

(2000) 10 DEL CK 0012

In the Delhi High Court

Case No : Civil Misc No. 4043 of 2000 in Civil Writ No. 2609 of 2000

A.K. Sharma (Corporal)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-10-2000

Acts Referred:

Citation : (2000) 10 DEL CK 0012

Hon'ble Judges : N.G. Nandi, J

Bench : Single Bench

Advocate : Mr. Harish Uppal, for the Appellant; Mr. A.K. Bhardwaj, for the Respondent

Judgement

N.G. Nandi, J.—In the writ petition under Article 226 of the Constitution of India the petitioner prays: (i) promote the petitioner to the rank held by his contemporaries with effect from the date the contemporaries were granted the ranks of Sergeant and for Junior Warrant Officer (JWO); (ii) grant waiver of the requirement of passing promotion examinations; (iii) set aside AFRO letter No. RO2802/3/RW (Extn.) dt. 29.9.99 in respect of Petitioner, and grant extension in service of three years to pass the promotion examinations so as to fully comply the SOC granted by the Govt of India granting rank, by this C.M. the petitioner prays for the stay of the order of discharge.

2. The say of the petitioner is that the petitioner was enrolled in Indian Air force as Airman as Airframe Fitter in October 1980; that the petitioner in 1987 passed Sergeant education test Part-I; that on 31.8.88 alleged incident of beating took place at Tezpur and the petitioner taken in close custody; that the petitioner was tried by the District Court Martial and awarded punishment of "reduced to rank", "dismissed from service" and "6 months R.I.". In January 1989 the petitioner filed a petition u/s 161(1) of the Air force Act, 1950 (hereinafter referred to as "the Act") and the same was dismissed without speaking order. In January 1989, the petitioner filed Confirmation Petition u/s 161(2) of the Act to the Chief of Air Staff. In March 1989 the petitioner filed civil writ petition in Gauhati High Court;

that on 20.3.1995 the writ petition, being C.W.P. No. 355/89, filed by the petitioner came to be allowed by Gauhati High Court and the court martial of the petitioner was quashed with back wages; that on 31.7.1997 writ appeal No.196/95 filed before Gauhati High Court by the Union of India and Another was disposed of by asking the appellants to dispose of the statutory appeal u/s 161(2) of the Act within seven weeks; that on 22.9.97 letter from Air Headquarters, enclosing the order of the Chief of Air Staff allowing the petitioner's petition u/s 161(2) of the Act setting aside the finding and sentence of the court martial and relieving him of all consequences of the trial came to be received by the petitioner; that in March-September 1999 the petitioner passed Part-II Sergeant Trade Test and only one more test left, which shall be held in March-September 2000 cycle and the result will be declared in December 2000. The petitioner applied to appear in the said test; that the petitioner requested for the waiver of the clearance of the trade test and also for extension of his service so as to enable him to clear the remaining test; that vide communication dated 14.10.99 the Station Headquarters refused extension and gave the date as 2.10.2000; that trade test Part-III of Sergeant Final Part shall be held in September 2000 and result will be declared in December 2000 and the discharge date for the petitioner has come as 2.10.2000 without taking into consideration that for 9 years the petitioner suffered for no fault of his as the Chief of Air Staff did not reply to his petition u/s 161(2) for over eight years whereas the Chief of Air Staff is required to reply and dispose of the said petition within 3 months or reasonable time. Hence this petition for waiver of requirement of passing examination and/or extension of service for granting opportunity to pass the examination and for exemption from requirement of passing promotion examination.

3. It is submitted by Mr. Uppal, learned counsel for the petitioner that Annexure P-1A (page 19) suggests that the DCM proceedings against the petitioner has been set aside by the Chief of Air Staff vide his order dated 16.9.97 and that the petitioner is relieved of all consequences of the trial and the petitioner, on reinstatement would also be entitled to all consequential benefits, as if he was never tried by the DCM; that as per para 4(C) of Annexure P-2A (page 21), the promotions and ranks and pay as would have been applicable. Referring to the proposal in Annexure 2A it has been stated that the petitioner's promotion aspected; that in view of this the petitioner stands promoted to the higher rank; that the Chief of Air Staff took eight years in deciding the petition u/s 161(2) of the Act though the petition was required to be disposed of within 3 months or reasonable time and that the time taken in deciding the said petition should not be to the detriment of the petitioner and the respondent can not take advantage of its own wrong by not waiving the requirement of clearing the promotion examination or the petitioner be granted extension of service to enable him clear the promotion examination.

