
(2000) 05 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1761 of 1997

Capt.Rajindra Kumar Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-05-2000

Acts Referred:

Army Rules, 1954 — Rule 13A

Citation : (2002) 1 SCT 11

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

Advocate : Subash Bhat, R.K. Gupta, Advocates appearing for the Parties

Judgement

Arun Kumar Goel, J.—Heard learned counsel.

2. Petitioner challenges the order dated 11.7.1997 (AnnexureJ with writ petition) whereby he has been retired under Army Rule 13A, as also

order dated 6.3.1997 (AnnexureH with writ petition) whereby his prayer for compensatory chance to enable him to appear in Promotion

Examination Part B, was declined by the respondents; besides asking for a direction to the respondents to allow him one compensatory chance in

terms of communication 17.11.1989 (AnnexureA with the writ petition) issued by the Army authorities.

2. With a view to properly understand the factual matrix of this case admitted facts need to be noted.

3. Petitioner joined the Indian Army in the year 1978 and was granted permanent Commission on 14.12.1985. As per provisions of the Army Act,

Rules and Army Instructions governing the same, petitioner was required to pass Promotion Examination PartB without loss of seniority i.e. within

five years of reckonable service, 14.12.1990. Last date for passing promotion examination PartB with loss of seniority i.e. 11 years of reckonable service, 14.12.1996.

4. At the time of filing this writ petition, it is admitted case of both the parties that petitioner had not successfully passed the Promotion Examination

PartB as he failed in Current Affairs and Military History Papers.

5. Another fact which is admitted by both the parties is that petitioner did join Operation Pawan and was thereunder deployed as a member of

Indian Peace Keeping Force in Sri Lanka. It is further not in dispute that petitioner remained posted in Sri Lanka from September 1989 to

December 1989, whereas the examination in question was held in February 1990. Thus it is obvious that petitioner was to appear in the Promotion

Examination in question about some time after his return from Sri Lanka.

6. In these circumstances it is to be seen whether petitioner is entitled to the benefit of communication of Army Authorities as contained in

Annexure A. For ready reference relevant portion of this Annexure is extracted herein below :

1. I am directed to refer to SAI 1/S/85 and to convey the sanction of the President to the grant of same number of compensatory chances for

promotion exam partB and D as the offrs will miss, while physically serving in OP Pawan in Sri Lanka and OP Meghdoot in Siachen Glacier.

2. To be eligible for the compensatory chances an offr should be physically serving in OP Pawan (Sri Lanka)/OP Meghdoot (Siachen Glacier) on

the day of the promotion exam or should have physically served at any time at these places during the last six months prior to the exam. If an offr is

withdrawn/reinducted from Sri Lanka/Siachen before the commencement of the six months period prior to the exam, he will not be eligible for such

compensatory chances.

3. The substantive promotion to the rank of Capt or Maj, as the case may be, as well as the pay and allces to that effect shall be protected in

respect of such offrs by the same number of years as the compensatory chances admissible to such an offr.

4. The provisions of this letter will have retrospective effect from 29 Jul. 87.

7. Petitioner claims that he is entitled to another compensation chance for clearing Promotion Examination PartB. In addition to this petitioner also

places reliance on the recommendation made by the Army Authorities vide Annexures C, D, E, F and G to writ petition.

8. Shri Gupta, learned counsel for the petitioner, submitted that in the face of situation in which his client was placed while working in Indian Peace

Keeping Force at Sri Lanka, he was not in a fit state of mind to undergo examination in question, therefore, his client was entitled to the benefit of

AnnexureA extracted hereinabove as well as recommendations made by his superiors on the representations made by him.

9. Another ground pleaded in support of this writ petition was that Rule 13A of the Army Rules, 1954, is ultra vires to the extent that if an Officer

fails to clear and qualify the examination in question, it should result in his not getting promotion. However, termination of services of such an officer

cannot be sustained under this Rule, therefore, to this extent it was liable to be struck down.

