

(2009) 01 DEL CK 0044

In the Delhi High Court

Case No : Writ Petition (C) No. 1467 of 2002

Capt. Sunil Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Citation : (2009) 156 DLT 386

Hon'ble Judges : Sanjay Kishan Kaul, J;Mool Chand Garg, J

Bench : Division Bench

Advocate : K.C. Mittal, Sumit Babbar and Sujeet Kumar, for the Appellant;
Sanjeev Sachdeva and Preet Pal Singh, S. George, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The petitioner was commissioned as a Short Service Commissioned Officer on 8.3.1997 for a period of five (5) years. The petitioner was attached to the Infantry Unit for a period of three (3) years. The petitioner sustained injuries on 24.4.1998 while returning from his leave and consequent to the injuries sustained was placed in the low medical category on 24.7.1998. The medical treatment of the petitioner continued and it is the case of the petitioner that the injury was attributable to military service. The petitioner was ultimately placed in low medical category (permanent) P1E1.

2. The petitioner was reverted from Infantry to the Army Service Corps on 8.3.2000. It is the case of the petitioner that he applied for grant of Permanent Commission or in the alternative for extension of Short Service Commission on 14.7.2001, which was recommended by his Commanding Officer. A Selection Board was scheduled for 18/19.10.2001 the result of which was announced on 6.12.2001. As per this No. 5 Selection Board, the case of the petitioner was not considered but was placed in the list of cases which were withdrawn for administrative reasons. The petitioner has referred to the fact that in this Selection Board No. 5 there were cases of two officers whose names had been withdrawn earlier but were cleared in this Board.

3. The petitioner claims to be aggrieved by the withdrawal of his name for administrative reasons or insufficient material and pleads that his name should have been put up in the subsequent Board for consideration in the Permanent Commission. However, the case of the petitioner was not considered by any subsequent Selection Board and the petitioner, thus, did not get the opportunity to either be retained for further Short Service Commission or to be permanently absorbed as his initial tenure of Short Service Commission ended on 7.3.2002.

4. It is also the case of the petitioner that his case was not one which was recommended by the Selection Board No. 5 for release as such an occasion could have occurred only if the case was considered by the Board. Not only that in the list of Officers considered, the ones who have been recommended for release are separately enlisted.

5. The petitioner submits that he was entitled for extension of service in case issue of grant of Permanent Commission was delayed and was pending consideration for administrative reasons in terms of Clause 24 (b) of the Special Army Instructions No. 3/1998, the relevant portion of which reads as under: "GRANT OF PERMANENT COMMISSION (PC)

(a) ...

(b) In those cases in which grant of PC is delayed from one administrative reason or the other, the officers, excepting those placed in unacceptable low medical category or those charged with a view to taking disciplinary action against them, will continue in service for a total period of ten years or till they are granted permanent commission, whichever is earlier,

6. The petitioner claims that even though the Selection Board was held on 18/19.10.2001 and the result was declared on 6.12.2001, the proposal for release of the petitioner was made on 5.12.2001 independent of the proceedings of the Selection Board which came to be approved on 6.12.2001. The stated reason for such release is that the petitioner had not been able to qualify the Basic Young Officers' Course (for short "BYOs Course"). The petitioner claims such a release order to be illegal since if the case of the petitioner had been properly considered in terms of the relevant instructions, the petitioner would have been granted either the Permanent Commission or extension of Short Service Commission. The action of the respondents in releasing the petitioner by invoking Rule 13A of the Army Rules, 1954 (hereinafter referred to as the said Rules) is alleged to be not sustainable. The relevant Rule reads as under:

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 Service 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 " called upon to retire; or 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.

7. The petitioner claims that mandatory requirement for application of the aforesaid Rule 13A of the said Rules is the issuance of the show cause notice which has, in fact, not been issued.

8. The petitioner further submits that the release order has not been issued by the appropriate authority as the Military Secretary had no authority to terminate the services of the petitioner and there is no delegation of the authority in favour of the Military Secretary. The petitioner seeks to give an explanation about the non-clearance of the BYOs Course by claiming that though he was commissioned in the Army Service Corps, the petitioner was actually posted in the Infantry for three (3) years during which period he was never nominated by the respondents for the said Course and was, thus, deprived of the opportunity to join the Course. Thus, though a person even in medical category A-3 is eligible for grant of Permanent Commission, the mandatory medical requirement to complete the BYOs Course is A-2. This is alleged to be in conflict with the Regulations.

9. It is the case of the petitioner that even if he was not eligible to take the BYOs Course due to his medical category he ought to have been transferred to another wing or service where he would have become eligible to take the said Course in terms of the Army instructions.

