

(1980) 07 GUJ CK 0017
In the Gujarat High Court

Major I.N. Maligi	Vs	APPELLANT
Director General, N.C.C. and Others		RESPONDENT

Date of Decision : 24-07-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
National Cadets Corps Act, 1948 — Section 9
National Cadets Corps Rules, 1948 — Rule 28, 28(2)(c)

Citation : (1980) 2 GLR 79

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Judgement

B.K. Mehta, J.—By this petition, under Article 226 of the Constitution of India, the petitioner, who was re-employed in the National Cadet Corps (hereinafter called "the NCC" for sake of brevity) on whole times basis as Administrative Officer after his release from emergency commission service in the Army, has challenged the order of termination of August 29, 1975 issued by the Deputy Director of the National Cadet Corps as well as the order of March 8, 1977 issued by the Under Secretary to the Government of India in the Ministry of Defence, approving non-extension of the services of the petitioner. A few facts need be noticed in order to appreciate the challenge to these two impugned orders.

2. The petitioner was granted short term emergency commission in Artillery of Indian Army in 1963. He was released from emergency commission service with effect from October 1, 1967. It appears that he was selected for the grant of Commission in NCC by the Government of India u/s 9 of the National Cadet Corps Act, 1948 (hereinafter called "the NCC Act" for the sake of brevity) read with Rule 21(5) of the National Cadet Corps Rules, 1948 (hereinafter called "the NCC Rules" for the sake of brevity) It is Common ground that he was appointed on whole basis. The order of appointment of September 25, 1967 is annexed at Ex. "A" to the petition. Pursuant to his appointment, he was posted at 57 Maharashtra Battalion NCC, Ahmednagar as Administrative Officer. He reported on duty with effect from October, 3 1967. According to the petitioner, Rule 22 of

the aforesaid NCC Rules enjoins that a commissioned Officer shall hold the office till he attains the age of 52 years and the normal tenure of his posting is for three years which is extended from time to time till the officer concerned reaches the age of 55 years. Accordingly, his services were extended from time to time till October 3, 1975 from which date his whole time employment was terminated by the impugned order of August 29, 1975.

3. The petitioner being aggrieved with this impugned order of termination, preferred an appeal to the Director General of NCC. Meanwhile his services were extended upto January 2, 1976 and then again upto April 2, 1976. The appeal of the petitioner was, however, dismissed some where in December, 1975 and the intimation was given to him in that be half by the Director General. He, therefore, sought personal interview of the Director General which was granted to him on January 15, 1976. It is the case of the petitioner that in the course of this personal interview he was informed that he was relieved from the services on account of some lapses like unauthorised absence from service, negligence in maintenance of stores etc. It is his grievance that though a Commission for Inquiry was established to inquire into some allegations against him, the Government did not proceed further and the inquiry was dropped somewhere in November, 1974.

4. The petitioner carried the matter in further appeal to the Defence Ministry of the Government of India from the order of the Director General. The appeal was preferred on March 15, 1976 which, according to the petitioner, is still not disposed of. However, the Under Secretary in the Defence Ministry of the Government of India by the second impugned order of March 8, 1977 informed the petitioner that the President of India has been pleased to approve the non-extension of the service of the petitioner beyond the expiry of his tenure of April 2, 1976 and he was required to hand over the vacant and quiet possession of the premises allotted to him. These two impugned orders are the subject matter of this petition.

5. This petition has been resisted by the respondents and an affidavit-in-reply of one Lt. Col. Prakash Chand, (IC-11335) Officer Commanding Gujarat Girls Battalion NCC Ahmedabad has been filed on behalf of the respondents contention, inter alia, that the tenure of appointment of the petitioner was for three years at the end of which, or for that matter even in course of which the services of the petitioners were liable to be terminated according to the conditions of service applicable to whole time officers as prescribed in Appendix "A" and "B" to the letter of the Government of India issued in Ministry of Defence bearing No. 5431/63/NCC-PERS (D)/775-III/D(GS--III) dated December 21, 1963. These two Appendices containing the alleged conditions of service were not put on record on behalf of the respondents alongwith the affidavit in reply. However, by a further affidavit of Major G.S. Ahluwalia. Assistant Director, NCC, Gujarat, filed on July 7, 1980 these two Appendices have been put on record.

6. At the time of hearing of this petition, Mr. M.D. Pandya, learned Advocate,

appearing for the petitioner, raised the following four contentions:

(1) The impugned order of termination, and for that matter the second impugned order according approval to non-extension are arbitrary and, therefore, violative of Articles 14 and 16 of the Constitution of India.

