

(2001) 11 DEL CK 0097
In the Delhi High Court
Case No : Suit No. 1438 of 1998

H.C. Chandel

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Army Act, 1950 — Section 13
Army Rules, 1954 — Rule 13, 13A, 15, 15A
Constitution of India, 1950 — Article 14, 16

Citation : (2002) 96 DLT 174

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Jagjit Singh, for the Appellant; Nemo, for the Respondent

Judgement

J.D. Kapoor, J.—This is a suit for Declaration, Mandatory Injunction and Recovery of Damages against Union of India and Chief of Army Staff declaring the termination of the plaintiff as illegal and void with the direction to the defendants to reinstate the plaintiff in the service and compensation of Rs.10,25,000/- towards damages, losses, mental agony, defamation and harassment.

2. The case of the plaintiff in brief as under:-

3. The plaintiff joined the Army in the "Ranks" on clerical post as "Clerk" (General Duty) in March 1991. By way of quick promotions, he rose to the rank of "Naik". During this period, he qualified the written test and interview held at Bangalore and he was appointed as "Service Cadet" and sent for training to ACC Wing (IMA Dehradun) in the year 1987. After completing the mandatory training of three and half years from the said institution, in December, 1990, he was sent for further training to Indian Military Academy Dehradun and Successfully completed the said training and was appointed as Second Lieutenant in the Regular Army and commissioned by the President of India on 14.12.1991.

4. However, while in training at Dehradun, plaintiff was asked to give options of

his service and also the same at SSB interview forms. He opted for "Service" Cadre of the Army. After completing his required training, he was again asked to give an option and he opted for "Service" cadre of the Army as he was above 30 years old and had no technical aptitude for artillery and related fields. However, instead of posting him to "Service" branch of the Army, he was posted in the "Fighting Arm" viz. Regiment of Artillery of the Army. With reluctance, the plaintiff joined the Artillery School Deolali on 6.1.1992 and subsequently protested to the concerned authority by representations dated 5.2.1992, 11.5.1992. Again vide letter dated 4.3.1993, he made a request for change of his cadre from Arms to Services. In the meantime, the plaintiff could not qualify a course called "Young Officers" course. His representation dated 4.3.1993 was favorably recommended by his Commanding Officer as well as by the Formation Commander vide recommendation letter dated 31.3.1993 for the change from "Arms" to "Service" in respect of the plaintiff. The relevant extracts from the said letter are as under:-

"1. The offer's "s performance on regimental duties has been absolutely satisfactory.

2. The offer's is an ACC entry and his erstwhile trade was Clk (GD). His failure on the YO's course indicates that he does not have a scientific temper to shape into a good artillery offer's , which does require a basic technical bend of mind. It would be in the best interest of the service, if his developed knowledge and skill is further exploited rather than pushing a square peg into a round hole. This would also meet the offer's requirement."

5. However, no action was taken by the concerned authorities on the recommendation of the Commanding Officer. plaintiff again sent a representation and reminder to the authorities and sought interviews from Military Secretary and Colonel Commandant. However vide letter dated 21.8.1993, the plaintiff was asked by the authorities to submit a detailed case for transfer from Arms to Service. The plaintiff submitted the detailed case to the concerned authorities. In spite of details furnished by him as well as protect he was sent for platoon Weapons to the Infantry School, Mhow. Ultimately, request of the plaintiff was rejected vide letter dated

6. In spite of his confidential reports being outstanding, the show cause notice dated 26.9.1994 was sent to the plaintiff under Army Rule 13A, whereby he was asked to reply to show cause why he should not be removed from service as he had not qualified the examination of Young Officers Course twice within four years of his service. By letter dated 10.2.1995, the plaintiff was directed to resign, otherwise he would be compulsorily retired. The plaintiff refused to take voluntarily retirement by stating reasons in the communication dated 20.2.1995 and letter dated 14.2.1995. Ultimately, an order for his compulsory retirement dated 27.3.1995 was passed u/s 19 of the Army Act read with Army Rule 13A on payment of pension and gratuity.