It is submitted by Mr. Bhardwaj, learned counsel for the respondents that the extension of service can not be claimed as of right nor promotion a right of

petitioner; that for both the suitability of the employee has to be seen; that there can not be a waiver of condition of clearing trade test/promotion examination; that in 1997 and in 1998 the petitioner had the opportunity to appear and clear the trade test but he did not avail this opportunity and that the time taken in deciding the petition u/s. 161(2) is not relevant and that the petitioner did not qualify the examinations.

4. In the case of Jwo Shankar Vs. Union of India & Ors. , the Division Bench of this Court in L.P.A. NO.416 OF 1998 in paragraph 7 has observed that the extension in service is not as of right.

5. In paragraph 8 of the counter it has been stated by the respondents that as per the existing policy, the sergeant promotion examination consists of three parts. An airman can appear and pass part I and II of Sergeant Promotion Examination together. However he can appear in Part-III examination only after passing his Part-I and II examinations that the petitioner had failed to pass part I and II examinations together during August 1987. Also he failed to pass the same even after two years of his reinstatement. Annexure R-7 dated 19.3.1999 is the reply to the petitioner's application. It is suggested there from that the petitioner's said application was duly considered by the respondent. It is also suggested that an Airman will be promoted to the rank of sergeant on passing examination and he will be granted all his dues with effect from the date his contemporaries were promoted and that after he is promoted to the rank of sergeant he will have to pass JWO promotion examination.

6. Annexure-2 is the copy of the Air force Order No.11 of 1999, which deals with the extension of airman. Perusal of the same suggests that the said order stipulates that an airman who is consistent in his over all service may be granted extension of engagement which is governed by the principle stated therein. Clause (d) thereof deals with the passing of the promotion examination whereas clause (e) deals with the conduct records.

It will be seen that the petitioner applied for grant of extension for a period of 6 years w.e.f. 3.10.2000 which was not approved in terms of the Air force Order No.11 of 1998 and that he had incurred one red ink entry in the conduct sheet on account of using unfair means in sergeant promotion examination Part-III, held on 9.2.1998 at 11 Wing, Air force and also had not passed his sergeant promotion examination; that passing of promotion examination is one of the eligibility criterion for the promotion and that the petitioner was not considered for promotion to the next higher rank i.e. sergeant with effect from the date his contemporaries were promoted on passing the last part of sergeant promotion examination.

7. Annexure P-3 dated 8.4.99 also suggests that an airman can be promoted to the rank of sergeant on passing of the examination and he will be granted all his dues with effect from the date his contemporaries were promoted to the rank of sergeant he has to pass JWO promotion examination and on passing JWO

Promotion Examination he will be considered for promotion to the rank of JWO with effect from the date his contemporaries have been promoted. This makes clear that the petitioner can be promoted to the post of sergeant on passing examination and after he is promoted to the post of sergeant he will have to pass the JWO promotion examination and on passing JWO promotion examination he will be considered for promotion with effect from the date his contemporaries have been promoted. Thus passing of promotion examination is one of the criterion for promotion to the higher rank. Admittedly the petitioner has not passed the requisite promotion examination. As far as the extension in service to enable the petitioner to clear the promotion examination is concerned, it does not prima-facie appear acceptable since firstly, there can not be extension in service as of right and that too for enabling the petitioner to clear the promotion examination when he had the opportunity after he was reinstated in service pursuant to the order dated 16.9.97 in the petition u/s. 161(2) of the Act by the Chief of Air Staff.

8. In view of the above it prima-facie does not appear that the petitioner has satisfied the requirement of clauses (d) and (e) of Air force Order No.11 of 1999 as far as the extension is concerned, which again can not be claimed as of right, as pointed out above.

9. The above discussion would reveal that the petitioner is not entitled to the relief in this C.M. as regards the stay of operation of the discharge order, which would be dependent on the extension, if any, in service.

10. None of the above observations shall be construed to mean an expression of opinion on the merits of the contentions of the parties. The observations are restricted only for the purpose of deciding this interlocutory application.

11. In the result the application, being devoid of merits, fails.