

(1996) 10 AHC CK 0040

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 19295 of 1990

Munna Lal Yadav

APPELLANT

Vs

Commanding Officer, 388, DSC, Platoon C.O.D., Kanpur & Ors.

RESPONDENT

Date of Decision : 30-10-1996

Acts Referred:

Army Act, 1950 — Section 19, 20, 22
Army Rules, 1954 — Rule 13(3)(Hi)(v)

Citation : (1996) 10 AHC CK 0040

Hon'ble Judges : D.K.Seth, J

Final Decision : Allowed

Judgement

D. K. Seth, J.—By the notice dated 451989 (Annexure1 to the writ petition) the petitioner was asked to show cause as to why his recruitment in Defence Security Corp. (hereinafter referred to as DSC) should not be considered irregular on the ground that the petitioner having been discharged compulsorily under Army Rule 13(3) (HI) (V) who are ineligible for recruitment in DSC. After considering the show cause the petitioner was discharged by an order dated 151984 (Annexure6 to the writ petition). The petitioner made a petition on 1881989 as also on 5101989 (Annexure7 to the petition) to the Chief of Army Staff, which was rejected by him vide order dated 24111989 (Annexure"8" to the writ petition) alongwith these two orders the petitioner has also challenged the order dated 581988 by which the petitioner was discharged from Army under Rule 13(3) of the said Rules, by means of present writ petition with the following prayers:

"(i) to issue a writ, order or direction in the nature of mandamus directing the opposite parties to produce the entire record of the case before this Hon"ble Court.

(ii) to issue a writ, order or direction in the nature of writ of certiorari quashing the orders dated 581988, 151989 and 24111989 (Annexures 6 and 8) respectively.

(iii) to issue a writ, order or direction in the nature of writ of mandamus directing the respondents to reinstate the petitioner as Sepoy in the 388 DSC Platoon, COD, Kanpur with all consequential benefits from the date of discharge.

(iv) to issue any other suitable writ, order or direction which this Hon''ble Court may deem fit and proper in the circumstances of the case.

(v) to award costs of this petition to petitioner."

2. Lt. Col. Sri Ashok Kumar (Retd.) learned counsel for the petitioner contends that the discharge of the petitioner by order dated 581988 from the Army under Rule 13(3) (iii) (v) is void and should be ignored and the said discharge should be treated as discharge under Rule 13(3) (iii) (iv) and, therefore, the petitioner cannot be discharge from DSC on the ground of his being discharged cornpulsorily from the Army under the said Rule. Secondly, the contends that the discharge from DSC was effected pursuant to Army Headquarter letter dated 27th May 1985 prescribing certain guidelines which cannot override the Army Act, Rules and Regulations and, therefore termination of the petitioner from DSC is wholly without jurisdiction. He has also sought to impugn the validity of the said Army Headquarter letter dated 27th May 1985. He has also sought to make out a point that in the facts and circumstances of the case the petitioner could not have been discharged from the Army under Rule 13(3) (Hi) (v). Thus he has supported the reliefs claimed in the writ petition.

3. Sri Sushil Harkauli, learned counsel appearing on behalf of respondents, on the other hand contends that after haying accepted the order of discharge being the order dated 581988 and having joined D.S.C., pursuant to such discharge the petitioner is estopped from challenging the order dated 581988 on the principle of estoppel. Secondly, he contends that the said order dated 581988 was open to challenge by means of appeal and otherwise as provided in the Army Act, Rules and Regulations framed thereunder. The petitioner having not challenged the same to the procedure prescribed it no more open to him to seek reopening of the said order. He further contends that the order dated 581988 was passed under Rule 13(iii) (v) in accordance with law after issuing appropriate show cause notice on the basis of the petitioner's own admission of the charges levelled against him, for which the said provision for discharge was invoked against him. He further contends that since the writ petition does not contain either any pleading or ground or prayer questioning the validity of the Army Headquarter letter dated 27 51985, the petitioner is not permitted to challenge the same. So long the same is not challenged and remained operative the petitioner cannot question his discharge from DSC on the ground that he was ineligible for recruitment and, as such he was discharged therefrom.

4. In the course of argument Sri Ashok Kumar, learned counsel for the petitioner has taken a point that in order to discharge under Rule 13(3) (iii) (v) of the Army Rules notice to show cause has to be issued by the Brig. In the present case the same having not been done the discharge is void and nullity.

