

(1999) 05 AHC CK 0069

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41753 of 1998

Brahm Dutt Sharma

APPELLANT

Vs

Commanding Officer, Ist U.P. Bt., N.C.C. and others

RESPONDENT

Date of Decision : 17-05-1999

Acts Referred:

Constitution of India, 1950 — Article 226
National Cadets Corps Act, 1948 — Section 13, 13(2), 13(3)
National Cadets Corps Rules, 1948 — Rule 22, 28, 28(2)

Citation : (1999) 3 AWC 2452

Hon'ble Judges : D.K. Sethi, J

Bench : Single Bench

Advocate : N.K. Pandey, for the Appellant; S.C. and Uma Kant, for the Respondent

Judgement

D.K. Sethi, J.—By an order dated 5th September, 1998, the petitioner has been relinquished of his Commission. This order has since been challenged in this writ petition. Mr. N.K. Pandey, learned counsel for the petitioner contends that the petitioner was eligible for promotion to the post next but despite his willingness, he has not been allowed to attend the refresher course and, thereby, he has been denied of his promotion. On the other hand, he has been relinquished from the Commission illegally. Therefore, the order contained in Annexure-1 to the writ petition should be set aside. He further contends that this order was passed since the petitioner had not returned a sum of Rs. 2,500 within 7th November, 1997, though it was so refunded on 9th November, 1997.

2. Mr. Uma Kant, learned counsel for the respondents on the other hand contended that the petitioner did not perform his duties and that he did not attend the refresher course and had also informed by his letter dated 20th October, 1997, that he was unable to attend the third refresher course. Therefore, the petitioner cannot get any relief out of this writ petition.

3. I have heard both the learned counsel at length.

4. Before the order of relinquishment was passed, disciplinary proceeding was held against the petitioner and the finding thereof was recorded in the letter dated 11th November, 1998, where it was found that the petitioner was advanced some money and the receipt thereof was signed by his wife and not by him which was irregular and against the Government Orders. He was again directed to refund the said amount which was advanced to him on 26th October, 1997 by 7th November, 1997, by a letter dated 5th November, 1997. But the money was refunded on 9th November, 1997 and thus he had misused the said amount for the period between 26th October, 1997 till 9th November, 1997. It was also found that the petitioner did not attend the refresher course. On these grounds, he was asked to reply by 20th November, 1997, The petitioner had replied through his reply dated 29th November, 1997. Thus, it appears that he did not reply within the time but had replied beyond the time.

In the counter-affidavit, it has been pointed out that the petitioner was asked to attend the refresher course to be held between 19th June, 1995 and 18th July, 1995, by an order dated 15th April, 1995, indicating that he was to be promoted as his promotion was due on 14th September, 1996. Admittedly, the petitioner did not attend this refresher course. Again by an order dated 29th March, 1996, the petitioner was asked to attend the refresher course between 18th July, 1996 and 6th August, 1996, indicating that his promotion was due on 14th September, 1996. Admittedly, the petitioner did not attend this refresher course as well. By an order dated 3rd October, 1997, it was pointed out that one vacancy was allotted to the petitioner and another to one Rajendra Singh on refresher course between 27th October, 1997 till 25th November, 1997. Admittedly, the petitioner did not attend this refresher course as well.

In the writ petition, the petitioner had made out a case that he had attended his first refresher course between 28th April, 1986 till 29th May, 1986 and second refresher course between May, 1989 and June, 1989. Despite three opportunities given, the petitioner did not attend the third refresher course successively in terms of order dated 15th April, 1995 ; 29th March, 1997 and 3rd October, 1997, which are Annexures C.A. 3, C.A. 4 and C.A. 5 respectively to the counter-affidavit. In his letter dated 20th October, 1997, the petitioner had informed the Commanding Officer that due to severe economic crises, the petitioner was unable to attend the third refresher course pursuant to the order dated 3rd October, 1997. He also informed that he was not feeling well and had been somehow attending his regular duties. Thus, he has expressed his inability to attend the third refresher course even on 20th October, 1997.

Admittedly, such promotion is available only when third refresher course is completed. The petitioner was already promoted to the post of First Officer on completion of his second refresher course some times in 1990. The next promotion was due in the post of Chief Officer, which is available only on successful completion of third refresher course to be attended during 10 to 13 years of service and completion of 15 years of reckonable service. Admittedly, in

the present case, as contended in paragraph 23 of the writ petition, the petitioner was appointed as third officer on 12th September, 1981. Thus, he would have completed 15 years" of service on 12th September, 1996. His third refresher course was due between 1992 and 1994. However, he was asked to attend the refresher course in 1995, 1996 and 1997. Admittedly, the petitioner did not attend the refresher course in 1995 and 1996 and informed his inability to attend the same course in 1997. Thus he has not fulfilled the requisite qualification for attending the third refresher course in order to advance his claim for being considered for promotion to the post of Chief Officer. When the petitioner himself had avoided to attend the refresher course and acquire qualification, he cannot claim to have any legal right for being considered for promotion.