(2) The power of termination, if any, is not unfettered and absolute under the rules and, therefore, the impugned orders, in so far as they did not assign any reasons for the termination, are bad in law, void and ineffective.

(3) The impugned order of termination has been issued by an authority which is not competent under the law to terminate the services of the petitioner. The impugned order granting approval to the non-extension of service cannot make the termination which is bad in law and void as effective and legal.

(4) In effect and substance, the impugned order of termination is virtually an order of dismissal and, in so far as it did not follow the procedure prescribed under the relevant Rules for inflicting penalty, is bad in law and void.

7. Since the view which I am inclined to take on the first three contentions is in favour of the petitioner, I do not intend to deal with and decide the 4th contention urged on behalf of the petitioner., Before I deal with the first three contentions urged on behalf of the petitioner, it would be profitable to advert to a few relevant and material provisions of the NCC Act and NCC Rules, and also to the terms and conditions prescribed in Appendices "A" and "B" to the Government of India's letter of 21st December, 1963 on which the respondents rely in support of their contentions.

8. Section 3 of the NCC Act provides for the constitution of the National Cadet Corps. Section 5 enjoins that there would be three divisions of the Corps namely:

(i) the Senior Division the recruitment to which is from amongst the University male students:

(ii) the Junior Division the recruitment to which is from the male students of any school; and

(iii) the Girls Division the recruitment to which is from the female students of the University or school, as the case may be.

Section 6 provides for enrollment of the students in different divisions. However, for enrollment in the Girls Division the student concerned has to attain the prescribed age. Section 8 provides for the discharge of persons enrolled in the different divisions. Section 9 which is material for purposes of this petition provides as under:

9. Appointment of Officers-The Central Government may provide for the appointment of officers in or for any unit of the Corps either from amongst members of the staff of any University or school or otherwise and may prescribe the duties, powers and functions of such officers.

Section 11 provides for punishment for offences under the Act. It reads as under:

11. Punishment for offences under this Act-Any person enrolled under this Act may be punished for the contravention of any rule made under this Act with fine which may extend to fifty rupees to be recovered in such manner and by such authority as may be prescribed.

The only important section, of the Act acquired to be noted is Section 13 which empowers the Central Government to enact necessary rules to carry out the object of the Act. Section 13(2)(i) empowers the Central Government to make rules to provide for removal or discharge of any person subject to the Act while clause Cm) of Section 13(2) empowers the Government to provide by rules for any other matter which is necessary to be provided by or under the Act.

9. The provisions which are relevant and material for purposes of this petition under the National Cadet Corps Rules (NCC Rules) are contained in Part IV, VII and X. Part IV provides for appointment of officers. Rule 16 in the said part prescribes qualifications for appointment as an officer in the NCC. It is not necessary to set out the entire Rule 16 because admittedly the petitioner is appointed under proviso (iii) to Rule 16. The relevant Part of Rule 16, therefore, reads as under:

16. Qualifications for appointment: No person offering himself for appointment as an officer shall be appointed as such officer:

xx xx xx xxx xxx

provided that:

(i) xx xx xx

(ii) xx xx xx

(iii) the Ministry of Defence, Government of India, may authorise the appointment of any person who is not qualified for appointment under the rule.

The next important rule in this Part is Rule 21 which prescribes the method of appointment. Sub-rule (5) of Rule 21 which is again material for purposes of this petition provides as under:

(5) If the Government of India is satisfied that the applicant is suitable and qualified for appointment as an officer in the National Cadet Corps, it will commission him as an officer in the National Cadet Corps.

The next important rule is Rule 22 which prescribes the period of appointment. It thus reads:

22. Period of Appointment-Subject to the provisions of Part VII of these rules, a person commissioned in the National Cadet Corps shall hold that commission as an officer in that Corps for a total period not exceeding 15 years or until he reaches 45 years of age, whichever is earlier, when he shall be discharged from

the Corps:

Provided that if in the opinion of the authority granting him the commission, such person continues to be physically fit and it is necessary or expedient so to do, such authority may, for a period of two years from the date the National Cadet Corps (Amendment) Rules, 1977, come into force, extend the period of commission of such persons upto the age of 50 years and beyond the said 15 years of service.

10. It should be noted at this stage that the provision contained in this rule at the relevant time of the appointment, according to the petitioner entitled a commissioned officer to continue in service until he reaches the age of 52 years which could be extended under the proviso upto the age of 55 years. Parts V and VI of the NCC Rules are not material for the present purpose. Part VII provides for the discharge of officer. Rule 28 (1) empowers the authorities to discharge an officer in the Cadet Corps and Rule 20 (2) provides the grounds on which such a discharge could be effected Rule 28 (1) reads as under:

28 Discharge-(1) Every officer and cadet shall, on becoming entitled to receive his discharge under the Act or these rules, be so discharged with all convenient speed.

