

(2015) 05 JH CK 0067

In the Jharkhand High Court

Case No : Writ Petition (S) No. 7676 of 2006

Upendra Kumar Upadhayay

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 22-05-2015

Acts Referred:

Citation : (2015) 3 JLJR 335

Hon'ble Judges : Rongon Mukhopadhyay, J

Bench : Single Bench

**Advocate : Sanjay Kumar Dwivedi, for the Appellant; J.P. Gupta, A.S.G.I.,
Advocates for the Respondent**

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J.—The present writ application has been filed challenging the order dated 23.08.2006, by virtue of which the discharge of the petitioner from service has been approved from Army Low Medical Category Personnel to be made effective from 31.01.2007 as also for a direction upon the respondents to superannuate the petitioner on the due date and not on 31.01.2007.

2. The brief facts leading to the present writ application is that the petitioner was posted as Naik CST No. 6929245A in 23 Infantry Division Ordinance Unit. The petitioner was treated for Bronchial Asthma and as per the opinion of the Classified Specialist Medicine and Chest Physician of Medical Hospital, Namkum dated 21.11.2005, it was indicated that Bronchial Asthma of the petitioner was under control and he was recommended to be put in Med Cat P2(P) and that the petitioner be excused from night duty in winter season. A show cause notice dated 7.7.2006 was issued by the Commanding Officer, wherein the petitioner was directed to show cause as to why he should not be discharged from service under the provisions of the Army Rule 13 (3) item iii(v) for being under Low Medical Category P-2(Permt.) Reply to the show cause duly followed on 11.07.2006, in which various grounds were taken by the petitioner and a request

was made that the petitioner due to medical disability be exempted from standing duties and standing sentry duty. By virtue of the letter dated 23.08.2006, approval was given for discharge of the petitioner under the provisions of Army Rule 13(3)(iii)(v) and that the same shall take effect from 31.01.2007. The petitioner was sent for Invaliding Medical Board (IMB) but it was indicated in hospital discharge slip that since IMB is a right of medical authority, the petitioner was sent back to the unit. The petitioner being aggrieved by issuance of letter dated 23.08.2006, by which he was discharged from service has preferred the present writ application.

3. Heard Mr. S.K. Dwivedi, the learned counsel for the petitioner and Mr. Pratyush Kumar, the learned Central Government Standing Counsel.

4. Mr. S.K. Dwivedi, the learned counsel for the petitioner, has submitted that the letter dated 23.08.2006, which is under challenge in the present writ application has been issued dehors the provision of Army Rules. It has been submitted that the authorities have been empowered to authorize discharge under the provisions of Rule 13 of Army Rules, 1954 and that the respondents have bypassed the provisions of Rule 13(3)(iii), which require that a person enrolled under the Act, who have been attested, may be discharged from service after being found medically unfit and which action is to be carried out only on the recommendation of an Invaliding Board. It has been submitted that the respondents had taken resort to Rule 13(3)(v) by giving the case the colour of falling under all other classes of discharge, which excludes the other conditions including medical unfitness since there was no recommendation on the part of Invaliding Board discharging the petitioner from service. It has, thus, been submitted that the respondents themselves have not followed the provisions of Army Rules while discharging the petitioner from service.

5. In this context, learned counsel for the petitioner has referred to the case of Union of India (UOI) and Others Vs. Rajpal Singh, (2008) 12 JT 476 : (2008) 14 SCALE 591 : (2009) 1 SCC 216 : (2009) 1 SCC(L&S) 92 : (2009) 3 SLJ 71 : (2009) 3 SLR 117 .

6. Mr. Pratyush Kumar, learned Central Government Standing Counsel, on the other hand, has supported the impugned letter dated 23.08.2006 and has submitted that clause 5 of Rule 13(3)(iii) of Army Rules has been invoked, which specifies all other classes of discharge. Learned counsel for the respondents has urged that it is to be borne in mind that the show cause, which has been submitted by the petitioner itself smacks of indisciplined attitude on the part of the petitioner as refusal of the petitioner from doing standing duty can be gathered from the show cause reply submitted by him and in such circumstances, it was not necessary for the respondents to discharge the petitioner on the ground of medical disability. Learned counsel for the respondents further submits that the duties, which are to be assigned to the petitioner, are not as per his choice and any stand taken by the petitioner contrary to the orders with respect to performance of his duty can be treated to

be an indisciplined approach, which has properly been dealt with in terms of the provisions of Army Rules.

7. The moot question, which arises in the present writ application is whether the action of the respondents in discharging the petitioner from service by resorting to Rule 13(3)(iii)(v) can be said to be a camouflage in order to override/circumvent the refusal of the Invaliding Medical Board to recommend discharge of the petitioner from service.

8. Rule 13 of the Army Rules is followed by a table, which gives the category of the Army Personnel, which comes in separate columns denotes Category of Army Personnels, the grounds of discharge, the competent authority to authorize discharge and the manner of discharge. In the context of the present case, it would be apt to refer to the provisions, which are applicable in the present case and which is quoted hereunder:

"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 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 warrant 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 commissioned officer and warrant officers of Remounts, Veterinary and Farms, Corps, the "Commanding Officer" means the Director Remounts, Veterinary and Farms."