5. Then again, Rule 22 of the National Cadet Corps Rules, 1948, framed u/s 13 of the National Cadet Corps Act, 1948, provides that a person commissioned in the National Cadet Corps shall hold that Commission as an officer for a total period not exceeding 15 years or until he reaches 45 years of age, whichever is earlier, when he shall be discharged from the Corps. Provided further if in the opinion of the authority the petitioner continues to be physically fit and it is found necessary or expedient, the period may be extended for a period of two years upto the age of 50 years and beyond the said 15 years" of service.

6. In the present case, since the petitioner did not attend the refresher course successively despite three opportunities and had received the money through his wife and did not utilise the same and ultimately, refunded it after the date fixed, he cannot be deemed to be a person fit to claim extension under the said proviso referred to above.

7. Section 13 of the Act empowers the Central Government to make rules. Sub-section (3) requires laying down of such rules before each House of the Parliament. Following the said procedure, the rules had since been framed. Sub-section (2) of Section 13 prescribes the various purpose for which rules are to be framed. Clause (i) of sub-section (2) deals with removal or discharge of person subject to the Act. Thus, in Rule 22, the period of appointment and discharge has since been provided. As discussed above, Rule 22 prescribes maximum period of 15 years or 45 years, whichever is earlier. In the present case, admittedly, the petitioner in paragraph 25 of the writ petition, contended that he is going to complete 45 years of age during the next academic session. In the affidavit, he has also affirmed his age as 44 years. The affidavit was affirmed in 1998, whereas he had completed 15 years in 1996. Thus, he cannot be expected to continue beyond 15 years unless he is promoted to the post of Chief Officer or his service is extended in terms of the proviso. In the present case, he having completed 15 years in September, 1996, he could not be retained beyond that as soon he failed to attend the refresher course in 1995, 1996 and 1997 and he could not be eligible for promotion to the "post of Chief Officer. Rule 28 provides for discharge on various grounds. His letter dated 20th October, 1997, indicates

that he was not physically fit and he himself admitted that he was somehow attending his duties, from which it is clear that he was also not medically fit. Clause (g) of sub-rule (2) of Rule 28 prescribes that if in the opinion of the competent authority, it is necessary to discharge a person for any other reason, the authority could so discharge.

8. Be that as it may, he could be discharged even under Rule 22 without Rule 28 by reason of completion of 15 years of service on account of non-attendance of the refresher course and not being eligible for promotion to the post of Chief Officer, thus rendering himself ineligible for extension of service by reason of proviso to Rule 22.

9. In order to claim promotion, one has to show that he has a right to be considered. The right to be considered follows eligibility. When eligibility consists of acquisition of a particular qualification through a particular process, a person can claim such right only when he acquires such qualification through such process, in the present case, the petitioner is asking for an opportunity to attend the 3rd refresher course in order to acquire the qualification and eligibility and, therefore, to be considered for promotion. The question for consideration for promotion cannot precede the acquisition of qualification or eligibility. Therefore, the petitioner cannot claim to have a legal right for being considered for promotion without acquiring the qualification or the eligibility. So far as the petitioner's claim for opportunity to attend 3rd refresher course is concerned, as observed earlier he had wasted three chances that came in his way. He himself had shown utter lack of diligence. Sincerity in attending the 3rd refresher course offered to him thrice and the last even after he had crossed the limit of 15 years. A person can claim a legal right or claim to be offered an opportunity of attending the process for acquiring qualification or eligibility criteria only when he shows that he was denied of such opportunity and or that he was deprived of such opportunity and that he was never offered any such "opportunity. Where an opportunity is offered repeatedly and the petitioner on his own volition did not avail of such opportunity repeatedly and had himself indicated his inability to avail of such opportunity after having wasted two other earlier opportunities without explaining the reasons of non-availing such opportunity while forwarding lame excuse for the third one, one cannot expect to claim any legal right for affording an opportunity to attend the 3d refresher course for the fourth time. In the facts, therefore, the petitioner cannot claim any right, when there was no denial of opportunity and opportunity was offered thrice, that he should be given one more opportunity.

10. The writ jurisdiction is discretionary and is exercised only when the petitioner has shown that he was diligent and is not responsible for any delay or laches. In the present case, the petitioner's conduct as discussed above, depicts utter lack of diligence and sincerity making him ineligible to invoke the discretion exercisable in writ jurisdiction.

11. The petitioner himself having been responsible for not attending the

refresher course, he could not claim for being considered for promotion to the post of Chief Officer in absence of requisite qualification. Even if he is allowed for the third refresher course after 1997 after having wasted three chances and crossing the age bar as well as 15 years' reckonable service, he cannot claim to have any legal right to claim eligibility for being considered for the post of Chief Officer in terms of the rules as observed earlier. Thus, it appears that the petitioner is not eligible for being considered for promotion to the post of Chief Officer and there is no infirmity in the impugned order dated 5th September, 1998, contained in Annexure-1 to the writ petition in discharging him or relinquishing him of his Commission.

12. The writ petition, therefore, fails and is, accordingly dismissed, however without cost.