

(2007) 08 DEL CK 0218

In the Delhi High Court

Case No : Regular First Appeal (OS) No's. 51-52 of 2005

Union of India (UOI) and Another

APPELLANT

Vs

Sh. H.C. Chandel

RESPONDENT

Date of Decision : 14-08-2007

Acts Referred:

Army Act, 1950 — Section 19

Army Rules, 1954 — Rule 13A, 15A

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2007) 08 DEL CK 0218

Hon'ble Judges : Aruna Suresh, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Rekha Palli, for the Appellant; Jagjit Singh, for the Respondent

Final Decision : Dismissed

Judgement

Aruna Suresh, J.—The present appeal is the outcome of judgment and decree passed by the learned Single Judge of this Court on 5.11.2001 whereby the suit of the respondent (the plaintiff in the suit) was decreed with the directions to reinstate the plaintiff in the service ASC forthwith with consequential benefits like salary, wages and allowances etc. The respondent herein had joined army in the Ranks as a clerk in the clerical post (General Duty) in March 1991. He was promoted as "Naik" in the ranks and his name was also recommended for higher departmental promotion through Army Cadet College (in short ACC) to the post of potential service cadet. The respondent qualified the written examination and interview in between the year 1986-87 and was appointed as Service Cadet. He was sent for training to ACC Wing, Indian Military Academy (in short IMA), Dehradun, where he took training for three and a half years and on completion of the training, he was sent for further training to IMA in December 1990. On successful completion of training, he was appointed as Second Lieutenant in the regular Army and was commissioned by the President of India on 14.12.1991.

2. During his training, he was asked to give options of his service and also the

same at SSB interview forms. The respondent opted for service cadre of the army giving reasons that he was above 30 years old and had no technical aptitude for artillery and related fields. However, he was posted as officer into Fighting Arm, Regiment of Artillery form instead of posted in service branch as opted by him. Reluctantly, the respondent joined the Artillery School Deolali on 6.1.1992. He continued to send his representations to the concerned authorities for considering his transfer to service branch of the army vide letters dated 5.2.1992, 11.5.1992 and 4.3.1993.

3. When the respondent was making representations for transfer of his cadre from Arms to Service, he was required to qualify Young Officers Course which he could not succeed. His Commanding Officer favorably recommended his letter dated 4.3.1993 and further recommended by the Formation Commander vide endorsement dated 31.3.1993 for change of cadre of the respondent from Arms to Service. But no action was taken. Vide letter dated 21.8.1993, the respondent was asked by the authorities to submit a detailed case for transfer from Arms to Service as requested which was duly submitted by him. In spite of the details provided by the respondent as well as protests by him for his placement to Platoon Weapons to the Infantry School, Mhow, his request was rejected vide letter dated 10.11.1993.

4. The show cause notice dated 23.9.1994 was served upon the respondent under Army Rule 13A to show cause why he should not be removed from service as he had not qualified examination of Young Officers Course twice within four years of his service which was duly replied vide letter dated 7.10.1994. The respondent was asked to resign or otherwise he would be compulsorily retired vide letter dated 10.2.1995. Since the respondent refused to take voluntarily retirement giving reasons in the communication dated 14.2.1995 and 20.2.1995, he was compulsorily retired vide order dated 27.3.1995 u/s 19 of the Army Act read with Army Rule 13A on payment of pension and gratuity etc. This termination order and the action on the part of the authorities was challenged by the respondent by way of a suit.

5. The appellants before us were duly served with summons for settlement of issues but none appeared on their behalf; despite the fact that opportunities were given to file written statement on different dates. They were ordered to be proceeded ex parte vide order dated 26.7.1999. After considering the evidence and the documents on record, the learned Single Judge was pleased to decree the suit of the respondent vide his judgment and decree dated 5.11.2001.

6. The appellants filed an application under Order 9 Rule 13 CPC for setting aside ex parte decree which was dismissed by the learned Additional District Judge on 21.3.2005. In the present appeal, the appellants have assailed the order of the Additional District Judge dated 21.3.2005 as well as the final judgment dated 5.11.2001 and prayed for setting aside the ex-parte judgment dated 5.11.2001 and also the order rejecting the application of the appellant dated 21.3.2005.

7. Let us first examine the order of the Additional District Judge dated 21.3.2005 whereby she rejected the application of the appellants filed under Order 9 Rule 13 CPC. It is submitted by the learned Counsel for the appellants that appellants were not in the know of the suit filed by the respondent till they received the copy of the final judgment from the respondent on 28.12.2001.

