

(2001) 03 DEL CK 0114
In the Delhi High Court
Case No : C.W.No. 1154 of 1999

Capt. Pratap Singh

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 22-03-2001

Acts Referred:

Army Act, 1950 — Section 19
Army Rules, 1954 — Rule 13

Citation : (2001) 03 DEL CK 0114

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Ms. Jyoti Singh, for the Appellant; Ms. Nandini Ramachandran, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Mukundakam Sharma, J.—This writ petition is directed against the order dated 6.1.199 passed by the respondents retiring the petitioner from service upon his failure to successfully clear his promotion examination Part "B" within his 11 years of reckonable service.

2. The petitioner joined the Indian Army on 1.11.1979. He was commissioner into the Indian Army as Second Lieutenant on 14.6.1986 after putting in 7 years and 7 months pre-commission service. In terms of the army orders the due date in the case of the petitioner for passing his promotion examination part "B" without loss of seniority was within 5 years of reckonable service i.e. on or before 14.6.1991 and the last date for the petitioner to clear his promotion examination part "B" with loss of seniority was within 11 years of reckonable service i.e. on or before 14.6.1997. On the ground that the petitioner had not cleared his promotion examination part "B" by 14.6.1997 a show cause notice was issued by the respondents on 11.9.1997 requiring him to show cause as to why he should not be compulsorily retried or removed from service in terms of the provisions of rule 13-A of the Army Rules. On receipt of the said notice the petitioner

submitted his reply on 5.8.1998 and also submitted a statutory complaint dated 3.8.1998. The aforesaid reply submitted by the petitioner as also on the recommendations of the Military Secretary the Central Government in exercise of the powers conferred upon it by section 19 of the Army Act read with Rule 13-A of the Army Rules issued an order on 6.1.1999 directing that the petitioner be retired from service on payment of pension and gratuity, if any, admissible to him. The statutory complaint dated 3.8.1998 filed by the petitioner was also considered and rejected by the respondents on 22.4.1999. Being aggrieved by the same the present petition was preferred by the petitioner.

3. Challenge is made to the aforesaid order by the petitioner on the ground that the impugned order is illegal, arbitrary and without jurisdiction. Counsel appearing for the petitioner during the course of her arguments relied upon the review of the policy on termination of service for failure in promotion examination part "B" issued by the respondents on 24.8.1999. A copy of the said review policy of the respondent dated 24.8.1999 is placed on record which provides that the officer's services would not be terminated due to not passing part "B" examination till 20 years of reckonable service. It was also provided therein that the officers who fail to qualify in promotion examination part "B" and/or "D" on completion of 20 years of reckonable service would be issued show cause notice under Army Rule 13-A for termination of service and their services would be terminated as per provisions of Army Rule 13-A. It is also indicated therein that the aforesaid changes in the provisions would be effective with retrospective effect i.e. from 24.4.1998. Relying on the said review policy the counsel for the petitioner submitted that as per the said policy the services of the petitioner were required to be continued until he completed 20 years of reckonable service. It was also submitted by her that as the petitioner has been deprived for his chances to clear the examination twice due to the fault of the respondents the petitioner should have been given the compensatory chances to clear the promotion examination Part "B" and having not done so the impugned order is liable to be set aside and quashed. During the course of here arguments she laid emphasis on the fact that both in 1991 and 1992 when the petitioner was scheduled to appear in his examination he was ordered to be moved out and was thus unable to prepare for the examination and Therefore, he could not clear the same.

4. Counsel appearing for the respondents however, submitted that the circular relating to the review of the policy issued on 24.8.1999 was not applicable to the case of the petitioner as before the issuance of the said circular the petitioner had incurred the liability to pass his promotion examination Part "B" with loss of seniority i.e. on or before 14.6.1997 in terms of which even the show cause notice was issued to the petitioner under Army Rule 13-A on 11.9.1997. It was submitted that the petitioner's case was covered by paras 12 & 15(a) of Special Army Instructions dated 1.5.1985. Relevant part thereof of on which reliance was placed in reproduced below:

"Promotion Examination Part A and B (Lieutenant to Captain).

12. Eligibility conditions time limit for passing promotion examinations part A and B, penalties, show cause notice and termination of service on account of failing to qualify in these examinations over the specified period are given in Appendix A to this SAI"

"Show Cause Notice" for termination of Service.

15. The service of an officer, who fails to qualify in the specified promotion examination will be terminated under the provisions contained in Army Rule 13-A after serving him with a show cause notice as follows:-

(a) Promotion Examination Part A or B:

(i) Show Cause Notice: Show cause Notice will be served to officers who fail to qualify in these examinations on completion of 11 years reckonable service for officers commissioned before 31st July, 1984 and 9 years reckonable service in case of officers commissioned on or after 31st July, 1984.