10. The petitioner has explained that he was provisionally nominated only in the 4th year for the BYOs Course No. 22 commencing from July 2000, but was not allowed to proceed due to ongoing treatment and medical category. On 29.3.2001 the petitioner was again provisionally nominated for the BYOs Course No. 24 commencing from 16.7.2001 with the right to apply for waiver of medical category and applied for waiver on 28.3.2001. The petitioner was nominated for the BYOs Course for the third time commencing from 14.1.2002 and the petitioner applied for waiver on 9.11.2001. Instead of being given a waiver the petitioner was issued a release order.

11. The writ petition has been opposed by the respondents. The sub-stratum of the case of the respondents is that the petitioner was only enrolled for a period of five (5) years in the Short Service Commission and for being considered for any extension or grant of Permanent Commission, there is a mandatory requirement that such officers clear the BYOs Course within a period of four (4)

years from the initiation of their Commission. The officer was granted two chances to clear this Course but since the petitioner met with an accident and was in the low medical category he could not attend or pass the BYOs Course and as such was ineligible either for extension or grant of Permanent Commission.

12. The respondents have referred to the relevant Army Order No. 18/88 dealing with the policy of failure to qualify the stipulated Course for retention in the service. The relevant portion reads as under:

18A. All Short Service Commissioned Officers are required to qualify in BYO's Course of their respective arm/service within four years of the date of grant of Commission. Short Service Commissioned Officers who fail to qualify in the BYO's Course in the first chance will be eligible to have a second chance.

19. ...

20. Short Service Commissioned Officers who fail to qualify in the BYO's Course or the Departmental Examination as applicable, even after availing of the second chance will be given the option to resign their Commission, failing which their Commission will be terminated under the provisions of SAI 1/S/85. Such Officers are also considered unfit for grant of permanent Commission / extension.

13. The respondents have also referred to the Special Army Instruction 1/85, which reads as under:

BASIC YOUNG OFFICERS (BYOs) COURSE

3. All officers, including Short Service Officers, are required to attend and pass in the Basic Young Officers (BYOs) Course (all part or legs thereof) of their respective arm or service within the first four years of service. Those officers who attend a BYOs Course for the first time, but fail or are unable to complete the course, will be given a second chance to qualify on it. Officers who cannot attend their present arm/service BYOs Course on account of medical grounds may be transferred by the Military Secretary to another arm/service. An officer who cannot be usefully employed in any arm/service because of his medical category or cannot qualify on any of the BYOs Course in total of two chances allowed will be called upon to resign his commission and on refusal to do so will be removed from the service as per provisions contained in Army Rule 13A.

14. The respondents pleaded that the petitioner was detailed on 10.5.2000 for the BYOs Course commencing from 17.7.2000 to 16.12.2000 and as per the detailment order any officer in low medical category could apply for waiver of medical category. In case the waiver is granted the implication is that the same is not counted as one of the two chances in which the officer had to clear the BYOs Course. It is alleged that the petitioner did not apply for the waiver of medical category and thus, exhausted the first chance. The petitioner was again detailed for the BYOs Course on 29.3.2001 commencing from 16.7.2001 to 15.12.2001. The petitioner applied for the grant of waiver on account of being in the low medical category which request was considered favourably and a nine (9)

month waiver was granted to the petitioner. The respondents further submitted that the four (4) year period for the petitioner to clear the BYOs Course expired on 7.2.2001 but on account of grant of the waiver he was entitled to another detailment for the Course in the extended period beyond four (4) year period.

15. The case of the petitioner was to be placed before the Selection Board in October 2001 along with other officers for grant of extension or Permanent Commission. The petitioner submitted a representation dated 16.10.2001, the relevant portion of which reads as under: "4. Due to my medical category A " 3 and need for regular therapy at RandR hospital under neuro surgeon (for improvement and avoid further degeneration) I have been unable to BYO"s course for ASC which is mandatory requirement for selection board for grant of permanent commission to SSC " 63.

5. In view of the above may I request the following for your kind consideration and necessary action please.

Take up the case with appropriate authority for grant of deferment of my selection Board for permanent commission.

I am recovering slowly but surely and likely to be in a fit condition for doing YO course in second part of year 2002. Therefore, it is requested that I should be detailed for YO course anytime after June 2002.

16. The aforesaid representation of the petitioner was recommended by the IO and RO and forwarded to the MS Branch for consideration the very next day on 17.10.2001. It is in pursuance to the request of the petitioner that the case of the petitioner was withdrawn from the Selection Board. Thus, it is pleaded that the petitioner has misrepresented to this Court that his case was deferred on administrative grounds while the fact is that it was withdrawn at the own request of the petitioner.

