

(2004) 11 DEL CK 0153

In the Delhi High Court

Case No : Writ Petition (Civil) No. 5580 of 2000

Shish Ram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-11-2004

Acts Referred:

Army Act, 1950 — Section 2, 2(1), 2(2), 20(3)
Defense Services Regulation, 1962 — Rule 206
Reserve Forces Act, 1888 — Section 4, 5
Reserve Forces Act, 1950 — Section 5

Citation : (2004) 115 DLT 619 : (2005) 80 DRJ 422 : (2006) 1 SLJ 395

Hon'ble Judges : Gita Mittal, J; Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : S.M. Hooda, for the Appellant; Rajiv Shakhddhar, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—The issue that arises for our consideration in the present writ petition is whether the petitioner having been transferred to reservist establishment ceased to be a serving personnel and consequently could not have been dismissed from service under the provisions of Section 20(3) of the Army Act. In support of the said plea the petitioner has relied upon Regulation 206 of the defense Services Regulations and also on regulations 151, 156, 157 and 213 of the said regulations. In order to appreciate the aforesaid plea, which is raised in this writ petition, narration of few facts leading to filing of the present petition is considered necessary.

2. The petitioner was enrolled in the Indian Army on 28th June, 1963 with the terms of engagement requiring him to complete 10 years of service in colour and the remaining 10 years in reserve service. On 24th July, 1974 the petitioner was transferred to the reserve establishment. In the aforesaid manner, the petitioner was called for and he attended biennial reservist training. On 20th January, 1978 the petitioner was again called for biennial reservist training for the period from

5th June, 1978 to 2nd July, 1978 by the O.C. Reservist, by sending a registered letter to the petitioner on 20th January, 1978. The petitioner, however, failed to attend the said training. On 16th May, 1978 again another registered letter was issued to the petitioner by the O.C. Reservist Establishment directing the petitioner to report for training on 19th June, 1978. The petitioner also did not report and did not attend the aforesaid training. On the failure of the petitioner to report for training he was declared a deserter as he absented himself from training without leave. On 3rd July, 1978, an apprehension roll was issued by the O.C. Reservist to the Superintendent of Police, Mahendergarh (Haryana) by a letter of even date with a request to apprehend the Army reservist, being deserter.

3. Some time in April, 1979 the respondents came to know that the petitioner was serving with Delhi Transport Corporation at Maya Puri Depot as a Driver. On 24th April, 1979, the respondents directed the petitioner to report for O.C. Reservist Training by a letter of even date. The petitioner, however, again failed to report for said training. The respondents by letter dated 11th June, 1979 approached the Delhi Transport Corporation to forward a certificate in respect of the petitioner for exemption from Reservist Training in the event he was working as a Driver and was efficient in his trade. On 25th July, 1979 O.C. Reservist Establishment advised the petitioner to approach the Depot Manager, DTC so that the requisite certificate exempting him from reservist training could be forwarded to the establishment by 15th August, 1979.

The petitioner not only failed to report for reservist duty but also failed to obtain exemption certificate from the DTC and, Therefore, he was dismissed from service under the provisions of Section 20(3) of the Army Act on the ground that he had been declared as deserter w.e.f 19th June, 1978.

4. The petitioner filed a writ petition in this court, which was registered as CWP No. 294 of 1997. The said writ petition was disposed of with a direction to the respondents to consider the representation of the petitioner and in case the petitioner was still aggrieved, he was given the liberty to get the said writ petition revived. The petitioner, however, filed a second writ petition in this court, which was registered as CW 2728/1997, which was disposed of on 28th April, 2000 with permission to the petitioner to withdraw the writ petition and to challenge the dismissal order.