7. This action has been challenged in the suit for the reasons that Sections 19 of the Army Act deals only what the termination of service and not with compulsory retirement. Show Cause notice under Army Rule 13A was bad in law as it has not been issued by the Chief of the Army Staff but by an officer who was just holding the rank of Colonel and for the same reasons, the order of compulsory retirement is bad because of this not being issued by the Chief of the Army Staff as per requirement of Rule 13(a). Further that the plaintiff has been discriminated by the defendants being from the "Ranks" background because in similar circumstances, Army personnel/officials have been transferred from Arms to Service and over the years this is being followed as a normal practice in the administrative set up in vogue. Some of the instances have been given in ground (iv) of the plaint.

8. Lastly that the plaintiff has given option for "Service" and not for Artillery and even after joining the Artillery, he has been continuously lodging his protest in spite of the plaintiff having earned certificates of merits and outstanding reports and served 14 years in regular Army and there was no ground for compulsorily retiring the plaintiff merely he has not been able to qualify some tests and his services could have been availed in some other department.

9. In spite of having been served with the summons, the defendants which is Govt. of India and Chief of Army Staff have not chosen to contest this case and as a result allowed themselves to be proceeded ex parte.

10. Perusal of the record shows that in spite of several dates of hearing written statement was not filed but the fact remains that none has put in appearance on behalf of the defendants though observation was made that defendants have been duly served. The question of direction to the defendants for filing written statement does not arise when none has put in appearance on behalf of the defendants. It was perhaps in view of this fact that on 1.10.1999 this court noted that notice was served upon Mr. H.S. Phoolka, Standing Counsel for Union of India but in spite of this , none appeared for the defendants and as a consequence, defendants were proceeded ex-parte vide order dated 16.11.1998.

11. plaintiff by way of evidence has filed affidavit and proved the following documents:-

1. Ex. P-1 which is the original President Commission having registered no. A 49855.
2. Ex. P-2 which is a letter dated 5.2.1992 sent by the plaintiff.
3. Ex, P-3 which is a letter dated 11.5.1992 sent by the plaintiff.
4. Ex. P-4 which is a letter dated 4.3.1993 bearing No. 324101/42/A sent by Maj. Anil sharma, 1021/102 Med Regt c/o 56 APO.
5. Ex. P-5 which is a letter dated 2.6.1993 bearing No. 51053/HCC/C1/Pers sent by the plaintiff.

6. Ex. P-6 which is a letter dated 16.8.1993 bearing No. 51053/Gen/70/pers sent by the plaintiff.
7. Ex. P-6-A is a posal receipt bearing S.No. 2678.
8. Ex. P-7 which is a letter dated 21.8.1993 bearing No. 102401/38/G sent by Maj. T Sateesh Adjt for Co.
9. Ex. P-7-A which is a copy of letter bearing No. 51053-x/pers dated 31.8.1993 sent by the plaintiff.
10. Ex. P-7-B which is a postal receipt being S.N. 2899.
11. Ex. P-8 which is letter dated 11.9.1993 bearing No. 51053/HCC/X/Pers sent by the plaintiff.
12. Ex. P-8-A which is a certificate issued by the Infantry School, MHOW (MP) in respect of the plaintiff. Certificate.
13. Ex. P-9 which is a letter bearing No. 305501/P/X/A dated 15.12.1993.
14. Ex. P-10 (colly) which is copy of confidential report along with letter dated 4.1.1994 & 30.8.1994.
15. Ex. P-10-A which is a copy of letter bearing No. 324101/P/52/A dated 21.9.1994.
16. Ex. P-11 which is a copy of notice to show cause dated 23.9.1994 along with the covering letter dated 26.9.1994.
17. Ex. P-12 which is a copy of reply to show cause notice dated 7th October 1994 along with forwarding letter dated 8.10.1994.
18. Ex. P-13 which is a copy of letter bearing NO. 102401/IC-51053F/HCC/26/G dated 10.2.1995.
19. Ex. P-13A which is a copy of order dated 3.2.1995.
20. Ex. P-14 which is a copy of letter dated 9.2.1995.
21. Ex. P-14-A is a copy of forwarding letter dated 12.1.1995 vide which C.R. is sent by the defendant.
22. Ex. P-15 (colly) which are letters bearing No. 51053/HCC/Genl dated 14.2.1995.
23. Ex. P-16 which is a copy of letter bearing No. 51053/HCC/Gen dated 20.2.1995 sent by the plaintiff.
24. Ex. P-17 which is a postal receipt.
25. Ex. P-18 which is a copy of order dated 27.3.1995 in respect of compulsory retirement of the plaintiff.