5. Sri Harkauli, on the other hand contends that the order dated 581988 was passed after it was approved by the Brig. Rule 13(3) (III) (v) prescribes the authority having jurisdiction to discharge a Soldier of the category to which the petitioner belong. The giving of show cause notice is the procedure prescribed. But it is not necessary that show cause notice is to be signed or issued by the Brig, himself. The approval of discharge by the Brig and passing of the order by Brig, rectifies the defect, if there is any. Though according to him giving of show cause notice by the Brig, is not mandatory. Sri Harkauli, learned counsel for the respondent has also relied on the counteraffidavit and various documents annexed with the same. S. A.

Army Act in Chapter IV deals with the condition of service providing in Section 18 that the service of "every person subject to the Army Act shall hold office during the pleasure of the President. A "person subject to the Army Act may be dismissed or removed from service by the Central Government, "according to the provisions of the Act, Rules and Regulations framed thereunder under Section 19. The Chief of Army Staff is also empowered to dismiss or remove from service a person subject to the Act other than the officer. The same power is also vested under subsection (3) of Section 20 in the Officer Commanding a Brigade or equivalent Command or any prescribed officer to dismiss or remove from service any person under this Command other than the officer or Junior commission officer. Subsection (7) of Section 20 makes such exercise of power subject to the provisions contained in the Act, Rules and the Regulation, made thereunder. By reason of Section 22 any person subject to the Army Act may be retiree, released or discharged from service by such authority and in such a manner as may be prescribed. This is now Rule 13 of Army Rules have been incorporated prescribing the authorities empowered to authorise discharge.

6. Rule 13 prescribes that each of the authority prescribed in column 3 of the Table appended to the said rule shall be the competent authority to discharge from service the person subject to the Act specified in column 1 thereof on the ground specified in Column 2. Under subrule (2) any person superior to the authority prescribed by means of subrule (1) may also exercise such power exercisable by such authority, mentioned in the table. Subrule (2A) clarifies that such authority would also be empowered to discharge any person from service either unconditionally or on fulfilment of certain specified conditions which are exercisable either by the Central Government or by the Chief of Army Staff. Subrule, (3) while explaining the term "Commanding Officer specifies the "Officer Commanding Corps" or the department to which a person to be discharged, belongs with certain exceptions with which we are not concerned. Category (iii) deals with "persons enrolled under the Act who have been attested". Admittedly, the petitioner belonged to this category which is not in dispute. However such clauses as many as five have been provided in Category III, each dealing with different ground of discharge. The petitioner claims his discharge to be one under clause (iv) which specifies all cases of discharge in Column 2. According to the learned counsel for the petitioner the

purported discharge under Category III, Clause (v) can not be applied.

7. In order to appreciate the situation it is necessary to refer to the said rule which are relevant for our purpose, is quoted below:

"13. Authorities empowered to authorise discharge.(1) Each of the authorities specified in column 3 of the table below shall be the competent authority to discharge from service person, subject to the Act specified in column 1 thereof on the grounds specified in column 2.

(2) Any power conferred by this rule on any of the aforesaid authorities shall also be exercisable by any other authority superior to it.

(2A) Where the Central Government or the Chief of the Army Staff decides that any person or class of persons subject to the Act should be discharged from service, either unconditionally or on the fulfilment of certain specified conditions then, notwithstanding anything contained in this rule, the Commanding Officer shall also be the competent authority to discharge from service such person or any person belonging to such class in accordance with the said decision.

(3) In this table "Commanding Officer" means the Officer Commanding the Corps or department to which the person to be discharged belongs except that in the case of junior commissioned officers and warrant officers of the Special Medical section of the Army Medical Corps the "Commanding Officer" means the Director of the Medical Service, Army and in the case of junior commissioned officer and warrant officers of Remounts, Veterinary and Farms Corps, the Commanding Officer "mean the Director Remounts, Veterinary and Farms: TABLE Category Grounds of Competent Manner of discharge authority to discharge authorise discharge

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to show cause against the contemplated discharge"

8. A perusal of the said provision does not support the contention or learned
counsel for the petitioner to the extent that the petitioner comes within the
purview of Clause (iv). Inasmuch as in, that event discharge is to be effected on
the own request of the persons before fulfilling the conditions of his enrolment.

