

(2005) 10 DEL CK 0021
In the Delhi High Court
Case No : CW 2745 of 2003

Nb. Sub. Raj Pal Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Army Act, 1950 — Section 18, 23

Army Rules, 1954 — Rule 13(2)(A), 13(3), 13(3)(I), 13(3)III

Citation : (2006) 127 DLT 470

Hon'ble Judges : Markandeya Katju, Acting C.J.;Anil Kumar, J

Bench : Division Bench

Advocate : S.M. Dalal, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—This petition shall determine whether the discharge of the petitioner, a JCO, without the recommendation of Invalidating Board was valid and in consonance with the relevant Army Rules, 1954 and Army orders.

2. The brief facts to appreciate the controversy are that the petitioner was enrolled in the Army on 9th March, 1980 and was posted to 12 JAT Regiment initially and from 11th February, 1985 to 20 JAT Regiment. On 31st July, 2000, while serving the 20 JAT at around 0400 hours, he felt pain all over his chest, both the shoulders and arms and was admitted to Military Hospital and after treatment discharged on 7th November, 2000 and placed in low medical category S1H1P2E1 with effect from 6th November 2000 for six months. On account of disability, Ischaemic heart disease (ANTERO SEPTAL MI) , he continued in a low medical category with effect from 6th May, 2001 and thereafter on review he was placed in the permanent low medical category for two years with effect from 24th October, 2001.

3. The petitioner contended that before the expiry of two years period for which he was placed in permanent low medical category, the petitioner was served with

a show cause notice from his CO on 27th February, 2002 stating that since he was placed in permanent low medical category, Therefore, why should he not be discharged from services as no sheltered appointment was available and the Unit was deployed in a field area. The show cause notice given to the petitioner was cryptic and is extracted as under:-

"ENGLISH TRANSLATION

20 JAT

C/o 99 APO

2062/A/ February, 2002

JC 488931 X

Nb Sub Rajpal Singh

20 JAT

C/o 99 APO

SHOW CAUSE NOTICE

1. During re-categorization board held at 178 Army Hospital on 24.10.2001, as per AF MSF-15A you have been declared in permanent low medical category.
2. Because the unit is deployed in field area, there is no sheltered appointment. As a result of the above, show cause as to why you should not be discharged from service because your retention in service is not in public interest.
3. Please send reply of the show cause notice by 10.3.2002.

Sd/- xxxx

(Rajesh Ahuja)

Colonel

Commanding Officer"

4. The petitioner replied to the show cause notice by his communication dated 23rd May, 2002 contending that as per the doctor's advice he can perform light duties and he is willing to serve.
5. The petitioner stated that he was brought before a Release Medical Board (RMB) on 22nd April, 2002 and he was discharged from service from 31st August, 2002 by the order of OIC Records, the JAT Regiment allegedly under the authority of Army Rule 13(3) I (iii)(c) read with Rule 13(2)(A).
6. The petitioner challenged his discharge on the ground that as a JCO he could be discharged under Army Rule 13(3) I (ii) by the Commanding Office after the opinion of Invalidating Board and not under Army Rule 13(3) I (iii)(c) read with 13 (2) (A). As the opinion of the Invalidating Board was not taken, his discharge

is contrary to rules and it is liable to be quashed and he is to be reinstated. He also relied on a policy directive issued by the respondent no.2 vide notification no.B/10122/LMC/MP-2(PBR) dated 15th March,2000 The petitioner contended that under Army Rule 13(3)(I)(iii)(c), he could be discharged by the Chief of Army Staff only and not by OIC JAT and under Rule 13(2)(A), the power could be delegated to the CO and no such decision had been taken.