(ii) Termination of Service: Service of all officers who fail to qualify in the above examination on completion of 13 years reckonable service for officers commissioned before 31st July, 1984 and 11 years reckonable service in case of officers commissioned on or after 31st July, 1984 will be terminated as per provisions contained in Army Rule 13A."

It was also submitted on behalf of the respondents that the aforesaid policy dated 24.8.1999 is not applicable to the case of the petitioner as the liability of the petitioner to pass the aforesaid examination accrued before issuance of the aforesaid revised policy letter on 24.8.1999 and also because even the show cause notice was issued on 11.9.1997 which was even prior to the effective date of the revised policy. It was also submitted that even the final order of compulsorily retiring the petitioner was passed on 6.6.1999 prior to the issuance of the revised policy letter and thus the case of the petitioner had attained finality. It was also contended by the respondents that the petitioner never made any request either in February, 1991 or February, 1992 that his posting should be deferred as he was scheduled to appear for his examination during the aforesaid period. It was submitted that no documentary evidence has been placed on record and as such the said plea is not available to the petitioner. It was also submitted that the petitioner could have taken the examination at any point of time before the expiry of the 11 years period and having not done so he has incurred the disability in terms of rule 13-A read with the policy.

5. The relevant portion of the Special Army Instructions dated 1.5.1985 have been reproduced above. The same would indicate that the time limit for passing promotion examination Part "A" and "B" should be strictly followed and in the event of non-compliance thereof show cause notice and termination of services on account of failing to qualify in the said examination over a specified period is to follow. It is an admitted fact that the petitioner was commissioned on

14.6.1986 and Therefore, in terms of the extant rule and the policy he was liable to pass the promotion examination part "B" with loss of seniority on or before 14.6.1997 i.e. within 11 years of reckonable service. The petitioner could not pass the promotion examination part "B" till 14.6.1997. The plea that the petitioner could not pass the said examination because of the fact that in 1991 and 1992 when he was to appear in the examination he was moved out by the respondent is also without merit. The petitioner could have appeared in the said examination at any point of time before completion of 11 years of service even assuming that he could not appear in the said examination during the aforesaid two years because he was ordered to move out by the respondents. Even the petitioner could have immediately represented to the respondents to keep the said movement order in abeyance or could have appeared in the said examination at any subsequent point of time. Besides the aforesaid grievance of the petitioner as raised in the present petition, if any, arose in 1991 & 1992 and to rake up an issue of the aforesaid nature after a lapse of about 7 years is not only belated but such plea raised for the first time in the rejoinder only and not being mentioned in the writ petition at all cannot give any leverage to the petitioner.

6. The next issue which is required to be enquired into is whether the case of the petitioner is covered by the policy letter dated 24.8.1999. The said revised policy letter has been made applicable to cases from 24.4.1998. The petitioner had completed 11 years of reckonable service on 14.6.1997 i.e. before 24.4.1998 and since he did not pass in the said examination Part "B" as per the old policy by which he was governed, a show cause notice was issued to him on 11.9.1997 and a final order compulsorily retiring the petitioner had also been passed on 6.6.1999 which is before the issuance of the revised policy letter. The case of the petitioner having reached finality prior to the issuance of the aforesaid revised policy and the said policy having been made applicable to cases on or after 24.4.1998 the case of the petitioner cannot be said to be covered by the said revised policy. The date on which the impugned order was passed against the petitioner retiring him from service, the revised policy was not in existence at all and Therefore, the case of the petitioner was governed by the old policy in terms of which the petitioner was retired from service.

7. My attention was drawn to a decision of the Jammu & Kashmir High Court in the case of Capt. Rajinder Kumar Singh Vs. Union of India, decided on 25.5.2000. In the said judgment the Jammu & Kashmir High Court held that the policy contained in the letter dated 24.4.1999 was not applicable to cases in which final orders had already been passed. The said decision was rendered by the J & K High Court in SWP No. 1761/1997 decided on 25.5.2000. An appeal was taken before the Division Bench of the said Court where the appeal was registered as L.P.A. (SW No. 265/2000). The Division Bench of the J & K High Court upheld the decision of the Single Bench and dismissed the appeal re-confirming the judgment of the learned Single Judge. I respectfully agree with the aforesaid interpretation given by the J & K High Court with regard to the

interpretation of the policy contained in the letter dated 24.4.1999 and I hold that the benefit of the said revised policy could not be extended to the petitioner as his case is not governed by the said policy but is governed by the old policy of the respondents.

8. In the result, I find no merit in this petition and the same stands dismissed.