10. All these pleas have been controverted by the learned counsel appearing for the respondents, who urged that the petitioner is not entitled to

any relief whatsoever in this writ petition. According to him, under the ex parte interim order passed by this court on 4.12.1997 petitioner has

availed almost about 21/2 years, he has urged for the dismissal of writ petition with costs.

11. Reliance was also placed by Shri Bhat on Special Army Instructions (SAI) 1/S 1985 as amended by SAI 26/S 1989. According to him, after

the issuance of show cause notice, explanation furnished by the petitioner was considered and on examination thereof as well as in accordance with

the relevant provisions governing the subject, order dated 11.7.1997 AnnexureJ to writ petition has been rightly passed, which needs to be upheld.

12. So far benefit of AnnexureA is concerned, it cannot be granted to the petitioner as was urged by Shri Gupta. Reason being that the petitioner

had returned well in time for appearing in the 11th and last admissible chance available to him as per relevant provisions governing the same. Had

he been actively involved in the Operation Pawan on the date of examination i.e. in February 1990, in no situation benefit of AnnexureA, as

extracted hereinabove, could be denied to him so far compensatory chance was concerned.

13. It is further not the case of the petitioner that he has not availed all the 11 chances which were admissible to him. As such recommendation

made by the officers of the petitioner cannot improve his case and in no case can those be permitted to either be a substitute for Army Rules

framed by the Government in exercise of powers vested in it under the Army Act. In addition to this, those are merely recommendatory and are

not binding on the authorities. Petitioner was well aware that he has to clear the examination in question within the time allowed with loss of

seniority he had not been able to clear the same within the time allowed without loss of seniority. (In former case it has to be passed within 11

years, whereas in the latter case it has to be passed within 5 years).

14. There is nothing brought to the notice of the court during the course of hearing that there is anything on the basis whereof this period can be

extended besides Annexure A, either under the provisions of Army Act, Rules framed thereunder, Regulations or Special Army Instructions.

Though learned counsel for the petitioner insisted that it will lead to grave hardship to retire him at this age whereas he was to retire at the age of 52

years.

15. This is an argument that may invoke sympathy but in no case can a litigant like petitioner be allowed to claim grant of compensatory chance as

a matter of right.

16. In this context it may also be noted that it is not the case of the petitioner that he was in actual Operation Pawan on the date when examination

was held.

17. So far the challenge to the vires of Rule 13A which is extracted hereinabove, is concerned, suffice it to say that it is without any basis. With a

view of weed out the officers who are not in position to come up to the required standard as prescribed under the Army Act and the Rules, outer

limit has been provided. On nonfulfilment whereof its consequences are also provided. It is not for the petitioner or for that matter any other army

officer to suggest that what should follow in case of nonfulfilment or non acquisition of the necessary condition/qualification like passing of the

examination in question. Moreover on examination of Rule 13A it cannot be said that it suffers from any vice which may call for striking down any

portion thereof, as was urged by Shri Gupta, learned counsel for the petitioner. Moreover in the matters concerning the army, scope of interference

is very limited by this court unless it can be patently demonstrated with

reference to contemporaneous official record that impugned order is in violation of and, or it impinges any provision of law. That being so, claim as put up by the petitioner in the writ petition is wholly untenable so far it relates to his claim of grant of compensation chance to pass the Promotion Examination Part B.

18. Faced with this situation, Shri Gupta placed reliance on communication No. A/16516/GS/Mt 2 dated 24.8.1999 issued by Director General of Military (MT 2) GS Branch Army Headquarters, New Delhi, which is in the following terms :

REVIEW OF POLICY ON THE TERMINATION OF SERVICE FOR FAILURE IN PROMOTION EXAMINATION PART B.

1. A copy of Govt. of India letter No. A/16516/GS/MT2/481/D/(GSH) dated 2th Aug. 99 is attached herewith for your info and dissemination to

all formations and units.

