
(2000) 04 DEL CK 0024

In the Delhi High Court

Case No : CWP. No. 2129 of 1990

Dharam Pal Singh Hav. (Retd.)

APPELLANT

Vs

U.O.I and Others

RESPONDENT

Date of Decision : 18-04-2000

Acts Referred:

Citation : (2000) 56 DRJ 114

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. J.S. Manhas and Mr. M.K. Bhardwaj for Mr. A.K. Bhardwaj, for the Appellant;

Judgement

A.K. Sikri, J.—Petitioner had joined Army in 1963. In 1967, he joined defense Security Corps. He was promoted to the rank of Havildar on 1.7.1981. It may be mentioned at this stage that the officers in defense Security Corps work on tenure basis which is extended from time to time. The petitioner was given extensions as Havildar and last extension was expiring on 31.5.1988. Petitioner became entitled to be considered for promotion to the rank of Junior Commissioned Officer (JCO) and he was considered for promotion to this post in 1986 and 1987 but was not found fit for promotion due to lacking in ACRs. Thereafter on 12.2.1987, petitioner submitted option of unwillingness for extension of service wherein he had stated that he was not willing to extend his service on empire of extended period of service w.e.f. 31.5.1988. On 18.3.1988 petitioner even proceeded on leave pending discharge from service as Havildar which was to become effective from 31.5.1988.

2. However, in normal course, petitioner along with others was considered for promotion to the post of JCO and was even cleared by DPC. This promotion was not given to the petitioner and petitioner retired from service as Havildar on 31.5.1988. Present petition is filed by the petitioner in which petitioner seeks mandamus directing the respondents to promote the petitioner to the rank of JCO w.e.f. 1988 with all consequential benefits as well as arrears of pay &

allowances and arrears of pension with 15 per cent interest. In support of petitioner's case Mr. Manhas, learned counsel for the petitioner submitted that on 20.4.1988, petitioner had sent a telegram requesting the respondents to consider the case of the petitioner for JCO and he received reply dated 28.4.1988 in which it was mentioned that as he had already proceeded on discharge from service, question of granting any further promotion to him did not arise.

3. After receiving this telegram, petitioner did not take any further steps and stood retired from service on 31.5.1988 and his retirement became fait accompli. However, belatedly he submitted statutory appeal on 30.3.1990 in which was rejected by communication dated 15.5.1990 in which it was, inter alia, mentioned that petitioner was not considered for promotion in April 1988 as he had already rendered unwillingness certificate for further extension of service. Thereafter present petition was filed.

4. According to Mr. Manhas, in the counter affidavit filed to this writ petition, it is revealed for the first time that petitioner was in fact considered and cleared for promotion to the post of JCO. Accordingly, he submits that he had right to be promoted as JCO and his promotion could not have been withheld merely because he was on leave in April 1988 and had he been promoted as JOC, he would have rendered further service as JCO as he had shown his unwillingness to work only as Havildar. On the basis of these submissions, the petitioner claims the relief as prayed for in the writ petition. It is also submitted that person junior to the petitioner namely Havildar Budh Ram was promoted as JCO before 31.5.1988 ignoring the petitioner.

5. On the other hand, it is contended by the respondents that once petitioner had submitted his unwillingness to work as Havildar and was not wanting any further extension of service w.e.f. 31.5.1988 there was no question of giving him any promotion. In fact according to the respondents, petitioner was informed of the aforesaid fact as far back as 28.4.1988 itself and he chose to accept the position at that time by not agitating against the same. Almost two years" thereafter that the petitioner submitted his statutory appeal which was rejected by the respondents and reliance is placed on the reasons given in the said communication dated 15.5.1990 which read as under:

"a) Consequent on rendering unwillingness certificate for further extension of service on 27 Jan 87, your discharge order on completion of terms of engagement under Army Rule 13(3) item III(i) was issued vide our letter No: 1612/completion/Ser 41/CA-1 dated 17 May 1987. The complete pension documents in your respect were called and received from your unit 8 months in advance from the date of your SOS from the service.

b) Your name for promotion to the rank of Nb.Sub was brought in the panel during the year 1986 and 87 but not considered as you were unfit due to lacking of ACR criteria. Your name was again brought in the panel for selection during the year 1988 but was not considered as you were already rendered

unwillingness certificate for further extension of service and also proceeded on pension establishment (including LPR) on 18 March 88 before finalising the promotion roll.

c) As regards charge of option for further extension of service (i.e. unwillingness to willingness) as per para 4 of your petition, it is intimated that an option once exercised is final and cannot be changed."