17. The petitioner was detailed for the BYOs Course again on 29.10.2001 for the Course commencing from 14.1.2002 to 15.6.2002. The petitioner applied for waiver of the Course on account of low medical category in November 2001. This waiver could not be granted since four (4) years had expired on 7.3.2001 and even the nine (9) month waiver granted in March 2001 had also expired. Not only that the five (5) year period of Short Service Commission of the petitioner expired on 7.3.2002. It is in view of this situation that the case of the petitioner was forwarded for release on 13.12.2001 w.e.f. 7.3.2002.

18. The plea of the petitioner based on Rule 13A of the said Rules is negated on the ground that the same would have application only in case of a Permanent Commissioned Officer, who is sought to be retired or removed or in case of Short Service Commissioned Officer who is sought to be retired or released prior to the expiry of five (5) years term while the petitioner is not sought to be removed prior to the expiry of five (5) years period but his tenure had ended.

19. The respondents also state that the question of the petitioner being

transferred to some other Arm/Service would arise only if the petitioner had applied for it but the petitioner made no such application. Not only that there should be the requirement of such a person in some other Arm/Service and a post available for the same.

20. The last aspect urged on behalf of the respondents is that the petitioner filed a writ petition, being WP (C) No. 18417/2004 praying for direction for reinstatement followed by inter service transfer. That writ petition was dismissed on 1.12.2004. The order in the said petition is predicated on the fact that the petitioner had earlier filed the present writ petition and at that stage the present writ petition had been dismissed and SLP had been filed before the Supreme Court for staying the operation of the order. It is only in pursuance to the order dated 17.11.2005 of the Supreme Court that the present writ petition has been directed to be re-heard. The respondents, thus, submit that if at all the petitioner wanted to claim any relief in that behalf either the petitioner should have sought revival of that writ petition or amended the present writ petition. We may note that this is a very technical plea of defence.

21. We have examined the pleas of the learned Counsels for the parties. Non-disclosure and concealment of material documents/facts

22. We may note at the inception itself that when the case was initially taken up for hearing on 10.7.2008, the respondents had produced a letter dated 16.10.2001 addressed by the petitioner himself seeking deferment of the Selection Board. It was, thus, noticed that the letter showed that the petitioner was conscious about the requirement of BYOs Course and his inability to pass the same. This letter had never been placed on record by the petitioner and thus, there was non-disclosure of this material document. The respondents were directed to file this document with an affidavit which has since been filed. The petitioner was asked to appear in person. The petitioner admitted that he had written the letter but sought to allege that the letter was never acted upon. This was again found to be incorrect as the records produced before us showed that in pursuance to the request of the petitioner for deferment of the Selection Board on 16.10.2001 the case of the petitioner was processed on the next date itself on 17.10.2001 and the name of the petitioner was withdrawn at his own request.

23. In our considered view, the aforesaid shows that the plea of the petitioner predicated on the withdrawal of his name on administrative grounds from the Selection Board is clearly false as the petitioner himself had requested for withdrawal of his name which material fact was not disclosed in the writ petition. We are unable to accept the explanation given by learned Counsel for the petitioner that the letter was not of much importance and was, thus, not filed. This fact itself disentitles the petitioner to any relief on account of suppression of material facts and document but despite the same we have examined the other pleas.

The Consequences of Non-Qualification of BYOs Course

24. Para 18A of the Army Order 18/88 makes it clear that all Short Service Commissioned Officers are required to qualify the BYOs Course within four (4) years from the date of grant of Commission. There are two chances granted to an officer. The consequences of the failure to qualify the Course are stipulated in para 20 of the said Army Order which is an option to resign the Commission failing which the Commission will be terminated under the provisions of Army Instruction 1/85 and the officer would be considered unfit for grant of Permanent Commission. Special Army Instruction 1/85 specifies the clearing of BYOs Course within the first four (4) years of service and two chances being granted. There is, however, a stipulation that such officers who cannot attend the BYOs Course on account of medical grounds should be transferred by the Military Secretary to another Arm/Service. If there cannot be any useful deployment of such an officer in any other Arm/Service and there is non-qualification of BYOs Course in two chances, once again, the officer would be asked to resign his Commission failing which he would be removed from service.