It was on receipt of this judgment that the Government counsel was contacted who inspected the record on 9.1.2002 and since the process was not served on MS Branch, the appellants could not know of the filing of the present suit and Therefore could not defend it. Immediately, after coming to know of the ex parte judgment and order, they moved an application under Order 9 Rule 13 CPC. Learned Counsel for the respondent has refuted that the appellants were not in the know of the pendency of the suit filed him. He submits that summons were duly served and number of opportunities were granted for filing the written statement despite the fact that none was appearing on behalf of the appellants (defendants in the suit). Therefore, the Court rightly proceeded ex parte. The application was time barred as it had been filed after 30 days of passing of the decree and Therefore, was not sustainable.

8. After perusal of the order of the learned Additional District Judge, we agree with the findings given by her. The suit was filed by the respondent in July 1998. Since thereafter defendants were sent number of summons on different dates. As per the record, they were reported to have been served for 2.12.1998 but non appeared. The learned Single Judge granted opportunities to file written statement on 2.12.1998 and 3.3.1999 and finally on 22.3.1999 cost was also imposed upon the appellants. Neither the written statement was filed nor cost was paid. Finally, on 26.7.1999, the appellants were proceeded ex parte.

9. Despite the fact that the appellants were proceeded ex parte, vide order dated 1.10.1999, to ensure complete justice fresh steps were ordered to be taken for service on the respondent. Despite service of notice of default on the Standing Counsel of Union of India, none appeared on 16.11.1999. Finally, on completion of trial ex parte the judgment and decree dated 5.11.2001 was passed against the appellants.

10. To say that the summons should have been served upon the MS branch of the appellants is not acceptable as the summons were served on Chief of Army Staff and Ministry of defense which fact is established from acknowledgment due cards duly registered for the Chief of Army Staff and Ministry of defense and received back in the registry of this Court. Even the summons sent through the process server were also served upon the appellants in September 1998. It is pertinent to mention here that the standing counsel for the Government of India had inspected the record on 2.11.1999. Despite this the appellants did not care to appear and contest the suit. Therefore, we fully agree with the observations of the learned Additional District Judge which are:

As such, again on 16.11.1999, the defendant was ordered to be proceeded ex

pate. The record reveals that even the standing counsel for the defendant had inspected the file on 02.11.1999. Despite that, no appearance was put. Under the circumstances, it becomes clear that despite due service, none appeared for the defendant without any satisfactory Explanation. It is alleged in the application that even the standing counsel never intimated the concerned department of the notice. However, no such affidavit of the advocate has been placed on record. Under the circumstances, the defendant has failed to show that they were not duly served with the summons.

11. The appellants have tried to allege that they came to know of the judgment and decree only when they received the copy of the judgment and decree on 28.12.2001 from the plaintiff. From the letter produced on the record under acknowledgment of the respondent it is clear that copy of the judgment was duly delivered to the Ministry of defense on 19.12.2001. Even the copy of the judgment sent to the department by post was also received by the appellants on 21.12.2001 as per the acknowledgment due. Therefore, the learned ADJ rightly rejected the plea of the appellants that they came to know about the judgment only on 28.12.2001. It is significant to say here that though the appellants have taken a plea that summons were not served upon the MS branch of the appellants, they could not know of the pendency of the suit but they did acknowledge that they received the copy of the judgment served by the plaintiff on the appellants though it was never sent to MS branch of the appellants. Thus it is obvious that the appellants after coming to know of the filing of the suit and after service of summons did not take interest to contest the suit. Therefore, delay in filing the application under Order 9 Rule 13 CPC being without merit was rightly dismissed. We do not find any reasons to interfere in the order of the learned Additional District Judge.

12. Coming to the merits of the case, the respondent challenged the validity of the show cause notice under Army Rule 13A as it had not been issued by Chief of Army Staff but by an officer of the Rank of Colonel. The respondent also challenged the order of compulsory retirement on similar grounds as it was not issued by the Chief of Army Staff and was against the rules. Learned Counsel for the appellants argued that even the rules shown to the Court and relied upon by the respondents were not in enforce at the relevant time as Rule 13A had already been amended and as per the rule, besides the Chief of Army Staff, Military Secretary is also empowered to issue show cause notice for compulsory retirement of an officer.

13. Rule 13A of the Army Rules, 1954 as amended, reads as follows:

13A. Termination of service of an officer by the Central Government on his failure to qualify at an examination or course.--(1) When an officer does not appear at or, having appeared fails to qualify, at the retention examination or promotion examination or any other basic course or examination within the time or extended time specified in respect of that examination or course, the Chief of the Army Staff [or the Military Secretary] shall call upon the officer to show cause

why he should not be compulsorily retired or removed from the service.