Rule 28 (2) prescribes the grounds on which the discharge of an officer or a cadet could be effected. Rule 28 (2) may be read in Extensa. It provides:

23(2) Any officer or cadet may be discharged as hereinafter provided on any of the following grounds, namely:

(a) that he has been convicted by a criminal Court of an offence punishable with transportation or imprisonment;

(b) that he has in filling up any form prescribed by these rules or otherwise for the purpose of obtaining his enrollment or appointment made any statement which was false and which he knew to be false or did not believe to be true"

(c) that his services are no longer required;

(d) that he is medically unfit for further service;

(e) that in the case of an officer, he has been permitted to resign his commission:

(f) that he ceases to be on the staff of or on the roll of the college or school as the case may be providing the unfit or part thereof to which he had been posted or appointed;

(g) for any other reason which, in the opinion of the competent authority is sufficient to warrant discharge;

(h) that he has either failed to attend or qualify in a Refresher-cum-Promotion Training Course despite being afforded with two opportunities by Director General National Cadet Corps.

Rule 29 prescribes who is the competent authority to authorise the discharge. Rule 29 (1) prescribes the competent authority for effecting discharge of an officer. It reads as under:

29 Discharging authority: (1) The authority competent to authorise the discharge of an officer shall be the Ministry of Defence, Government of India.

Rule 31, which is next important provision, enjoins the Commanding Officer to issue a discharge certificate setting out the authority effecting the discharge or dismissal the cause thereof and the full period of service of the person discharged from the NCC. Part X provides for the procedure of the disciplinary action against an officer or cadet of the NCC. Rule 38 provides for the various offences for which a disciplinary action can be taken against an officer or a cadet as the case may be. Rule 39 provides for the procedure for holding disciplinary proceedings and Rule 40 provides for different penalties. Rule 41 provides for recovery of fine imposed. In short, this is the scheme of the Act and the Rules in the matter of qualification, appointment and commissioning officers, their period and tenure of appointment and conduct, discipline and discharge provisions relating to them. It is in this context that I have to determine, whether the challenge of the petitioner to the impugned order is justified.

11. At the outset it must be stated that the power of discharge contained in Rule 28 is not an absolute or unfettered power which can be challenged as so arbitrary as to be violative of Articles 14 and 16 of the Constitution. An officer or a cadet may be discharged only on the ground that he has been convicted by a criminal court of an offence punishable with transportation or imprisonment, or for making any statement false to his knowledge in his application for enrollment as a cadet or appointment as an officer, or he is found medically unfit for further service, or for his ceasing to be a member of the staff of or on the roll of the college or school, as the case may be or for the reason that his services are no longer required, or for any other reason which, in the opinion of the Competent Authority, is sufficient to warrant his discharge. The grievance of the petitioner is that the order of termination of his services has been made without any reasons. On the other hand, it is the contention of the respondents that the services of the petitioner are terminated because the tenure of his appointment for three years was over, and, therefore, no reasons were required to be assigned for the termination. According to the respondents, the terms and conditions contained in Appendices "A" and "B" to the Government of India's letter of 21st December 1963 empowers the Government to terminate the services of any officer on completion of the normal tenure of his appointment or even at any time before the completion of full tenure, as may be thought fit in the discretion of the Government of India. Miss V.P. Shah learned Advocate for the respondents urged that Part IV which contains Rule 28 applies to those officers who are part-timers appointed from the staff of the colleges or schools, as the case may be, whereas the whole-timers like the petitioner are governed by the conditions of service prescribed in Appendices "A" and "B" to the aforesaid letter of the Government of

India which have been issued with the assent of the President of India and, therefore, there is no question of invoking Rule 28 which provides for the grounds of discharge.

