
(1994) 07 AP CK 0011

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 826 of 1987

Government of India and Others

APPELLANT

Vs

Captain H.R. Singha

RESPONDENT

Date of Decision : 21-07-1994

Acts Referred:

Army Rules, 1954 — Rule 13A, 13A(1), 13A(3)

Citation : (1994) 3 ALT 213

Hon'ble Judges : Lingaraja Rath, J;B. Subhashan Reddy, J

Bench : Division Bench

Advocate : N.V. Ranganatham, for the Appellant; M.V. Ramana Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Lingaraja Rath, J.—The question raised in this appeal is as to the interpretation of Rule 13-A of the Army Rules of 1954 (hereinafter referred to as "the Rules"). The respondents in the Writ Petition are the appellants. The respondent in this appeal was a Captain in the Army. It is the case of the appellants that a Captain to be promoted to the next higher rank of Major, is to pass an examination within a stipulated period, that is, 20 years from the date of entry into service, and that if the examination is not passed, the Chief of the Army Staff shall call upon the Officer to show cause why he should not be compulsorily retired or removed from service. On the explanation of the Officer being submitted and considered by the Chief of the Army Staff, he may, if the explanation is found unsatisfactory, recommend to the Central Government for the Officer (a) to be called upon to retire; or (b) to be called upon to resign. The Central Government after considering the explanation, if any, of the Officer and the recommendation of the Chief of the Army Staff, may call upon the Officer to retire or resign, and on his refusing to do so, the Officer may be compulsorily retired or removed from service on pension or gratuity, if any, admissible to him. The respondent having failed to clear that examination, was issued a notice by the Chief of the Army

Staff on 14-2-1985 calling upon him to show cause why he should not be compulsorily retired or removed. He submitted his explanation on 24-3-1985; but that having been found unsatisfactory, recommendation was made to the Central Government against him. What the actual recommendation made is not on record. The respondent was thereafter issued an Order by the Central Government on 16-8-1985 that he shall be called upon to retire and on his refusal to do so, he shall be compulsorily retired from service on payment of pension and gratuity, if any, admissible to him. Pursuant to that, the respondent submitted a representation to grant him one more chance to appear for Part-D promotion examination. But, before the order of retirement could be passed the Writ Petition was filed, in which an order of stay of retirement was passed. The Writ Petition having been ultimately allowed, the respondent is continuing in service.

2. The facts subsequent to the filing of the Writ Petition are that the respondent was permitted to appear for the next examination that took place on 27-12-1985. The results of the examination were published on 2nd February, 1986 declaring him to have passed. Thereafter, in April, 1986, the results were cancelled.

3. The learned single Judge came to the conclusion that since the Central Government had not issued sufficient notice to the respondent before passing the final order on 16-8-1985 and he having passed the examination subsequently, the order of compulsory retirement was not sustainable. The learned Judge also relied upon Special Army Instruction No. 1, which came into effect from 31st July, 1984 and which had been issued in supersession of the Special Army Instructions 3/S/57 and 23/S/58, as amended from time to time, to hold that the procedure contemplated therein had not been followed prior to the issue of notice under Rule 13-A of the Rules to the respondent.

4. In assailing the Judgment, submission is advanced by Mr. N.V. Ranganatham, learned Additional Standing Counsel for Central Government, that all the procedure prescribed by Rule 13-A of the Rules has been complied with and the order of compulsory retirement had been passed against the respondent validly to which no exception could have been taken.

5. To appreciate the contentions advanced on either side, it is necessary to extract the provisions of Rule 13-A of the Rules and Clause (15) of the Special Army Instructions.

"Rule 13-A: Termination of service of an Officer by the Central Government on his failure to qualify at an examination or course:-

(1) When an Officer does not appear at or, having appeared fails to qualify, at the retention examination or promotion examination or any other basic course or examination within the time or extended time specified in respect of that examination or course, the Chief of the Army Staff shall call upon the Officer to show cause why he should not be compulsorily retired or removed from the

service.

(2) In the event of the explanation being considered by the Chief of the Army Staff to be unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the Officer's explanation and the recommendation of the Chief of the Army Staff as to whether the Officer should be

(a) called upon to retire; or

(b) called upon to resign.

(3) The Central Government, after considering the explanation, if any, of the officer and the recommendation of the Chief of the Army Staff, may call upon the officer to retire or resign, and on his refusing to do so, the officer may be compulsorily retired or removed from the service on pension or gratuity, if any, admissible to him."

Clause (15) of the Special Army Instructions:

"15. The services of an Officer, who fails to qualify in the specified promotion examination will be terminated under the provisions contained in Army Rule 13-A after serving him with a show cause notice as follows:

(a) Promotion examination Part A or B

(i)

(ii)

(b) Promotion Examination Part C or D.

(i) Show cause notice: Show cause notice will be served to Officer who fail to qualify in these promotion examinations on completion of 18 years service,

(ii) Termination of service:

Services of officers who fail to qualify in the above promotion examinations upto or on completion of 20 years service will be terminated as per provisions contained in Army Rule 13-A.

(c) Promotion examinations - Part C or D - Graduate Veterinary Officer of RVS

(i)

(ii)"

6. Clause 15 (b) (i) contemplates a notice to be issued to the Officer who fails to qualify in the promotion examination on completion of 18 years service. Clause 15 (b) (ii) provides for termination of service of an Officer who fails to qualify in the promotion examination within 20 years of completion of service in accordance with the provisions contained in Rule 13-A of the Rules. It has been found as a fact by the learned single Judge that the provisions of clause (15) (b)

(i) of the Special Army Instructions had not been complied with so far as the respondent is concerned in as much as on completion of 18 years of service, no show cause notice had been issued to him of his having failed to qualify in the examination.