(2) In the event of the Explanation being considered by the Chief of the Army Staff [or the Military Secretary] to be unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the officer's Explanation and the recommendation of the Chief of the Army Staff [or the Military Secretary] as to whether the officer should be--

(a) called upon to retire; or

(b) called upon to resign.

(3) The Central Government, after considering the Explanation, if any, of the officer and the recommendation of the Chief of the Army Staff [or the Military Secretary] may call upon the officer to retire or resign, and on his refusing to do so, the officer may be compulsorily retired or removed from the service on pension or gratuity, if any, admissible to him.

14. Bare perusal of the provisions clearly indicate that when an officer fails to appear or does not qualify retention examination or promotion examination or any other basic course of examination within the time or extended time specified in respect of that examination or course, it is only the Chief of Army Staff or the Military Secretary who can call upon the said officer to show cause why he should not be compulsorily retired or removed from the service. On receipt of Explanation which is to be considered by the Chief of Army Staff or the Military Secretary as the case may be, if found to be unsatisfactory, the matter has to be sent to the Central Government together with the Officer's Explanation and the recommendations of the Chief of Army Staff or Military Secretary to decide if the officer should be called upon to retire or to resign. It is for the Central Government to consider the Explanation of the officer and the recommendation of the Chief of the Army Staff or the Military Secretary, and decide whether to call upon the officer to retire or resign, and on his refusing to do so the officer may be compulsorily retired or removed from the service on payment of pension or gratuity, if any, admissible to him.

15. Coming to the present case, the respondent H.C. Chandel was served with the show cause notice dated 23.9.1994 under Army Rule 13A with a covering letter dated 26.9.1994. This letter is signed by Rajiv Sharma, Colonel. In this show cause notice respondent was called upon to submit his written reply within fifteen days. This show cause notice is signed by I.K. Koshy, Colonel, MS 8 for Military Secretary. Thus, it is obvious that this show cause notice was not served upon the respondent either by the Chief of Army Staff or by the Military Secretary. Appellants could not have given effect to a show cause notice issued by a person who had no authority to do the same. However, this notice was duly replied by the respondent. Therefore, it cannot be said that the show cause notice dated 23.9.1994 sent to the respondent was in accordance with the Army Rule 13A as it is invalid and against the rules.

16. After considering the recommendations on behalf of the Military Secretary, the Government of India issued an order dated 3.2.1999 asking the Chief of Army Staff to call upon the respondent to seek voluntary retirement and in case of his refusal he should be compulsorily retired on payment of pension and gratuity. This order was duly communicated to the respondent. Even the compulsory retirement letter dated 27.3.1995 was signed and issued by J.K. Sharma, Civilian Staff Officer, DANS/Premature Retirement for Military Secretary. Mr. J.K. Sharma also signed this letter for and on behalf of Military Secretary. This letter is neither signed by the Chief of Army Staff or by the Military Secretary which is in complete violation of Army Rule 13A. However, respondent refused to take voluntary retirement and again requested the department to consider his representation favorably and transfer him from Arms to Service.

17. In the case of Government of India, rep. by Secretary, Ministry of defense, New Delhi and Ors. v. Captain H.R. Singha 1994 (7) SLR 305, the Division Bench of the Andhra Pradesh High Court considered the principles and the provisions of Rule 13A of the Army Rules. It was observed:

A reading of Rule 13-A of the rules, as extracted above, would show a two tier method for effecting retirement of an Officer on the ground of his having failed to pass the promotion examination. At the first stage, the Chief of the Army Staff is mandatorily required to issue a show cause notice to the Officer as to why he should not be compulsorily retired or removed from service. If an Explanation is submitted by the Officer, it is to be considered by the Chief of the Army Staff, which, if found unsatisfactory, he shall report the matter to the Central Government for orders along with his own recommendation, which is to be either to call upon the Officer to retire or to call upon him to resign. It is to be noticed that such an action has to be taken by the Chief of the Army Staff only if he considers the Explanation of the officer unsatisfactory which means that he has also the discretion, if he is otherwise satisfied with the Explanation to drop the proceedings. If however the recommendation is made to the Central Government, they are to first consider the Explanation along with the recommendation and may call upon the officer to retire or resign. If the Officer refuses to comply with that direction, he may be retired compulsorily or removed on payment of pension and gratuity, as may be admissible to him. The consideration by the Central Government, hence, is at two stages. The first being on receiving the recommendation from the Chief of the Army Staff where the Explanation of the officer is also taken into account and Central Government makes up its mind as to whether to accept the recommendation or not. If the recommendation is accepted, the matter is to be dropped. On the contrary, if the recommendation is accepted, direction is to be issued to the Officer to submit papers either for retirement or for resignation. That is the end of the first stage. if the Officer does not comply with the direction and refuses, the Government may pass an order either retiring him or removing him from service. The refusal of the Officer may be either express by his communicating as such or even by his silence. But if while refusing to comply with the direction, the officer brings to the