12. I am afraid that is too broad a contention urged on behalf of the Government of India which can be sustained. It is an admitted position that the petitioner was selected for the grant of NCC Commission under proviso (3) to Rule 16 of the NCC Rules and offered employment on whole-time basis in the NCC under the provisions of the Government of India, Ministry of Defence letter of December 21, 1963. Notwithstanding this position, it would be a very tall submission to read that the NCC Rules will not apply to the petitioner and the terms and conditions prescribed in Appendices "A" and "B" to the aforesaid letter of the Government of India of 21st December, 1963 will supplant the entire Rules. It should not be lost sight of that the appointment of officers is made by the Central Government in pursuance of the power contained in Section 9 of the NCC Act and once the officers are commissioned irrespective of their qualifications, they are appointed under the Act and governed by the various provisions contained in the NCC Rules. It is no doubt true that the petitioner was offered employment on the whole-time basis in the NCC under the provisions of the Government of India's letter of December 21, 1963, It would, however, not justify in urging that merely because the petitioner is appointed under proviso (3) to Rule 16 of the NCC Rules of 1948 and offered appointment under the provisions of the aforesaid letter of the Government of India all the provisions pertaining to the period of appointment, the tenure of appointment, the circumstances and the conditions under which an officer could be discharged, or subjected to disciplinary proceedings, would cease to apply to them and they would be governed by a different set of conditions de hors the Act and the Rules. If this contention urged on behalf of the respondents is accepted, namely, that the terms and conditions of the services of whole-timers appointed under proviso (3) to Rule 16 of the NCC Rules are only those which are contained in Appendices "A" and "B" to the Government of India's letter of 21st December, 1963, an anomalous situation would arise inasmuch as the services of the petitioner cannot be terminated except on specified grounds, those of whole-timers can be terminated at any time without assigning any reasons. I do not think that there can be any such intention of the subordinate legislation. As a matter of fact, there is a clear distinction which is easily discernible from the terms and conditions contained in Appendices "A" and "B" to the aforesaid letter of the Government of India of 21st December, 1963 between the period of appointment and the tenure of appointment. Clause 4 of the Appendix "A" provides for the period of appointment. It provides that officers would ordinarily hold commission until reaching the age of 55 years subject to the extension being granted upto a maximum age of 57 years. Clause 4 reads as under:

4. Officers will ordinarily hold commission until reaching an age of 55 years. Provided that an officer may be granted extension upto 57 years of age or may be discharged earlier if his services are not required.

Clause 8 of the conditions of service as contained in Appendix "B" provides for tenure of appointment. It reads as under:

8. The normal tenure of appointment for these officers will be two years extendable by one year at a time for so long as their services are required. Their services may be terminated at any time before the completion of full tenure of the appointment at the discretion of the Government of India.

13. It is, therefore, clear on combined reading of these two clauses which I have set out above that the tenure of appointment has nothing to do with the period of appointment. In other words, the tenure of appointment is for a period of two years or three years, as the case may be, from time to time. The period of appointment is the period for which the officer is generally entitled to hold commission till he reaches the prescribed age of 55 years or 57 years as the case may be; subject, however, to the right of the Government to discharge him if his service are not required. The contention urged on behalf of respondents that the Government has an absolute discretion in the matter of continuing a commissioned officer once his tenure is over, does not appear to be well founded. That interpretation would completely make the condition of the period of appointment nugatory. It cannot be the intention of the Government of India, on one hand to provide for commissioned officers upto the age of 55 or 57 years and on the other hand to whittle down that period of appointment by granting an absolute discretion to terminate the services of the commissioned officers once their tenure is over or for that matter even in midstream of their tenure. I am fortified in my view which I am taking by the clarificatory amendment which has been inserted by the Government of India by amending Appendix "B" by the letter of the Government of India in Ministry of Defence of May 22, 1972 which deals with the procedure for grant of NCC Commission under proviso (iii) to Rule 16 of the NCC Rules and terms and conditions of service of employment of such officers on whole-time basis in the NCC. In original Clause 4 of Appendix "A" the following sub-para is added which reads as under:

An officer may be discharged earlier if his services are not required.

In Appendix "B" original Clause B is deleted. Original Clauses 3, 4, 5, 6 and 7 have been renumbered as Clauses 5, 6, 7, 8 and 9 and new clauses as amended Clauses 3 and 4 have been added. Newly inserted Clause 4 provides for tenure which reads as under:

4. The normal tenure of appointment for these officers who are retained beyond the probationary period will be three years extendable by three years at a time for so long as their services are required but not beyond the age of 55 years. Their services may be terminated at any time before the completion of the initial or extended tenure at the discretion of the Government of India in terms of the NCC Act and Rules framed thereunder from time to time.