7. The petitioner also contended that there was no adverse report against him either from his CO or any of the superior officers regarding performance of his duties and general behavior which could be stated to be against the public interest and consequently any alleged recommendation that retention of the petitioner in service was not in public interest was arbitrary, without any basis and bad in law. The decision of OIC Records in the circumstances reflected complete lack of application of mind and if any case OIC Records ordered the discharge of the petitioner without providing an opportunity of hearing which is vocative of principle of natural justice. The petitioner also contended that the Release Medical Board cannot replace the requirement of invalidating Board as per the mandate of Army rule 13(3) I (ii). According to him, the recommendation of Invalidating Board has to precede the decision of discharge. The purpose of Release Medical Board is to assess the percentage of disability of a person and give its opinion with regard to attributability and relied on Army Order 3/89. The petitioner further contended that Release Medical Board is held only after the decision to discharge a person is arrived at and the date of discharge is fixed. The petitioner also highlighted contradictory stands regarding the competent authority for discharge inasmuch as in ground C of the counter affidavit, it was pleaded by the respondents that OIC Records is the competent authority which is also mentioned in para 7 of discharge certificate, however, in the same counter affidavit in grounds E and F, it was stated that the Commanding Officer is the competent authority.

8. Another plea of the petitioner is that respondents have retained in service five more JCOs suffering from similar ailments and who were placed in similar low medical category, however, only the petitioner has been discharged from the service. The petitioner also emphatically contended that though he was placed in low medical category P2, however, he could perform normal work and showed and communicated his willingness and as per the policy of the respondents, a person in P2 category is fit for further promotion and a large number of officers, JCOs and OR in PII category are serving in the Army. The petitioner relied on a judgment of Division Bench in CWP 5958 and 4356 of 2001 dated 13th March, 2002 and Capt. Virendra Kumar Vs. Union of India (UOI), and sought quashing of his discharge and sought his reinstatement.

9. Per contra, the respondents contended that in accordance with AO 46 of 80, retention of permanent low medical category personnel is always subject to availability of suitable sheltered appointment commensuration with their medical category. As suitable sheltered appointment was not available with Unit due to

deployment in field area, he was served with show cause notice dated 27th February, 2002 and as his reply was not considered satisfactory, his further retention in the service in permanent locategory was not recommended in public interest by the competent authority and accordingly his release order was issued by the OIC Records JAT Regiment Battalion with effect from 31st August, 2002 (AN) under Army Rule 13(3) I (iii)(c) read with Rule 13(A). According to the respondents, the petitioner was placed before the Release Medical Board held at 179 Military Hospital and the Release Medical Board assessed his disability at 30 per cent not attributable but aggravated by military service due to stress and strains of service with effect from 31st August, 2002.

10. In the counter affidavit filed by the respondent the plea of the petitioner that five more JCOs had been placed in similar low medical category were retained whereas only the petitioner was discharged from service, was not replied and consequently the respondents were directed to file an additional affidavit to explain the circumstances under which Rule 13(3)(I)(iii)(c) was applied and under what circumstances other officers were allowed to continue in service. Consequent thereto an additional affidavit dated 21st May, 2005 was filed detailing that the case of the petitioner is not similar to other JCOs as the permanent low category of others was on account of hypertension and three JCOs, namely, Shri Chand Payal, Shri Mohar Singh and Shri Jiwan Ram Jat have already been discharged on 31st August, 2003, 30th November, 2004 and 31st July, 2003 respectively. Regarding Nath Subedar A.K. Tiwari, who was also in permanent low category which was stated to be on account that he was suffering from hypertension, it was stated that since a sheltered appointment was available, he is still continuing in the sheltered appointment as a clerk. Regarding Nk. Nahar Singh it was stated that he was also in a permanent low medical category suffering from essential hypertension and he is also under sheltered appointment. The respondents tried to distinguish the low medical category of the petitioner with others on the ground that others were suffering essential hypertension whereas the petitioner was having IHD, Ischaemic heart disease.