26. Ex. P-19 which is a copy of representation dated 25.4.1996 made by the plaintiff.

27. Ex. P-20 which is a letter bearing No. 00469/BYO/IC 51053/MS 8C dated 12.8.1996 intimating rejection of representation of the plaintiff.

12. Perusal of the aforesaid documents shows that plaintiff was retired compulsorily on account of his failure to pass Young Officers Course. According to the counsel for the plaintiff, plaintiff has been discriminated as the following officers were not retired compulsorily on account of their having failed to qualify the Young Officers Course:

"That, it is pointed out here that the plaintiff has been discriminated by the defendants being from the "RANKS" background, because in the similar circumstances Army personal/officials have been transferred from various "Arms" to "Service" over the years being followed as a normal practice in the administrative set-up in vogue. Some of the instances whereby the defendant has transferred following officials from one cadre to another, in similar circumstances:-

INSTANCES from even year 1968=69

(a) Maj. Purshottam.

(b) Maj. Malhotra.

(c) Col. A Singh - Ex Artillery, who was instructor at ASC School, Bareilly for a considerable duration.

(All above transferred in the year 1968-69 to ASC, a branch of the services, being Yo's failure in their Arms) as in the case of the plaintiff. There are huge number of similar cases, records of which are in exclusive possession defendants.

Whereas the plaintiff has ben discriminated and compulsory retired and rules of nature justice have been violated. The action is against Article 14 & 16 of the Constitution.

13. Mr. Jagjit Singh has contended with vehemence that in spite of plaintiff opting for "Services", he was allocated "Artillery" and in spite of Commanding Officer having recommended that his services can be utilised in other cadres of Army. So much so, defendants did not take note of the fact that after spending huge amount on the plaintiff's training the President of India had issued him a commissioned certificate dated 14.12.1991 bearing registered No. 49855. Merely because the plaintiff could not pass the Young Officers Course, was not a sufficient ground for retiring him compulsory.

14. Section 13-A of the Army Act confers powers upon the Central Government to dismiss or remove from service any person subject to this fact. It reads as under:-

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."

15. It is contended that the procedural requirement of Chief of the Army Staff calling upon the officer to show cause why he should not be compulsorily retired or removed from service is of mandatory nature and Therefore any show cause notice or order passed by any officer other than the Chief of the Army Staff is illegal and void and is liable to be set aside even if it is presumed that the plaintiff was granted reasonable opportunity of being heard before the impugned order of removal was passed, still the order is rendered null and void if it is not in strict compliance of Rule 13-A.

16. In support of his contention as to the mandatory nature of Rule 13A Mr. Singh placed reliance upon the decision of Supreme Court in Capt. Virendra Kumar v. Union of India 1981 SC 947, wherein the services of the officers were terminated in terms of Rule 15A of the Army Rules, 1954. Rule 15A is also on the same parameter and identical to Rule 13A so far as the requirement of calling upon the errant officer by the Chief of the Army Staff for showing cause why his services should not be terminated is concerned. Rule 15 also provides that in the event of the Explanation considered by the Chief of the Army Staff being 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.