9. In the present case, admittedly the petitioner never made any request for his
discharge before fulfilling the conditions of his enrolment. On the other hand as it
appears from the undisputed facts that notice to show cause was issued to the

petitioner on 1441988, annexureCA1 to the counteraffidavit. By the said show cause notice it was alleged that the petitioner was not performing his duties since long, for which he was enrolled in the Army and, therefore, he was asked to show cause in writing a why he was not performing his duties. It was also stipulated therein that necessary disciplinary action to terminate his services would be initiated on receipt of his reply. Pursuant to the said show cause notice in his reply dated 1641988, AnnexureCA2 to the counteraffidavit, which was translated at the bar by Sri Harkauli the petitioner contends that he was not washerman by caste and the job of washerman is below his dignity. Therefore, he had made several request after having been enrolled as washerman for change of his trade. But it was not granted despite repeated request made by him and assurance given by the authority concerned. Therefore he was not performing his duties as Washerman since such trade is contrary to his heritage. Therefore, in the said reply he had claimed that he may be discharged from Army. Thus it appears that the petitioner had never made any request for his discharge on his own before fulfilling the conditions of his enrolment. On the other hand, when he was asked to show cause on certain charges relating to the proceedings for terminating the services, he admitted the charges and prayed for discharge when the charge stood proved by his admission. The request made in the reply for discharge cannot be said to be an application for discharge as contemplated in clause (iv). It was not made on his request but was made only to avoid the consequences of the admitted charges. Therefore the same cannot be brought within purview of clause (iv).

10. That apart notice to show cause contained in AnnexureCA1 to the counteraffidavit was a notice for terminating the services, which ineffect, is a notice related to clause (v) of Category III of Rule13. Inasmuch as there are two modes which are open in the case of disobedience to the superior officers. Admittedly the charges levelled in AnnexureCA 1 to the counteraffidavit is a charge of disobedience which is not in dispute. Section 41 of the Act prescribes the procedure to be taken on account of disobedience shown to the superior officer. If a person disobeys the Superior Officer, in such a manner as to show wilful defiance of the authority of any lawful command, the Court Marshal is ensued. The other mode is of discharge as contemplated in Section 20 read with Section 19 and 22 of the Act. Now notice itself is admittedly not a notice under Section 41. It was a notice to terminate the service within meaning of Section 19 which can be effected by means of provisions of Sections 20 and 22 read with Rule 13. The authority in its discretion instead of proceedings under Section 41 and proceeded under Section 19 read with Sections 20 and 22 and Rule 13 of the Rules which was also not objected to by the petitioner.

11. By reason of subsection (3) of Section 20 termination contemplated in Section 19 can be effected by means of discharge by an officer prescribed in subsection (3) who has to exercise as such power as contemplated in subsection (7) read with Section 22 followed by Rule 13. Therefore after the notice in AnnexureCA 1 to the counteraffidavit was issued process for discharge under

clause (v) Category III under Rule 13 was set in motion. Once such a proceeding was set in motion the subsequent request by the petitioner to allow him discharge under Clause (iv) cannot nullify the proceedings initiated under clause (v) and supersede the same. Then again such request was made in reply to the show cause. After the show cause notice was issued and reply was received the entire matter was at the discretion of the authority considering the same.

12. Admittedly, discipline is Supreme in the administration of Army. Little relaxation in the discipline would erode the entire fabric of the Army efficiency which is administered through Command meant to be carried out. In case any one is aggrieved on account of any command, provisions are provided for making representation to the officer superior to the officer commanding successively upto the Chief of Army Staff. Admittedly, the petitioner had never adopted such steps for not changing his trade and compelling him to perform the duties of Washerman. Instead he refused to work on his own admission not only once but on several occasions at several posting as would appear from his reply. Be that as it may, we are concerned only with the admission of the petitioner with regard to disobedience contemplated in Annexure CAI to the counteraffidavit and nothing besides thereof. Now the petitioner having admitted the guilt it was at the discretion of the authority concerned to discharge the petitioner under Clause (v) pursuant to Annexure CAI to the counteraffidavit.

13. Therefore, there appears on merit in the order dated 581988 no infirmity which could render the said order void and nullity, as indicated above.