11. We have heard the respective counsels at length and have also perused the rival contentions. u/s 18 of the Army Act, 1950, every person under the Act holds office during the pleasure of the President and can be dismissed or removed from service subject to the provisions of the Act and the rules made there under. Rules have been framed under the power under the Act and Chapter 3 of the Army Rule, 1954 relates to dismissal, discharge which are extracted as under:-

11. Discharge not to be delayed. "(1) Every person enrolled under the Act shall, as soon as he becomes entitled under the conditions of his enrolment to be discharged, be so discharged with all convenient speed:

Provided that no person shall be entitled to such discharge, if the Central Government has, by notification suspended the said entitlement to discharge for the whole or a part of the regular Army. (2) The discharge of a person, validly

sanctioned by a competent authority, may, with the consent of the discharged person, be cancelled by any authority superior to the authority who sanctioned the discharge either without any conditions or subject to such conditions as such discharged person aspects.

12. Discharge Certificate. "(1) A Certificate required to be furnished under the provisions of Section 23 is hereinafter called a "discharge certificate".

(2) A discharge certificate may be furnished either by personal delivery thereof by or on behalf of the commanding officer to the person dismissed, removed, discharged or released, or by the transmission of the same to such person by registered post.

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.

2(A)Where the Central Government or the Chief of the Army Staff decides that any person or class or 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 warrants officers of the Special Medical Section of the Army Medical Corps, the "commanding officer" means the Director of the Medical Services, Army, and in the case of junior commissioner officer and warrant officers of Remounts, Veterinary and Farms, Corps, the "Commanding Officer" means the Director Remounts, Veterinary and Farms.

Category

Grounds of Discharge

Competent Authority to authorize discharge

Manner of discharge

1

2

3

Junior Commissioned officers

I.(i)(a) On completion of the period of service or tenure specified in the Regulations for his rank or appointment, are on reaching the age limit whichever is earlier, unless trainee on the active list for further specified period with the sanction of the Chief of the Army Staff or on becoming eligible for release under the Regulations.

Commanding Officer

(b) At his own request on transfer to the pension establishment.

Commanding Officer

(ii) Having been found medically unfit for further service. Commanding Officer To be carried out only the recommendation of an Invalidating Board.

(iii) All other classes of discharge

(a) In the case of Junior Commissioner Officers granted direct commissions during the first 12 months service Area/Divisional Commander

If the discharge is not at the request of the Junior Commissioned Officer the competent authority before sanctioning the discharge shall if the circumstances of the case permit give the Junior Commissioned Officer concerned an opportunity to show cause against the order of discharge.

(b) In the case of JCOs, not covered by (a), serving in any Army or Command the General Officer Commanding-in-Chief of that Army or command if not below the rank of Lieutenant General.

(c) In any other case the Chief of the Army Staff.

12. From the perusal of the rules what emerges is that a person can be discharged either at his own request or on completion of service or tenure or having not been found medically fit in service. The petitioner is alleged to be discharged on medical grounds under Rule 13(3) I (iii)(c) read with Rule 13(2) (A). It is not disputed by the respondents that although he was placed in the low medical category from 24th October, 2001 to 24th October, 2003, no invalidating board was held in terms of Rule 13 (3)I (ii) to assess whether the petitioner was unfit for further service.

14. The plea of the respondent is that a person who is found medically unfit for further service is to be dealt with in accordance with the Army Order 46/80 which contemplates that the employment of permanent low medical category personnel at all time is subject to availability of suitable sheltered appointment commensuration with their medical category and since petitioner was placed in low medical category he was unfit for further service and release medical board of the petitioner was conducted and he was released thereafter. Considering the

provisions of the Army Rules and the orders, it is apparent that before the opinion is formed as to whether a particular officer is to be retained or not on medical grounds, there has to be an opinion of the Invalidating Board that further retention in the service on the medical ground is not possible and the question of suitable alternative appointment commiserating with the medical category will be relevant only thereafter. There is no rule that as soon as a person shall be placed in permanent low medical category, it will be presumed that he is unfit for further service. Such a perception shall also run counter to the specific Army Rules framed in this regard. The respondents have also not denied the plea of the petitioner that army personnel placed in similar low medical category are also entitled for promotion and have been retained.

