

(2003) 07 DEL CK 0095
In the Delhi High Court
Case No : CW 3894 of 2003

Manoj Kumar Gope

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Army Rules, 1954 — Rule 13(2A), 13(3)
Constitution of India, 1950 — Article 226

Citation : (2003) 5 AD 663 : (2003) 106 DLT 405 : (2003) 71 DRJ 662 : (2003) 2 ILR Delhi 69 : (2004) 1 SLJ 186

Hon'ble Judges : B.N. Chaturvedi, J;B.A. Khan, J

Bench : Division Bench

Advocate : Jyoti Singh, for the Appellant; Sameer Aggarwal and Rajiv, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Chaturvedi, J.—The petitioner was enrolled in the Army as Operator Radio Artillery. In the course of inter-unit handball competition held on 13th of September, 1993, he suffered a knee injury which was diagnosed as Post Traumatic Osteo-Arthritis in (left) knee. He was down graded medically to CEE(Temp) for 6/12 years on 3rd October, 2000. Subsequently, however, on 8th of April, 2001, he was upgraded to medical category SIHIA 2 (PERMT) PIEI (BEE PERMT). His next Review Medical Board was due to be held on 3rd of April, 2003 which, however, could not take place in view of his alleged discharge order issued on 15th of February, 2003. His Release Medical Board was held on 17th of April, 2003 granting him 20% minor disability pension.

2. The petitioner received a copy of a Circular dated 15/19.2.2003 stating that he would be discharged from service with effect from 31st of July, 2003. He was sought to be discharged on the grounds: (a) being placed in low medical category, his retention in service was not considered necessary as per Army Order 46/80 since the strength of his trade/category had exceeded the

sanctioned strength, and (b) being placed in permanent low medical category lower than SHAPE-I and being not up to the prescribed military physical standard under item I(iii) of the table annexed to Army Rule 13(3).

3. In pursuance of the aforesaid contemplated discharge, a show-cause notice dated 4.4.2003 was issued to the petitioner calling upon him to show cause as to why his services may not be terminated under Army Rule 13(3) being in a low medical category. The petitioner submitted a reply to the show-cause notice stating that notwithstanding his placement in low medical category since 3rd of April, 2001, he was performing his duties without any difficulty and that his case should, Therefore, be considered sympathetically. He, however, did not receive any communication from the respondents thereafter. The petitioner felt aggrieved by the said show-cause notice and alleged discharge order. He, Therefore, filed instant petition challenging the show-cause notice and his contemplated discharge and seeks issue of a writ of mandamus directing the respondents not to discharge him with effect from 31st of July, 2003 and to allow him to continue in service.

4. Defending their action, the respondents seek to maintain that the petitioner is sought to be discharged due to a policy decision vide Army Order 46/80 and under item I(iii) annexed to Army Rule 13(3) read in conjunction with Army Rule 13(2A). It is stated that since the strength of the trade/category had exceeded the sanctioned strength, the release of the petitioner and other similarly situated personnel was ordered vide letter dated 15th/19th Feb. 2003, in public interest. It is added that employment of permanent low medical category personnel is subject to the availability of suitable alternative appointment commensurate with their medical category and that their retention would not exceed the sanctioned strength of the regiment/corps. The show-cause notice was, according to the respondents, issued to the petitioner nearly 3/4 months before his proposed discharge with effect from 31st of July, 2003 with an intent to afford him an opportunity to present his case.

5. We have heard arguments on either side.

6. In the course of hearing, the learned Counsel appearing for the petitioner sought to assail the show-cause notice and purported order of discharge primarily on the ground that the show-cause notice being posterior to the issue of the discharge order, the whole exercise smacks of flagrant violation of principles of natural justice as well as of the provisions of Rule 13(3), rendering the impugned discharge order liable to be quashed.

7. No doubt, the impugned Circular dated 15/19.2.2003 contemplated discharge of the petitioner and some other JCOs, with effect from 31st of July, 2003, it simultaneously provided for service of a show cause notice on them before sanctioning their discharge. The requirement of issue of a show cause notice could not be an empty formality. Submissions made in reply to that show cause notice were required to be accorded due consideration before a final order, if any,

for discharge could be passed. Reading the impugned circular as a whole would clearly suggest that it simply tended to spell out discharge in contemplation. In no way, it was an order of discharge as such, as understood by the petitioner. Surprisingly, even the respondents laboured under the misimpression that consequent upon submission of a reply to the show-cause notice by the petitioner and consideration thereof, the impugned circular itself was to operate as a discharge order and no separate final order in that respect was required to be passed. If such a situation was to be allowed to stand, the petitioner would appear to be justified in assailing the impugned circular as suffering from the vice of non adherence to the principles of natural justice and the issue of the show-cause notice being just an eye wash.

8. Alleged order of discharge dated 15th/19th Feb., 2003 appears to be in the nature of a general circular mentioning names of some of the Army personnel, including the petitioner, who were proposed to be discharged with effect from 31st of July, 2003. Though an exercise for discharge of the petitioner was set in motion with the issue of the impugned circular but before the process in this regard could be completed, affording an opportunity of hearing to the petitioner by serving a show-cause notice on him and according due consideration to the reply, if any, to the show-cause notice, was imperative to lend sustainability to an order of discharge, independent of the impugned one. In the given case, though the petitioner submitted his reply to the show-cause notice, no order of his discharge independent of impugned Circular dated 15th/19th Feb. 2003, is claimed to have been passed by the respondents after taking into account his reply to the show-cause notice. Clearly, in the absence of any such order, it would be legally impressible to enforce the discharge of the petitioner merely on the strength of the impugned circular.

9. Realizing that an order for discharge after due consideration of petitioner's reply to the show-cause notice was necessarily required to be passed, the learned Counsel for the petitioner conveyed that the Competent Authority of respondents would pass an appropriate order on consideration of petitioner's reply to show cause on or before 31st of July, 2003.

10. In view of above, the petition is disposed of mandating continuance of the petitioner on the rolls of the Army unless and until on due consideration of the petitioner's reply to the show-cause notice, an order of discharge, if any, independent of impugned Circular dated 15/19.2.2003, is passed by the Competent Authority of the respondents. Ordered accordingly.

11. dusty.