14. So far as the question that the said notice in Annexure CAI to the counteraffidavit is to be given by the Brig. Commander or Sub Area Commander, Column 4 prescribes the manner of discharge. The same provides that the Brig, or Sub Area Command before ordering discharge shall give to the person to be discharge, an opportunity to show cause against the contemplated discharge. The said provision does not contemplate that notice is to be even and the same is to be signed by the rig. It contemplates that before the Commander discharge a person, the person should be given opportunity to show cause against the contemplated discharge. Then again the said provision has been clarified with the expression "if the circumstances of the case permit". The inclusion of this qualifying clause envisages that giving of opportunity is not mandatory and is dependent on the circumstances which may or may not permit. Then again giving of opportunity to show cause does not mean that the Brig, himself has to issue show cause notice. Here in this case admitted opportunity to show cause was given before the contemplated discharge and on the recommendation of Brig, himself after considering the reply of the petitioner who had availed of the. opportunity through the same order having been passed, the provision for giving opportunity as contemplated is complied with. It is not the case or the petitioner that the order of discharge was not passed by the Brig. Commander. The submission of the learned counsel for the petitioner that notice in Annexure CA 1 to the counteraffidavit having not been signed by the Brig. Commander, has

vitiating the termination, cannot be sustained in view of expressed provisions, referred to above.

15. Over and above after the order dated 5th August 1988 the petitioner did not complain of the same nor he had challenged by means of preferring any appeal or otherwise. On the other hand he has accepted the order and acted upon the same. By reason thereof he has waived his right which he had to challenge the same. After having accepted the said order and acted upon the same the principles of estoppel is attracted. The petitioner, therefore, is estopped from questioning the same at the subsequent stage when his services with DSC was terminated.

16. Admittedly, after the petitioner had accepted the said order of discharge dated 5/8/1988 got himself enrolled in DSC. After the papers of the petitioner was available to the DSC the petitioner was asked to show cause as to why his services should not be terminated and he should not be discharged under Clause (v) Category III of Rule 13 on the ground that he was not eligible or being enrolled or recruited in DSC. In case the discharge dated 5/8/1988 remains discharge under clause (v) in that event the petitioner cannot have any case to defend himself against the said show cause notice for discharge from DSC. Since it has already held that the discharge is discharge under clause (v), therefore, the petitioner cannot successfully defend his case against the said show cause issued by DSC unless he succeeds in assailing the Army Headquarter's letter dated 27/5/1985.

17. From the pleading, it appears that no case challenging the validity of the Army Headquarter's letter dated 27/5/1985 has been made out and neither any prayer to that extent has been incorporated or made. On the other hand the Army Act and the Rules permit for issue of Army instruction or circular for the purposes of administering the Army. By the said letter eligibility criterion for recruitment in DSC has been specified. DSC is also an Army organisation under the control of Army itself. The Army had liberty to specify the qualification for being eligible for enrolment in DSC. The discharge under clause (v) pursuant to disobedience which was otherwise subject to Court Martial also have consequence of disqualifying a person from getting re enrolled in other wing of the Army. Any eligibility criterion can not be said to be bad or perverse. Be that as it may since the same has not been challenged the petitioner can not question the applicability of the said Army letter in his case. It is not the case of the petitioner that the said Army letter has been struck down.

18. Therefore, the discharge of the petitioner from DSC also cannot be questioned by the petitioner since admittedly he comes within subclause (1) of clause (f) of the said Army letter.

19. The learned counsel for the petitioner relies on the decision in the case of C. L. Sharma v. State of M.R., AIR 1990 SC 463 and contends that the administrative instruction cannot override the rules. So far as the proposition is

concerned as laid down in the said decision there cannot be any two opinions. But in the present case nothing has been shown to this court as to how the said administrative instruction is contrary to any statutory rule so as to find that the statutory rule will prevail and the said administrative instruction is to be ignored. Unless it is shown that the said administrative instruction is contrary to the rules the principles enunciated in the said decision, cannot be attracted. On the other hand learned counsel for the respondent contends that the said instruction is not in conflict with any of the rule or in other words the same specified the eligibility criterion to be adhered to. Therefore the above decision does not help the petitioner, as has been sought to be argued by the learned counsel for the petitioner.

20. For all these reasons the writ petition fails and as such is dismissed.

21. There will, however, be no order as to costs. Petition dismissed.