15. A Division Bench of this Court in the matter of L/Hav. Raj Singh and Subedar Vijay Singh in CWP 5958 and 4356 of 2001 decided on 12th September, 2002 had held that if a person has been found medically invalid for further service, an order of discharge can be passed only on the recommendation of an Invalidating Board and rejected the contention of the Union of India that a medically invalid person can be retained only as per the order No.46/80. The relevant portion of the order is extracted for reference:-

"16.If a person has been found medically invalid for further service, an order of discharge can be passed only on the recommendation of an invalidating board. It is not the case of the respondents that any recommendation had been obtained from invalidating board.

17. Faced with the situation, the learned counsel would contend that a medically invalid person can be retained only as per order No. 46/80 which is to the following terms:

- a). Subject to availability of suitable alternative appointment to commensurate with their medical category.
- b). That the retention should be justified in public interest.
- c). That the retention should not exceed the sanctioned strength of the Regiment/ Corps.

18.However, this would not help the respondents because before the opinion is formed as to whether a particular officer is to be retained or not, there has to be an opinion of the Invalidating Board that further retention in the service on medical grounds is not possible. It is only then one has to see whether a suitable alternative appointment commensurating with the medical category of the concerned officer is available or not and whether retention would be justified in public interest.

19.Submission of Mr. Jayant Bhushan, to the effect that in a case of this nature, clause (v) shall apply, must be rejected. Rule 13 must be read as a whole. Having regard to the fact that the matter relating to discharge on medical grounds is covered by Rule 13(3) I (iii), the doctrine of generally and specially

non-derogate shall apply. Even otherwise, Rule 13(3)III (v) uses the expression "all other classes of discharge" which by necessary implication would exclude a discharge of an army officer having been found medically unfit for further service. In any case, if Rule 13(3)III (v) is permitted to be resorted to in such cases, the Army authorities can exercise this power arbitrarily as the expression "all other cases are discharged" does not lay down any guidelines of such cases. However, since in the present case, we are holding the opinion that the matter relating to discharge on medical grounds is covered by Rule 13(3) III (v), it is not necessary for us to express any opinion on the validity of Rule 13(3) III(v).

20. Even if it is presumed that Rule 13(3) III (v) is applicable, power under this Rule could be exercised only by Brigadier/Sub Area Commander and that too after giving an opportunity of hearing to the concerned person. In the instant case, the notices had been issued by the Commanding Officer and not by the Brigadier or Sub Area Commander. The order of discharge had also been passed by the Commanding Officer but he used the power only in terms of Rule 13(3) only."

16. The show cause notice dated 27th February, 2002 essentially made out a case of petitioner being in a permanent low medical category and consequently his retention in the service was not in public interest and for no other reason. The petitioner also contended that his non retention was insisted on account of his placement in permanent low medical category and for no other reason. No other reason was disclosed for not retaining the petitioner in public interest and in the circumstances, the inevitable inference is that the petitioner was discharged on account of his placement in low medical category. If the retention of the petitioner was not in public interest for any other reason, the respondents were to spell out the same so as to give a reasonable opportunity to the petitioner to reply to such allegations. When the rules provides specifically for discharge of a person on account of his medical unfitness for further service he could not be discharged under any other rules other than the one which provides for discharge on the ground that the petitioner was unfit for further service. The respondents contentions Therefore, that the petitioner was discharged under the Army Rule 13(3) I (iii) (c) and 13 (2) (A) is not correct and sustainable. In similar circumstances a Division Bench of this Court in L/Hav Raj Singh (supra) had invoked the doctrine of generally and specially non derogant. Discharge of the petitioner being not under Rule 13 (2) (A) or Rule 13 (3) I (iii) (c) is also born out as the order of discharge has not been passed by the Chief of Army Staff or his delegate as is contemplated under Army Rule 13 (3) I (iii) (c) and 13 (2) A and the order of discharge was passed by OIC Jat records.