17. The Supreme Court has observed that these rules lay down the procedural basis and prescribe a certain procedure which must be followed. The Chief of the

Army Staff must be satisfied that the officer is unfit to be retained in service. Such a satisfaction is not purely subjective and only on formation of opinion the Chief of the Army Staff shall proceed further. Once the Chief of the Army Staff holds that the Explanation of the officer is not satisfactory there is another opportunity given by the rule to the affected officer to make a representation to the Central Government. The Supreme Court observed that the consequence is that the order of termination or removal of service is invalid for failure to adhere to the basic procedure as the top brass must act according to law as lawlessness in the defense force is a grave risk.

18. There is a no gainsaying the fact that wherever power is conferred upon a particular person it cannot be transferred or usurped by any other functionary unless it is provided under the rules. If a particular authority is required to call for the Explanation of an officer or employee and make his recommendations for his removal from service that authority or person also has a right to make such recommendations after recording his non-satisfaction. Even delegation by such an authority to a lower functionary is not permissible if the rules do not vest such a power in the said authority. Merely because a person vested with the authority to call Explanation or recommend removal or compulsory retirement happens to be top brass does not mean that he has inherent powers to or can suo motu delegate his authority to a lower functionary.

19. It is with some object and purpose that a top brass of the organisation is vested with power for making recommendations for removal from service or termination or compulsorily retire an official. It is the experience and the wisdom of that authority which carries weight with the ultimate authority to decide whether the delinquent officer be called upon to retire or to resign and on his refusal may be compulsorily retired or removed from service. Had it not been so nothing prevented the authorities from conferring such a power either upon a functionary who is directly dealing with the officer/employee concerned or power with top brass to delegate his authority or recommend resignation or compulsory retirement or removal from service. Once there is infraction and non-adherence of the mandate of the rule the question of having afforded the delinquent officer or person reasonable and full opportunity of being heard recedes to the background.

20. Thus if any act either in the form of calling upon the personnel to show cause as to why he should not be compulsorily retired or removed from service is done by any other person or authority than the one prescribed under the rules, such an act suffers from vice of illegality as well as irregularity on account of non-compliance of the mandate of the rules as the procedure set out in the rule has to be followed in letter and spirit.

21. In the instant case not an iota of document has been produced nor has any plea taken by the defendant that it was the Chief of Army Staff who had called upon the officer/plaintiff to show cause why he should not be removed from the service nor has there been any such note that the Chief of the Army Staff after

considering the Explanation has found it to be unsatisfactory. There is obvious and clear violation of the rule 13A which renders the order of removal as invalid.

22. Even otherwise there is no fault of the plaintiff. He rose from the rank of Naik after clearing various examinations and obtaining recommendatory letters from his superiors and/commission for the President. He has been making representation right from the beginning that he should not be assigned Artillery division as he has been working in an promoted from the rank in the service division and so much so after having ben commissioned he opted for service division when called upon the exercise his option whether he would like to opt for Artillery division or Service division. Not only that even his Col. Commanding Officer and Brig. lauded his competence and recommended for his being posted in the Service division. Even their recommendations were not taken into consideration. Apart from this the plaintiff was also discriminated against as many as three officers i.e. Maj. Purushotam, Maj, Malhotra and Col. A. Singh who were retained in the service in spite of their having failed to qualify Young Officers" Course.

23. Holding up the matter from all its possible aspects, one cannot find escape from the conclusion that his removal from service was void per se mainly due to non-adherence of mandatory Rule 13A and secondly because of his having been posted against his willingness as in response to the options sought by the authorities he opted for Service division and that though he raised from the rank but because of his excellent performance in the service division that his superiors in the service division had recommended for his posting in the said division and that there was no adverse report as to his work and conduct wherever he was posted and merely because he could not qualify Young Officers" Course was not sufficient ground to remove him from the service. The officer is still in his 40"s and has many years to do. As the services of the officer can be well availed of in the Service division, the impugned order could have been avoided.

24. In the result the show cause notice dated 26.9.94 and order dated 27.3.95 are held to be illegal and void and inoperative. The suit is decreed. The defendants are hereby directed to reinstate the plaintiff in the service ASC forthwith with consequential benefits like salary i.e. wages and allowances etc.

25. However the plaintiff has of his own foregone the damages or losses for mental agony and harassment and defamation.