6. It is further submitted that as per rules, once this option of willingness or unwillingness is given official is not entitled to change that as per terms and conditions of service contained in ROI 31/78, the relevant portion of which reads as under:

"No change in the option of willingness or unwillingness certificate already furnished will be permitted."

7. It is also submitted that even if petitioner was considered and cleared for promotion in April 1988, petitioner was not entitled to get the same as he was on leave pending discharge/retirement and for this purpose respondents rely on sub-rule 2(d) of 84 reading as under:

"2(d) Acting rank will be granted from the day the vacancy occurs provided that the individual has assumed the duties of the higher rank from that day and reversion will take place with effect from the day the individual ceases to perform the duties of the appointment for which acting rank is granted or the vacancy ceases to exist except as provided otherwise."

8. I have considered the submissions of both the parties and gone through the records. Admittedly, petitioner had submitted his unwillingness certificate of further extension of service on 27.1.1987. As per that even discharge order was issued on 17.5.1987 and complete pension documents were called for and received from his unit 8 months in advance from the date of his SOS from service. Petitioner had no right to change his option in view of ROI 31/78 extracted above. Therefore, the effect of that is that petitioner was to be discharged from service w.e.f. 31.5.1988(A.N.). Not only that, he himself proceeded on leave on 18.3.1988 predatory to date of discharge. Therefore the stand the respondents taken in reply dated 28.8.1988 in response to petitioner's telegram dated 20.4.1988 that he could not be granted promotion is perfectly valid and cannot be faulted with. In fact after reply dated 28.4.1988, petitioner accepted the position and file the statutory appeal almost 2 years after his retirement in March 1990. No doubt while rejecting the statutory appeal vide reply dated 15.5.1990 it is mentioned that in the year 1988, petitioner was not considered as he had already tendered unwillingness and stand taken now in the counter affidavit is that the petitioner was in fact considered and cleared for promotion. This however would not change the position in law inasmuch as even if the petitioner was considered for promotion in normal course, due to his unwillingness to serve the force after 31.5.1988 and the fact that petitioner was on leave predatory to retirement as on that date, he could not be given

promotion to the post of GCE.

9. It was further contended by Mr. Manhas that petitioner had right to withdraw the unwillingness certificated dated 27.1.1987 which was in the nature of resignation as it was becoming effective from 31.5.1988 and he could withdraw the same before 31.5.1988. In support of this submission, he relies upon Constitutional Bench judgment of Supreme Court in the case of Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, . This judgment is of no avail to the petitioner for two reasons:

1) Petitioner has not been able to show that he withdrew his unwillingness certificate. He has relied upon telegram dated 20.4.1988 for this purpose but copy thereof has not been enclosed and Therefore it is not known as to what was written in the said telegram. Even in para 6 of the writ petition where mention is made to this telegram, it is not stated that the petitioner had withdrawn the unwillingness. As per para 6 of petition, in this telegram, he has only made request for being considered for selection to the rank of JCO and this request was rejected by stating that he could not be considered for promotion as he had already submitted his unwillingness certificate. Even thereafter the petitioner did not state that he had withdrawn his unwillingness certificate. There is no averment even in the statutory appeal filed by him on 30.3.1990.

2) As per the relevant rules quoted above, the option for unwillingness certificate once given cannot be allowed to be changed. Therefore, it was not permissible for the petitioner to change his option. It may be mentioned that the unwillingness certificate cannot strictly be treated as resignation inasmuch as extension of the petitioner as Havildar was coming to an end on 31.5.1988 and he was entitled to further extension only if he exercised his option to continue as such. Once he gave the option not to continue and this option is final, it cannot be treated as resignation and once such an option is final and is not amenable to change, the principle laid down in the aforesaid judgment of Supreme Court would not be applicable in the instant case.

10. This writ petition Therefore fails and is dismissed. Rule is discharged.