(emphasis supplied)

The clarificatory amendment made in Appendices "A" and "B" make the position quite clear. I do not think that the learned Advocate for the respondents was justified in reading the original clauses in Appendix "A" and "B" particularly Clause 8 of Appendix "B," as investing the Government with an unfettered discretion of terminating the services of a commissioned officer without any reasons. The attempt to read Clause 8 in the manner in which the learned Advocate for the respondents wanted me to read would jeopardize the security of the services of commissioned officers and their services will depend on the sheer will of the Government of India if the view of the learned Advocate for the respondents is accepted that without assigning any reasons the Government can terminate the services of a commissioned officer merely because the tenure is over before he reaches the age of 55 years. The amendments which have been set out above clinch the issue and it cannot be urged successfully that the services of a commissioned officer can be terminated without any reason. It is no doubt true that under the amended conditions of service as contained in Appendices "A" and "B", the services of the commissioning officer can be terminated at any time before the completion of the initial or extended tenure at the discretion of the Government of India, but it can be only and only if their services are not required and that too again the termination should be according to the terms of the NCC Act and the Rules. The newly inserted Clause 4 to Appendix "A" and "B" makes this position abundantly clear. The result of the conjoint reading of the NCC Act and Rules and the terms and condition of the whole-timers as applicable at all the relevant time of the case of the petitioner is that his services can be terminated only in accordance with Rule 28 provided his services are not required by the Government. Rule 28(2)(c) exactly provides for this contingency. Not only Rule 28(2)(c) is to be complied with, it is Rules 29 and 31 which are also to be complied with as now clearly laid down by the newly inserted Clause 4 of Appendix "B" set out above. In other words, it is only the Ministry of Defence of the Government of India which can authorise discharge of an officer, and the Commanding Officer has to furnish a discharge certificate setting out the particulars as prescribed in Rule 31 which, inter alia, requires the causes of discharge. The contention of the respondents, therefore, that the respondents are in no obligation to assign reasons is also completely misconceived. It is an admitted position that no discharge certificate has been issued to the petitioner. It is also an accepted position that the impugned order of termination has been made in the first instance by an authority which was not competent under law to make it. It is no doubt true that by subsequent order of March 8, 1977 an attempt has been made to approve the non-extension of the services of the petitioner after the expiry of his extended tenure on 2nd April 1976. In my opinion, this is a very queer way of terminating the services and more so those of the commissioned officers. The newly inserted Clause 4 of Appendix "B" prescribes that the normal tenure of appointment would be three years extendable by a further period of three years, It is difficult to appreciate why the authorities have thought fit to grant extension to the petitioner after his last extension of three years expired on October 3, 1975 of three months each.

It is equally beyond comprehension as to why the Ministry of Defence which was the competent authority to authorise discharge has not thought fit to pass necessary order of terminating the services of the petitioner if his services were really not required by the Government. No reasons have been assigned either in the order of termination by the authority which, in fact, passed the order of discharge; nor by the Ministry of Defence in their letter where non-extension of the service of the petitioner was approved. No attempt has been made in the affidavit-in-reply filed on behalf of the respondents as to what were the circumstances under which the services of the petitioner were found to be not necessary to the NCC. As a matter of fact it is his grievance that the junior officers have been retained in the service and he has been picked up for discharge. It is also his grievance that some inquiry proceedings were initiated against him for the lapses of unauthorised absence and negligence and for reasons best known to the authorities these proceedings were dropped. It is not the case of the respondents that they had dropped the proceedings because they did not find any merit in them. In any case, the fact remains that neither in the impugned order of termination nor in the second impugned order of non-approval of the extension of the services of the petitioner any reasons have been given for effecting the discharge of the petitioner on the ground that his services were no longer necessary or required. In the affidavit-in-reply also no attempt has been made to justify the impugned order of discharge on the ground of his services becoming unnecessary to the Government. As a matter of fact a bold stand has been asserted and maintained that the respondents are not under any obligation to assign any reasons. Rule 28(2)(c) read with the newly inserted Clause 4 of Appendix "B" entitle the petitioner to continue in service upto the age of 55 years unless it is shown that his services were no longer necessary or required by the Government. In that view of the matter, therefore, I am of the opinion that this petition should succeed. It should be recalled again that the power of discharge as contained in Rule 28 is not an absolute and unfettered power of termination of service. Even if we construe Clause (c) of Rule 28(2) read with the newly inserted Clause 4 of Appendix "B" as empowering the Government to terminate the service of a commissioning officer in its absolute discretion even then that power is to be exercised having regard to the exigencies of the services in the public interest (vide: *Amarsing Setansing Medatia v. Gujarat State Road Transport Corpn. and Ors.* (1980) 21 GLR. 500).

14. In that view of the matter, therefore, the impugned order of discharge is bad in law, void and ineffective.

15. The result is that this petition is allowed and appropriate writ should, therefore, be issued quashing and setting aside the said order and it is declared that the petitioner continues in service all along as if the said two impugned orders were non-est. The petitioner would be entitled to receive all the benefits to which he is entitled as if he was in service all along, A writ of mandamus should accordingly be issued against the respondents. The respondents are restrained from taking over the possession of the premises allotted to the

petitioner. Rule is made absolute accordingly with costs.