5. In the light of the aforesaid background facts, the present petition was filed in this court, on which we have heard the learned counsel appearing for the parties. Learned counsel appearing for the petitioner submitted that the impugned order, which is purported to have been passed under the provisions of Section 20(3) of the Army Act, is without jurisdiction and non est in the eye of law as there is no provision in the Army Act to effect the reserve of a soldier and that such a provision is only contained in the defense Service Regulations and, Therefore, the provisions of Section 20(3) of the Army Act is applicable only to the serving soldier and not to the reservist. Elaborating the said submission, the counsel

submitted that when a soldier is transferred to reserve under defense Service Regulations then for all purposes a soldier is under the command of of Reservists and that even for disciplinary purposes only the O.C. Reservist is empowered to initiate actions under regulations and not the army authorities. In support of the aforesaid contention, the counsel relied upon the provisions of Regulation 206, which provides as follows:-

"206- Responsibility for effecting transfer to the reserve- OsC reservists are responsible for maintaining the establishment of reservists in accordance with the quota laid down by Army Headquarters. Transfers to the reserve will be effected by OsC units in consultation with OsC reservists or Officer-in-Charge records. Once a man has been transferred to the reserve, he comes under the administration and disciplinary orders of the of reservists".

6. It was also submitted by the counsel that exemption from training is also envisaged under the defense Service Regulations. He further submitted that even procedure of attendance of a reservist is contemplated in the defense Service Regulations, which stipulates that whenever a soldier is due for discharge or to pension while away from their unit, their attendance should be obviated and consequently the petitioner became entitled to pension and, Therefore, the O.C. Reservist was duty bound to sanction the pension as contemplated in the relevant regulation.

7. The aforesaid submissions were, however, refuted by the counsel appearing for the respondents, who submitted that the provisions of the Army Act would be applicable to a reservist like the petitioner, which is explicitly clear on a bare reading of Section 2 of the Army Act read with Note-4 appended thereto. In support of the aforesaid contention, the counsel also referred to the provisions of Section 5 of the Indian Reserve Forces Act, 1950 and the Indian Reserve Forces Rules, 1955.

8. In the light of the aforesaid submissions, we have carefully perused the records, which were placed before us and also the relevant provisions of the law which were referred to by the counsel appearing for thee parties. The provisions of Section 2(1)(c) and Section 2(2) of the Army Act are also relevant to the facts of the present case. The relevant part thereof are extract hereinbelow:-

"2. Persons subject to this Act.- (1) The following persons shall be subject to this Act wherever they may be, namely:

(a)

(b)

(c) persons belonging to the Indian Reserve Forces"

9. The aforesaid provisions would make it crystal clear that persons belonging to the reserve forces are subject to the provisions of the Army Act and those who fall in the categories of (a) to (g) to sub-Section 2, continue to remain, subject to

the provisions of the Army Act until they are duly retired, discharged, released, removed , dismissed or cashiered from service.

10. In this connection, we may also refer to the provisions of Section 5 of the Indian Reserve Forces Act, 1888, which reads as follows:-

"Liability of Reserve Forces to Military Law- Subject to such rules and orders as may be made u/s 4, a person belonging to the Indian Reserve Forces shall as an officer or a soldier, as the case may be, be subject to Military Law in the same manner and to the same extent as a person belonging to the Regular Army".

11. In the light of the aforesaid express mandate of the provisions of law, the contention of the petitioner that the provisions of the Army Act, particularly, the provisions of Section 20(3) of the Army Act is not applicable, cannot be accepted. We also find the submission of the learned counsel for the petitioner that the Brigade Commander had no power and jurisdiction to dismiss the petitioner from service under the provisions of Section 20(3) of the Army Act , as baseless and without any merit. It is also to be made clear at this stage that it is well-settled by now that in the event there is a conflict between the provisions of the Parent Act and the Rules/Regulations, the provisions of the Act would over-ride and would have to be given effect to and/or precedence over and above the provisions of the rules and regulations. This is particularly in view of the fact that the rules and regulations are only delegated piece of legislation and, Therefore, the provisions of the Army Act would definitely get precedence and wheresoever the rules and regulations are in direct conflict with the provisions of the Act they shall have to yield to the provisions of the Army Act.

