opportunity to defend himself should be given to the probationer. However, it has been simultaneously observed in the case of Nehru Yuva Kendra Sangathan v. Mehbub Alam Laskar's case (supra)'s case (supra) that mere holding a preliminary inquiry followed by an innocuous order of discharge, may not be held to be punitive in nature. The basic principle which is enunciated in these two cases is founded on the salutary rule that a person should not be condemned for misconduct without giving him an opportunity to defend himself.

19. The facts of the present case, however, show that it is not even disputed by the petitioner that he joined the Army, that he did not join his place of posting, that he has no discharge order from the service and that he did not disclose the factum of his earlier employment with the Army to the Delhi Police. He had no explanation to these facts even before us. These undisputed facts leave no room for any inquiry to be made. The whole case of the petitioner is predicated on the plea of an assumptive discharge which can hardly be sustained.

20. Another important aspect which weighs with us is that while exercising jurisdiction under Article 226 of the Constitution of India, the conduct of the petitioner has to be kept in mind. The petitioner, in the present case, in our considered view, is guilty of concealment of material facts and mis-representing the facts. The petitioner claimed that he had taken the examination, both written and oral, with the Delhi Police after obtaining permission from the Army. No application for such permission was found nor was any permission granted. The petitioner also claimed to have made an application for discharge while no such discharge application is found on the records of the petitioner with the respondents. Thus he has not come to the Court with clean hands and has also made wrong statements.

21. The petitioner has no doubt lost both the jobs. The present case is, however, not one where even the question of quantum of sentence can be doubted. A person who surreptitiously takes an examination for recruitment with Delhi Police while serving the Army and then deserts the Army to join the Delhi Police, without being discharged, really does not deserve any mercy. The petitioner has been repeatedly mis-representing facts to the Army, to the Delhi Police and even to this Court. In such a case, even the stated circular of the Delhi Police does not come to the aid of the petitioner.

22. We see no reason to exercise jurisdiction under Article 226 of the Constitution of India in favour of the petitioner who has only to blame himself for the position he finds himself in where he gets neither of the two jobs.

23. Dismissed.