17. The non-availability of a sheltered appointment could also be not a ground for discharging the petitioner before an opinion of the Invalidating Board that he is medically unfit for further service, as only after a person is found unfit for service, it is to be seen whether he can still be allowed on sheltered appointment commensurating with his medical category subject to availability of sheltered

appointment. Every person who is placed in the low medical category can not be discharged from the Army Army Act and the rules framed there under have to be followed. The petitioner could not be discharged merely on the basis of low medical category in the facts and circumstances. The justification by the respondents that five other JCOs out of which three have been discharged and two who have been retained, were suffering with essential hypertension and their medical condition is different from the medical condition of the petitioner, could not be a good justification for his discharge as petitioner being unfit for further service was to be determined and recommended by the Invalidating Board.

18. Perusal of the Army Order 3/89 also makes it apparent that the medical examination of all ranks prior to release, retirement, discharge, completion of tenure and service limit is carried out by release board. A bare perusal of the said Army Order and the Army rules show that the function and objective of Invalidating Board as contemplated under Army Rule 13(3) I (ii) can not be substituted with the functions of a Release Medical Board. The object and the scope of the two are different. The Release Medical Board is to assess the percentage of disability of a person and give its opinion with regard to the attributability and aggravation of a person's conditions due to Army service. A Release Medical Board is held once the decision to discharge a person is taken and date of discharge is fixed. Release Medical Board is not only for the persons who are discharged on medical grounds but also for those who are released, retired and who complete their tenure. From the rules and army order it is amply clear that on the basis of release board, a decision can not be taken under Army rule 13 (3) I (ii) that an army personnel is unfit for further service. This is also fortified from the policy directive of the respondents no. B/10122/LMC/MP-2(PBOR) dated 15th March, 2000 which categorically stipulates that under the provisions of AR 13, the decision to discharge on account of unfitness of a personnel for further service, is based on the recommendation of an Invalidating Board. This policy directive also contemplates that the Commanding officer is the Competent authority to sanction discharge of JCOs/OR who have been found medically unfit for further service.

19. The Apex Court in Capt. Virendra Kumar Vs. Union of India (UOI), had held that basic procedure before termination of service is to be adhered to. It was held that lawlessness in the defense Force is a grave risk not only for Four Star General but for the foot infantry soldier too. The petitioner could be discharged on medical grounds only pursuant to a recommendation of Invalidating Board in the facts and circumstances that he is unfit for further service and not on the basis of AO 46/108 contemplating in what circumstances unfit army personnel can be retained in the army in the public interest. The order stipulates that if the retention is justified in public interest and retention does not exceed the sanctioned strength, on availability of sheltered appointment, a person can be retained commensurating with his medical category. This, however, can not substitute the opinion of the Invalidating Board contemplated under rules. An army order in the present facts and circumstances will not change and can not

change the requirement of Army rules framed under powers conferred under the Army Act, 1954. Considering it under any perspective, it is inevitable to infer that the petitioner could be discharged on account of his low medical category only on the recommendation of the Invalidating Board under Army Rule 13 (3) I (ii) on the ground that he has been found to be medically unfit for further service and in no other manner in the present facts and circumstances.

20. Since we have already held that the discharge of the petitioner could be pursuant to the opinion of the Invalidating board under Army Rule 13 (3) I (ii) that he has been found to be unfit for further service, we do not dwell as to who was the competent authority as the respondents themselves have taken conflicting stand regarding competent authority in their counter affidavit.

21. Consequently, for the reasons aforesaid, we are of the opinion that the impugned order of discharge of the petitioner without the opinion of Invalidating Board that the petitioner is medically unfit for further service is not in accordance with Army rules, 1954. He could not be discharged from the service and the order of his discharge cannot be sustained. Resultantly the impugned order discharging the petitioner from 31st August, 2002 is, Therefore, set aside.

22. The writ petition is, Therefore, allowed and the petitioner is directed to be reinstated in service. Parties to bear their own costs.