In support of the aforesaid views expressed by us, we rely upon the ratio of the decision of the Supreme Court in *The Central Bank of India Vs. Their Workmen*, wherein it is provided as under:

"..... We do not say that a statutory rule can enlarge the meaning of Section 10; if a rule goes beyond what the section contemplates, the rule must yield to the statute....."

In *Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others*, , it was laid down as follows:-

"..... Now, if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with....."

13. From the above discussion, it is crystal clear that it is apparent that a person belonging to the Indian Reserve Forces, as the petitioner, would be subject to military law in the same manner and to the same extent as a person belonging to the Regular Army, which is provided for in the Army Act read with the

provisions of the Indian Reserve Forces Act and the said provisions would get precedence. The provisions of Rule 206 of the defense Service Regulations is to be read in the context of the aforesaid provisions and there should be a harmonious interpretation of the said Rule 206, which would be considered as provisions giving meaning to the provisions of the Act.

14. In the present case, the petitioner, who was enrolled in the army on 28th June, 1963, was under the terms of engagement. He was required to complete 10 years of service in colour and remaining 10 years in reserve. On 24th July, 1974 the petitioner was transferred to Reserve Establishment and in the process, the petitioner complete 11 years 5 months and 26 days of service in colour in the army. As per the requirement, admittedly, the petitioner was required to attend reservist training as and when called upon to do so and that he could be exempted from attending such training provided a certificate is issued by the concerned authority that the employee was working in the organisation and was efficient in his trade. So long such a certificate is not forthcoming, the concerned person is mandatorily required to attend the requisite training as and when called upon to do so. The petitioner attended the training in 1976 but in 1978 when he was called upon to attend the training, he failed to do so despite the fact that on 20th January, 1978 and 16th May, 1978, the petitioner was sent communication by registered post. The failure of the petitioner in attending the said training compelled the respondents to declare the petitioner as a deserter, consequent to which an apprehension roll was issued to the Superintendent of Police, Mahendergarh, (Haryana) on 3rd July, 1976. It is also disclosed from the records that the respondents, for the first time, in April, 1979, became aware that the petitioner was employed with Delhi Transport Corporation as a Driver at its Maya Puri Depot and after learning about the said fact, the respondents made an endeavor by writing a letter to the petitioner on 24th April, 1979 that he should attend the reservist training. Even in spite of the said communication the petitioner failed to attend the said training. The respondents also approached the DTC authorities to issue a certificate of exemption from reservist training for the petitioner by mentioning therein that the petitioner was working as Driver in DTC and was efficient in his trade. No response to the aforesaid letter was also received by the respondents, upon which the petitioner was directed to approach the Depot Manager for obtaining such a certificate of exemption, which the petitioner also failed to obtain. Thereafter, the aforesaid order of dismissal was issued, which was served on the petitioner. Therefore, the submissions of the counsel for the petitioner that the provisions of the Army Act, particularly Section 20(3) of the Army Act are not applicable to the petitioner and that exemption from training is accepted under defense Service Regulations, are found to be without any merit in view of the facts and legal position mentioned and discussed above and are rejected.

15. So far the submission of the counsel for the petitioner about the entitlement of the petitioner to pension is concerned, we have given our consideration to the aforesaid contention as well. It is, however, established from the records that the

tenure of service of the petitioner under the Army Act is not 20 years, which was required to include 10 years in colour and 10 years in reserve service. Regulation 203 (b) clearly provides that men transferred to the reserve from the colours will serve until the completion of the period of combined colour and reserve service for which they were originally engaged. Since the petitioner could not complete the entire length of service, as provided for, he was dismissed from service during the tenure of his engagement, by order dated 20th October, 1981.

16. Regulation 113 of the Pension Regulations for the Army, 1961 , Part-I clearly provides that a person who is dismissed from service is not entitled to any pension. The said provision is clearly applicable to the facts of the present case and accordingly we are of the considered opinion that the third submission of the counsel for the petitioner has also no force at all. In the light of the aforesaid discussions and conclusions arrived at, we find no merit in this petition and the same is dismissed.