9. The table, which has been appended to Rule 13 of Army Rules, 1954 and which has been quoted hereinabove, is with respect to the persons enrolled under the Act, who have been attested, which includes the petitioner also. The grounds of discharge in the table concerning the petitioner enumerate four ground and a fifth ground has also been mentioned, which excludes the other four grounds. The respondents have invoked clause 5 so as to suggest that the petitioner does not come within the other four grounds of discharge. Learned Central Government Standing Counsel has stressed much on the fact that prior to discharge, an opportunity to show cause against the contemplated discharge

had been issued to the petitioner, which fulfills the requirement of natural justice and which was the only criteria before discharging a personnel under clause 5. The contention of learned counsel for the respondents would have been appreciated had the case of the petitioner come within the zone as contemplated under Rule 13(3)(iii)(v). The entire case rests upon the medical fitness/unfitness of the petitioner. It has been categorically opined by the Classified Specialist Medicine and Chest Physician of Medical Hospital, Namkum, when the petitioner was treated for Bronchial Asthma to the effect that Bronchial Asthma was under control and he was recommended to be kept in Med Cat P2(P). The placement of the petitioner in Low Medical Category in P-2 (Permt) galvanized the respondents in issuing him a show cause notice, which although was issued under the provisions of Rule 13(3)(iii)(v) but at the same breath, it referred to Low Medical Category, which was fixed for the petitioner. The show cause reply submitted by the petitioner mentions about an exemption, which has been sought for by him and the statements, which have been made in the show cause, do not and cannot by any stretch of imagination make the petitioner liable for insubordination or indiscipline. Even the subsequent event after issuance of the letter of discharge dated 23.08.2006 strengthens the claim of the petitioner inasmuch as although the petitioner was sent to the Invaliding Medical Board but he was sent back to the unit, which is apparent from the hospital discharge slip. If the respondents had indeed in their true letter and spirit resorted to Rule 13(3)(iii)(v), there was no occasion for them to send the petitioner to the Invaliding Medical Board.

10. In the case of Union of India (supra) the Hon"ble Supreme Court was considering the question whether holding of an Invaliding Board is a condition precedent for discharge of a Junior Commissioned Officer (JCO) on account of Low Medical Category. The facts of the case under reference was that the army personnel, who was the Junior Commissioned Officer, while in service was placed in a Low Medical Category and subsequent thereto he was placed in a Low Medical Category (Permt.) for a period of two years and thereafter by issuing a show cause notice and on the recommendation of a "Release Medical Board", he was discharged. The order of discharge was challenged before the Hon"ble High Court of Delhi, which came to the conclusion that discharge of the petitioner without holding an Invaliding Board in terms of Rule 13(3)(i)(ii) was illegal. In appeal, the Hon"ble Supreme Court held as follows:-

"24. It is plain that a discharge on the ground of having been found "medically unfit for further service" is specifically dealt with in Clause (I)(ii) of the Table, which stipulates that discharge in such a case is to be carried out only on the recommendation of the Invaliding Board. It is a cardinal principle of interpretation of a statute that only those cases or situations can be covered under a residual head, which are not covered under a specific head. It is, therefore, clear that only those cases of discharge would fall within the ambit of the residual head viz. I(iii) which are not covered under the preceding specific heads. In other words, if a JCO is to be discharged from the service on the

ground of "medically unfit for further service", irrespective of the fact whether he is or was in a low medical category, his order of discharge can be made only on the recommendation of an Invaliding Board. The said Rule being clear and unambiguous is capable of only this interpretation and no other.

27. In view of the foregoing interpretation of the relevant rule, we are in complete agreement with the High Court that where a JCO is sought to be discharged on the ground of medical unfitness for further service, his case has to be dealt with strictly in accordance with the procedure contemplated in Clause I(ii) in Column 2 of the Table appended to Rule 13. The Rule prescribes a particular procedure for discharge of a JCO on account of medical unfitness, which must be followed and, therefore, any order of discharge passed without subjecting him to the Invaliding Board would fall foul of the said statutory rule.

32. For the foregoing reasons, we wholly agree with the reasoning and the conclusion of the High Court that the discharge of the respondent was not in accordance with the prescribed procedure and was, therefore, illegal. We do not find any illegality or infirmity in the impugned judgment/order, warranting our interference. The appeal, being devoid of any merit, is dismissed accordingly with costs."

11. In the present case, although the petitioner has been discharged and it has not been said in so many words that the petitioner has been discharged on account of Low Medical Category but as has been discussed above, on lifting the veil, it would clearly transpire that the petitioner was discharged from service on account of his being categorized in Low Medical Category P-2 (Permt.) and for which the petitioner was also sent to the Invaliding Board, which on the other hand sent back the petitioner to the Unit. Therefore, it can be deduced that the petitioner was being acted upon in terms of Rule 13(3)(iii) but in absence of recommendation of discharge by the Invaliding Board, the respondents took resort to Rule 13(3)(iii)(v) by excluding clause 3, which related to the medical unfitness for further service.

12. In such circumstances, the impugned order dated 23.08.2006 is not sustainable and accordingly the same is quashed and set aside. Consequently, the petitioner shall be treated to have remained in service till the date of his attaining superannuation and shall be entitled to all consequential benefits, which as a natural corollary follows the order of reinstatement.

13. This application is accordingly allowed.