7. A reading of Rule 13-A of the rules, as extracted above, would show a two-tier method for effecting retirement of an Officer on the ground of his having failed to pass the promotion examination. At the first stage, the Chief of the Army Staff is mandatorily required to issue a show cause notice to the Officer as to why he should not be compulsorily retired or removed from service. If an explanation is submitted by the Officer, it is to be considered by the Chief of the Army Staff, which, if found unsatisfactory, he shall report the matter to the Central Government for orders along with his own recommendation, which is to be either to call upon the Officer to retire or to call upon him to resign. It is to be noticed that such an action has to be taken by the Chief of the Army Staff only if he considers the explanation of the Officer unsatisfactory which means that he has also the discretion, if he is otherwise satisfied with the explanation, to drop the proceedings. If however the recommendation is made to the Central Government, they are to first consider the explanation along with the recommendation and may call upon the officer to retire or resign. If the Officer refuses to comply with that direction, he may be retired compulsorily or removed on payment of pension and gratuity, as may be admissible to him. The consideration by the Central Government, hence, is at two stages. The first being on receiving the recommendation from the Chief of the Army Staff where the explanation of the Officer is also taken into account and Central Government makes up its mind as to whether to accept the recommendation or not. If the recommendation is not accepted, the matter is to be dropped. On the contrary, if the recommendation is accepted, direction is to be issued to the Officer to submit papers either for retirement or for resignation. That is the end of the first stage. If the Officer does not comply with the direction and refuses, the Government may pass an order either retiring him or removing him from service. The refusal of the Officer may be either express by his communicating as such or even by his silence. But if while refusing to comply with the direction, the officer brings to the notice of the Central Government facts justifying his refusal and pleading as to why he should be retained in service, it is open to the Central Government to consider that and decide as to whether the ultimate order of retirement or removal is to be passed. The use of the word "may" twice in Rule 13-A (3) of the Rules would indicate such position. The provisions of Rule 13-A (1) may also be juxtaposed with that of Rule 13-A (3) wherein the word "shall" has been used so far as requiring the Chief of the Army Staff to issue notice to the Officer who fails to clear the examination.

8. The above reading of the provisions of Clause (3) of Rule 13-A is also in consonance with the principles of natural justice. Rules of natural justice are not only sacrosanct but are also to be read as of in-built provisions of all statutes even if their compliance is not expressly provided for. The only exception to

observance of natural justice in any State action either in compliance of the statutory provision or otherwise is where it has been excluded expressly or implicitly. It is for such reason that the principles of audi alteram partem is the unwritten law of all administrative actions subject to its exclusion by express words or by necessary implication. Hence so far as the second part of sub-rule (3) is concerned, the observance of the principles of natural justice before actually passing the order of compulsory retirement or removal is a necessary postulate. In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, a decision of the Constitution Bench, the apex Court held in paragraph 31, discussing the question of compliance with the principles of natural justice that the rule audi alteram partem can be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its application and even warrants exclusion and that if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands, natural justice could be avoided. But the Court administered the caution that the principles of natural justice must not be displaced, save in exceptional cases and in the context referred to in *Union of India and Another Vs. Tulsiram Patel and Others*, where the submission of the learned Attorney General that the words "where it is not reasonably practicable to hold an enquiry" were to be imported into the regulations being considered in that case.

9. We do not find, in the present case, any such exceptional contingency to have happened to justify the non-compliance of the principles of natural justice.

10. What has been done in the present case is that, after the recommendation of the Chief of the Army Staff was received, the Central Government straightaway passed the final order on 16-8-1985 directing the respondent either to retire or resign or else to be compulsorily retired. Such a composite order is least contemplated within the scheme of Sub-rule (3) of Rule 13-A. By passing such an order, the Government effectively stifled its own discretion which was to be exercised at a later point of time after being intimated of the refusal by the Officer to comply with their direction. Such a short-circuit of the two discretions is wholly violative of the spirit and scheme of the Rule. The decision to compulsorily retire or remove from service is expressly vested in the Central Government under Sub-rule (3). But what was done was, by passing of the composite order, to delegate the function of taking the decision to compulsorily retire or remove to the Chief of the Army Staff. He was required on refusal of the respondent to retire or resign, to take the decision himself. The Central Government acted as if it had no further duty after calling upon the Officer to retire or resign and mechanically passed the order that if the Officer refused to comply with the direction, he should be compulsorily retired or removed from service and that part of the decision was to be taken by the Chief of the Army Staff. We, hence, do not find such order of the Central Government to be in consonance with the requirements of the Rule and hence affirm the order under

appeal.

11. We also find ourselves in concurrence with the view taken by the learned single judge as regards the effect of non-compliance of Clause (15)(b)(i) of the Special Army Instructions No. I. A show cause notice was to have been served upon the respondent at the end of 18 years of his having not cleared the examination. Clause (15)(b)(i) of the Instructions has to be read along with Sub-clause (i) of Sub-clause (b) of clause (15) and would mean that before action is taken under Rule 13-A of the Rules when the Officer fails to clear the examination within 20 years of service, notice must have been served upon him at the end of 18 years.

12. In that view of the matter, we do not find any merits in this Appeal and dismiss it with costs. Hearing fee is Rs. 500/-.