

**(2013) 02 J&K CK 0001**

**In the Jammu And Kashmir High Court**

**Case No :** Service Writ Petition (SWP) No. 858 of 2010 and CMA No. 1211 of 2010

Subash Chander

APPELLANT

Vs

UOI and Others

RESPONDENT

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**Date of Decision :** 19-02-2013

**Acts Referred:**

Constitution of India, 1950 — Article 311

**Citation :** (2013) LabIC 3085

**Hon'ble Judges :** Virender Singh, J

**Bench :** Single Bench

**Advocate :** Anil Sethi, for the Appellant; K.K. Pangotra, for the Respondent

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**Judgement**

Virender Singh, J.—The petitioner, who was recruited and enrolled in the Army i.e. 4 JAK LI as Rifleman on 17th of June, 2000 and

continued up to July, 2005 through the medium of instant petition, seeks quash merit of order dated 28th of July, 2005 (impugned herein) issued by

Commanding Officer, 4 JAK LI (respondent No. 2 herein) whereby he has been discharged from Army service on the ground of fraudulent

enrolment, inasmuch as, he tampered his date of birth as 21st of June, 1979 instead of 21st of June, 1978 so as to overcome the hurdle of being

overage at the time of his enrolment in the Army, which fact, subsequently came to the notice of the Army Authority, in turn, forwarded the mark

sheet of the petitioner to Secretary J&K Board of School Education, Jammu for verification, in response thereto, the Secretary/Board issued

verification certificate bearing No. F(Veri-B)JD/4 dated 2nd Dec. 2004 wherein the correct date of birth of the petitioner is mentioned as 21st of

June, 1978. A copy of the mark sheet and the verification certificate are annexed

with the reply filed by the respondents as Annexures R-I & R-II.

The petitioner was served with a show-cause notice by the Commander 56 Mountain Bde vide letter No. 9104704/case/A dated 6th of July,

2005, photostat copy whereof is annexed with the reply filed by the respondents. The petitioner admitted his fault and begged pardon. That

communication, in vernacular, is also annexed with the reply. Considering the case of the petitioner as of grave nature, it was recommended for

discharge from the service under Army Rule 13(3) Item-III(v) by Commanding Officer, 4 JAK LI which has ultimately been approved by the

Commander, 56-Mountain Bde, the competent Authority on 22nd of July, 2005 and finally, the petitioner was discharged from service w.e.f. 28th

of July, 2005.

2. It is pertinent to mention here that during the pendency of the lis, the petitioner moved a miscellaneous application bearing CMA No.

3902/2010 for placing on record supplementary affidavit which was allowed by this Court vide order dated 07-12-2010. In the supplementary

affidavit, the petitioner asserts that the respondents have removed him from the service arbitrarily and trying to build a case on the basis of forged

document i.e. the petitioner was given show-cause notice and that he had admitted his guilt also. Mr. Pangotra, learned ASGI, has not responded

to this supplementary affidavit, but produced the entire record for perusal of the Court.

3. Heard Mr. Sethi appearing for the petitioner and Mr. Pangotra learned ASGI for the respondents.

4. Mr. Sethi vehemently contends that the petitioner has never admitted his guilt and the communication (Annexure IV) annexed with the reply on

which the respondents are banking heavily, is not signed by the petitioner at all, therefore, the said document cannot be read against him. He

submits that the signatures on Annexure IV are not of the petitioner and he has categorically disclosed this fact in his supplementary affidavit which

is not refuted by the respondents.

5. Mr. Sethi further submits that the signatures of the petitioner can be verified from the other documents available on record by sending them to

handwriting expert so as to arrive at the right conclusion as both the signatures are totally distinct and different. Mr. Sethi submits that from the

present set of circumstances, it can be comfortably inferred that before discharging the petitioner from service, no notice was ever served upon him, whereas under the relevant rules, the said protection was available to him. Learned counsel then submits that the petitioner was also entitled to the protection provided under Article 311 of Constitution of India and in the case on hand, he was not afforded an opportunity to put forth his case with regard to a serious charge of fraudulent enrolment. He, thus, contends that the impugned order of discharge deserves to be quashed solely on this fundamental flaw.

6. Mr. Pangotra learned ASGI vehemently refuted the arguments advanced by Mr. Sethi.

7. I have very minutely gone through the record made available by Mr. Pangotra.

8. At the first blush, the arguments put forth by Mr. Sethi appeared to some what attractive, but when appreciated in the light of the original record available with the Court, they fall on the ground.

9. Admitted position before the Court is that if the date of birth of the petitioner is taken as 21-06-1978, he was not eligible for his enrolment in the

army being overage. The certificate produced by the petitioner at the time of his enrolment in Army, issued by J&K Board of School Education,

Jammu reveals that on one side, the marks obtained by the petitioner are indicated and on the other side, along with Roll Number, there is a

column of date of birth. In the column of date of birth, where year is to be mentioned, a rubber is used for the purposes of erasing the year. In the

column of year, figure 7 is intact, whereas figure 9 is inserted after erasing original figure. When it is tallied with the verification certificate

subsequently obtained by the Army Authority from J&K Board of School Education, wherein date of birth of the petitioner is reflected as 21-06-

1978, there remains no doubt that figure 8 has been erased and instead figure 9 is inserted. This makes the difference of complete one year. This

all is visible to a naked eye and it can be very comfortably gathered that the person, who produced it for the purposes of his enrolment in the

Army, has certainly changed the date of birth.

10. Considering the date of birth of the petitioner as 21-06-1979, he was enrolled in the Army, whereas at that time he was overage and not

eligible.

11. In the light of the aforesaid tampering which is visible to the naked eye, the plea taken by Mr. Sethi that the petitioner had never admitted his

guilt on the ground that his signatures on Annexure IV do not tally with the other documents available on record pales into insignificance and there

appears to be no good reason for sending it to any handwriting expert. It would rather delay the matter unnecessarily. Argument advanced by Mr.

Sethi on this aspect is, thus, rejected.

12. The petitioner has obtained the appointment by fraudulent manner, therefore, he cannot be allowed to take advantage of his own wrong

claiming that he was holder of the post, as such, entitled to be dealt with on the touchstone of Article 311 of the Constitution of India or Army

Rules. May be, if there is any infringement of any Army Rule(s), although there appears to be none, that would not put the petitioner on any

advantageous position as he has usurped the seat/post meant for some other eligible candidate. Where an appointment in a service has been

acquired by practicing fraud or deceit, such an appointment is no appointment in eye of law or in service jurisprudence and in such a situation

Article 311 of Constitution is not attracted at all.

13. As a sequel what is stated hereinabove, I do not find any merit in the instant petition, hence dismissed at admission stage itself along with CMA

No. 1211/2010.

14. Since the petitioner has lost the job on account of his own fault which might have fallen heavily on his family members, I do not impose any

cost, otherwise the case at hand calls for slapping a very heavy cost upon him. Original record is returned to Mr. Pangotra, learned ASGI.