notice of the Central Government facts justifying his refusal and pleading as to why he should be retained in service, it is open to the Central Government to consider that and decide as to whether the ultimate order of retirement or removal is to be passed.

It was further observed:

The above reading of the provisions of Clause (3) of Rule 13-A is also in consonance with the principles of natural justice. Rules of natural justice are not only sacrosanct but are also to be read as of in-built provisions of all statutes even if their compliance is not expressly provided for. The only exception to observance of natural justice in any State action either in compliance of the statutory provision or otherwise is where it has been excluded expressly or implicitly. It is for such reason that the principles of audi alteram partem is the unwritten law of all administrative actions subject to its exclusion by express words or by necessary implication. Hence so far as the second part of Sub-rule (3) is concerned, the observance of the principles of natural justice before actually passing the order of compulsory retirement or removal is a necessary postulate.

18. In Capt. Virendra Kumar v. Union of India 1981 SC 947, the Supreme Court while interpreting Rule 15A of the Army Rule, 1954, which is identical to Rule 13A before us, held that these rules lay down the procedural basis and prescribe a certain procedure which must be followed. It is for the Chief of the Army Staff who has to satisfy himself that the officer is unfit to be retained in service. Such a satisfaction is not purely subjective and only on formation of opinion that Chief of Army Staff is required to proceed further. Once the Chief of Army Staff finds the Explanation of the officer unsatisfactory, he has to give opportunity to the concerned officer to make a representation may be to the Central Government. If the basic procedure is not adhered to by the top officials of the service, while terminating or removing him from the service, such an illegal order if enforced is likely to create lawlessness in the defense force which is a grave risk. (Also referred to by the learned Single Judge)

19. The learned Single Judge considering the validity and legality of the show cause notice rightly observed as follows:

There is no gainsaying the fact that wherever power is conferred upon a particular person it cannot be transferred or usurped by any other functionary unless it is provided under the rules. If a particular authority is required to call for the Explanation of an officer or employee and make his recommendations for his removal from service that authority or person alone has a right to make such recommendations after recording his non-satisfaction. Even delegation by such an authority to a lower functionary is not permissible if the rules do not vest such a power in the said authority. Merely because a person vested with the authority to call Explanation or recommend removal or compulsory retirement happens to be top brass does not mean that he has inherent powers to or can suo motu

delegate his authority to a lower functionary

Thus if any act either in the form of calling upon the personnel to show cause as to why he should not be compulsorily retired or removed from service is done by any other person or authority than the one prescribed under the rules, such an act suffers from vice of illegality as well as irregularity on account of non-compliance of the mandate of the rules as the procedure set out in the rule has to be followed in letter and spirit.?

20. As discussed above, the show cause notice and the termination notice were neither issued nor signed by the Chief of Army Staff or Military Secretary for that matter. Therefore, there is apparent clear violation of Army Rule 13A which renders the order of removal as invalid.

21. The services of the respondent were terminated because he failed to clear Young Officer's Course examination twice within four years as was required. Grievance of the respondent is justified when he claimed that he made number of representations to the department after his selection to be posted as service cadet when he qualified the written test. Initially he was in the army in the Ranks on clerical post while under training and even on completion of training he had given an option for service cadre but, he was given army cadre though he was fit for the service according to his temperament and also on his various representations strongly recommended by an Commanding Officer for his transfer from Arms to the Service. Instead of considering his representations, the appellants decided to proceed with the show cause notice and compulsorily retired the respondent. The respondent has shown few cases of discrimination where the officers despite having failed to qualify Young Officer's Course were retained in the service. This discrimination is in violation of principles of natural justice.

22. Thus, we are in consonance with the observations of the learned Single Judge given in his judgment dated 5.11.2001. There is no illegality or infirmity in the said judgment and decree. Therefore, we find no merits in this appeal which is accordingly dismissed.