2. The Govt letter Ibid makes the following provisions effective with retrospective effect from 24 Apr. 98.

(a) Grant substantive rank of Captain at five years' service, irrespective of posting Part II or not.

(b) There will be no loss of seniority for not passing Part II. An officer's services will not be terminated due to not passing Part II till 20 years of

reckonable service. Offrs who fail to qualify in Promotion Examination Parts B and/or D on completion of 20 years of reckonable service will be

issued a show cause notice under Army Rule 13A for termination of service. The services of theses offrs will be terminated as per provisions of

Army Rule 13A.

(c) Passing Part B will be a mandatory prerequisite for promotion to the rank of Acting Major.

3. There is no change in the eligibility conditions for Part D, and also in the penalties for not passing Part D.

4. Amdts to SAI 1/S/85 (as amended) and Regulations for the Army (Revised Edition 1987) are being published separately.

5. You are requested to disseminate the above information and the Govt. letter to all your subordinate formns, ests, and units.

19. On the basis of this communication Shri Gupta submitted that benefit of this communication may be extended to his client. Therefore, he

submitted that services of his client even now cannot be terminated due to nonpassing of examination in question till 20 years of reckonable service.

It is only after 20 years that a show cause notice is to be issued under Army Rule 13A for terminating his services.

20. This is an argument raised simply to be rejected for the reasons set out hereafter. This communication dated 24.8.1999 is not retrospectively

applicable to the cases which have attained finality like the present one. When a reference is made to AnnexureH, which is in the following terms :

Head quarters, Southern Command, Pune 411 001.

COMPENSATORY CHANCE FOR APPEARING IN PROMOTION EXAM PART B IN RESPECT OF IC 43574A CAPT RK SINGH.

1. Reference your letter No. 301111/B/GS(Trg) dated 20 Feb. 97.

2. IC4357A Capt RK Singh served in OP Pawan from 16 Sep. 89 to 20 Dec. 89. No Promotion Examination Part B was held during this period.

Officers serving in Op PAWAN were eligible for compensatory chance if they were physically serving in Sri Lanka on the day of the Promotion

Examination or any time before the examination and could not appear in the examination. The officer appeared in Part B Examination held from 05

Feb. to 08 Feb. 90. The result of the same are given by Appendix `A'. The officer is not eligible for a compensatory chance for the year in which

he has already appeared in the examination.

4. The Officer may be informed accordingly. Also please check eligibility of such cases before endorsing recommendations in future.

Sd/ (O.P. Deswal)

Col.

Dir MT 2

for Dy. Chief of the Army Staff.

21. It is clear that the petitioner was entitled to the benefit of compensatory chance if he was physically serving in Sri Lanka on the day of

Promotion Examination Part B or any time before the same and thus could not appear in the said examination. It was in these circumstances that

the prayer for the grant of compensatory chance was declined to the petitioner. Unless the communication of 24.8.1999 was made not only

retrospectively applicable but to all cases like those of the petitioner wherein final

orders had been passed, no benefit can be derived by the petitioner of the same.

22. Another reason to decline the benefit of this communication to the petitioner, even if it be assumed for the sake of argument without being

conceded that he is entitled to any benefit therefor, is that but for ex parte interim order dated 4.12.1997, petitioner would have been out of the

army service. Because of respondents having been temporarily restrained to forcibly retire the petitioner, his services could not be dispensed with.

Last but not the least, even in cases where a person obtains eligibility for regularisation on the basis of the same having been acquired because of

interim/adinterim orders passed by the courts, no benefit can be derived by a litigant, like the petitioner in the present case, of such a situation.

No other point is urged.

23. As a result of the aforesaid discussion there is no merit in this writ petition, which is accordingly dismissed, and as a consequence of it ex parte

interim order dated 4.12.1997 shall stand vacated forthwith.