25. The aforesaid, thus, makes it clear that the petitioner was required to qualify the BYOs Course in two chances.

26. It is not in dispute that the petitioner was given the chances. The petitioner was, for the first time, detailed for the Course on 10.5.2000 when the petitioner failed to apply for the waiver of medical category. The petitioner claims that he did apply but there is nothing on record to substantiate the same. The petitioner was detailed for the second time on 29.3.2001 when he applied for grant of waiver and his request was acceded to. A nine (9) month waiver was granted which, in fact, took the petitioner beyond the period of four (4) years. The case of the petitioner was coming up before the Selection Board in October 2001 and the petitioner addressed the letter dated 16.10.2001 to withdraw his name from consideration before the Board. Not only that he made a second request that he should be sent for the BYOs Course only in the second part of the year 2002 till which time his Short Service Commission tenure would be over. Thus, the petitioner was not willing to go through a BYOs Course on account of medical reasons till the end of his Short Service Commission.

27. The result was that the tenure of the petitioner came to an end without either extension or permanent absorption.

Applicability of Rule 13A of the said Rules

28. A bare reading of Rule 13A of the said Rules shows that the same is applicable in case of termination of services of an officer on the failure to qualify an examination or course. Undoubtedly in the case of the petitioner there is failure to qualify the BYOs Course, which is a pre-requisite for either extension of a Short Service Commission or the permanent absorption of the petitioner. But the petitioner has been actually discharged on completion of his Short Service Commission period on account of failure to qualify the Course and it is not a case of termination of service. The pre-requisite for any extension or absorption is

willingness of the petitioner. The petitioner did give his willingness. However, the petitioner of his own wrote to the respondents seeking the deferment of his Board to be held on 16.10.2001 and requested that he should be detailed for the BYOs Course some time after June 2002. The Short Service Commission of the petitioner was complete on 7.3.2002 and since the petitioner was not willing to go through a BYOs Course prior to that date there could not be any case for extension of the services of the petitioner.

29. We, thus, find no merit in this plea.

Non-Absorption of the Petitioner in another Arm/Service

30. The petitioner really seeks to rely upon the Special Army Instruction 1/85 which provides that if an officer fails to qualify the BYOs Course on account of medical grounds he may be transferred to another Arm/Service in case he can be usefully deployed there. There are, thus, two pre-requisites: (i) the petitioner should be willing for such alternative deployment; and (ii) there should be some other Arm or Service having such a requirement.

31. The petitioner never made any application for such transfer in any other Arm/Service. It, thus, never got examined whether there was some other Arm/Service available where the petitioner could be usefully transferred.

Competency of the Authority Releasing the Petitioner

32. It is the case of the petitioner that he was directed to be released by an officer lower than the officer to direct such release. It is pleaded that Military Secretary was competent to direct release of the petitioner. Learned Counsel for the respondents has drawn our attention to the records of the case to show that the case of the petitioner for such release was put up to the Military Secretary and it is that authority which approved the release of the petitioner. Thus, the grievance is without any basis.

Non-Consideration of the Petitioner by the Selection Board

33. The aforesaid aspect has already been dealt with under the heading "Non-disclosure and concealment of material documents/facts". The petitioner had earlier made out a case that his name was withdrawn from the Selection Board No. 5 on administrative grounds and thus, was required to be considered again in view of Clause 24(b) of the Special Army Instructions No. 3/98. The facts which came to light showed that it is the petitioner himself who had sought withdrawal of his case from the Selection Board as per the request dated 16.10.2001, which was acceded to by the respondents.

Non-placement of the case of the petitioner before a subsequent Selection Board

34. The petitioner had sought to make out a case of discrimination by pointing out that the Selection Board No. 5 considered two other cases which were withdrawn from the earlier Selection Board. However, case of the petitioner was not put up before the subsequent Selection Board.

35. The petitioner completely ignored the fact that he does not fulfill the basic requirement of clearing the BYOs Course nor was he willing to go through this Course prior to the second half of 2002 as per the request contained in the letter dated 16.10.2001. The Commission of the petitioner was ending on 7.3.2002 and the non-clearance of the BYOs Course was to result in the Commission of the petitioner coming to an end. There was, thus, no occasion to put the case of the petitioner before any subsequent Selection Board.

36. We note in this context that the grievance of the petitioner that he was never recommended for release in the Selection Board No. 5 is without any basis. The release was necessitated on account of the facts set out by the petitioner himself and what he prayed for in the letter dated 16.10.2001. It may also be touched upon here that the petitioner was deployed in the Infantry Division like all other persons and there was no special case made out in the case of the petitioner where he was deprived of an earlier opportunity to qualify the BYOs Course.

37. The petitioner could not have been considered for permanent absorption without having qualified the BYOs Course in view of Army Order No. 18/88.

38. In view of the aforesaid, we find no merit in respect of any of the aspects urged on behalf of the petitioner. There is no merit in the petition.

39. The writ petition is dismissed with costs quantified at Rs. 7,500.00. The costs have been imposed on account of non-disclosure and concealment of material documents/facts by the petitioner.