

(2003) 07 AHC CK 0058
In the Allahabad High Court
Case No : C.M.W.P. No. 15541 of 2001

JG-840373 Ex-Nb Sub Samsuddin

APPELLANT

Vs

Deputy Director General Defence Security Corps

RESPONDENT

Date of Decision : 18-07-2003

Acts Referred:

Army Act, 1950 — Section 190, 191
Army Rules, 1954 — Rule 187
Constitution of India, 1950 — Article 14, 16
Defence Service Army Regulations, 1987 — Regulation 26

Citation : (2003) 5 AWC 4571

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : Chandra Jeet Yadav, for the Appellant; N.K. Chatterjee, S.N. Srivastava and Addl. S.C, S.S.C, for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.-

1. Heard Sri Chandrajeet Yadav counsel for Petitioner and Sri Narendra Kumar Chatterjee, Additional Standing Counsel appearing for Respondents.

2. Brief fact giving rise to this writ petition are that Petitioner was enrolled in Defence Security Corps on 21st March, 1986. He was last posted at 103 D.S.C. Platoon, Company Defence Security Corps, Rifle Factory, Ishapore, 24 Parganas (North), West Bengal which comes under Defence Security Corps, Eastern Command, Fort William Kolkata. Petitioner was promoted to the rank of Naib Subedar with effect from 9th March, 1998. On promotion to the rank of Naib Subedar for the year 1998-99 he was graded in Annual Confidential Report as "high average". As per D.S.C., R.O.I. (Record Office Instruction) 1/94, which amended in para 5 (c) of R.O.I. 14/92 a Naib Subedar is entitled to promotion as Subedar and thus extension in service, if he has atleast one "above average" and one "high average" report, and does not have any "below average" report. If he

has earned only two reports, one should be "above average", and one "high average". If he has earned only one report it should be "above average". If no report has been earned in the rank, A.C.R. criteria is not to be applied. The note appended to the amended para 5 (c) (iv) provides that no cognizance of the report initiated after initiation of recommendation, will be taken into consideration, for the purpose of regulating extension of service.

3. Petitioner applied and filled up all necessary forms for extension of service. The application for extension with all completed formalities was forwarded to next higher authority through proper channel. The Petitioner was not informed of any order on his application. By order No. C.A.-1/1612/C/D.O./Ser 09, dated 4th May, 2000, including Petitioner's name in Appendix "C" at Serial No. 12, the Petitioner was discharged from service, with effect from 31.3.2001/ 1.4.2001, on the ground of his re-transfer to pension establishment, nor fulfilling the A.C.R. criteria of ex-pensioner. It is averred the Petitioner was surprised to receive the order of discharge, as his services were always excellent and he was not served with any kind of counselling/warning nor any disciplinary action was taken against Petitioner during his entire service. He was promoted as J.C.O. (Junior Commissioned Officer) in the rank of Naib Subedar, after fulfilling all eligible conditions which included "above average" and "high average" A.C. Rs. in the last five years, preceding his promotion on 9.3.1998, and was thus, entitled to extension of service.

4. Counsel for Petitioner submitted that Petitioner's initial A.C.R. as J.C.O. was initiated on 31st May, 1999. He had performed his duties as Platoon Commander of 103 Platoon Coy., D.S.C. Rifle Factory Ishapore, with full satisfaction of his Superior Officer. There was no comment made in his A.C.R. Petitioner was assessed as "high average" which is just below "above average". It is contended that in the next year the Petitioner was assessed as "above average" and thus, according to his last assessment made upto 31st May, 2000, during the calendar period from 1st June, 1999 to 31st May, 2000, his two assessments made him eligible for extension. According to him even under the amended record of instruction 1/94 which amended in para 5 (c) of R.O.I. 14/92, the Petitioner was entitled for promotion and consequential extension of service.

5. Petitioner made representation dated 3.6.2000, 22.11.2000 and 29.12.2000 to next higher authority through proper channel but no response was received. By this writ petition he has prayed for quashing the order of his discharge dated 4th May, 2000 and for a writ of mandamus directing Respondents to grant extension of service with all consequential benefits. During the pendency of writ petition, Statutory complaint dated 22nd November, 2002, submitted by Petitioner was rejected by C.O.A.'s on 19th June, 2001, and an order was communicated to Petitioner vide letter dated 28th June, 2001, by Service Records Officer, for O.I.C. records.

6. In the counter-affidavit of Major V.N. Appaswamy, Personnel Officer (Civ) of C.O.D., Chowki, it is stated that Petitioner initially served with Raj Rifles from

31st January 1969 to 30th September, 1984. He is drawing service pension with effect from 1st October, 1988, for services rendered with Raj. Rifles. The Petitioner was re-enrolled into D.S.C. (Defence Security Corps), on 21st March, 1986, in the rank of Naik initially for five years upto 20th March, 1991. His term of engagement was extended for five year each from 21st March, 1991 to 20th March, 1996, and thereafter 21st March, 1996 to 30th March, 2001, as he was meeting the eligibility criteria for such extensions. As per Government of India, Ministry of Defence letter dated 5th December, 1981, the initial period of employment of Naik rank with five years which can be extended by five years each upto age of superannuation, i.e., 55 years, subject to granting selection for further extension. A.C.R. criteria required for granting further extension to D.S.C. personnel is laid down in R.O.I. 2/96. Petitioner was promoted to the rank of the Naib Subedar on 9th March, 1998. His term of engagement was due to expire on 20th March, 2001. He sent willingness certificate for further extension of his service from 21st March, 2001 to 28th March, 2006. As per para 1 (iv) of R.O.I. 2 of 96 the A.C.R. grading required for granting extension in respect of Naib Subedar and Subedar is one "above average" and one "high average", and that he should not have any below average report. The Petitioner had earned one A.C.R. for the year 1999, at the time of considering his extension of service. It was graded as "high average" by his officer commanding. As per A.C.R. grading laid down in R.O.I. 2/96 the J.C.O. was found lacking in required criteria for extension of his service. His case was thereafter referred to Army Headquarter vide D.S.C. record letter dated 25th January 2000, for decision of D.D.G./D.S.C., Army Headquarter. They did not agree for further extension of service vide Army Headquarter letters No. 7/00585/ B.S.C.-1 dated 8th February, 2000 and as such discharge order was issued vide D.S.C. record letter dated 4th May, 2000. As per note given in R.O.I. 2/96 no cognizance of any report initiated after initiation of recommendations is to be taken into consideration for the purposes of regulating extension of service. The Petitioner's representation is still under process and has not been finalised.

7. During the pendency of the writ petition para 5 (c) (iv) of R.O.I. 14/92 as amended by R.O.I. 1/94, re-constructed vide R.O.I. 2/96 and amended vide R.O.I. 4/98 was again re-constructed by R.O.I. 2/2001 dated 29th March, 2001. R.O.I. 2/96, and Amended R.O.I. No. 2 of 2001 as annexed in Annexure-1 to the supplementary-affidavit of Cap. R. J. Randhwa are quoted as below:

R.O.I. No. 02/96:

Terms and conditions of service:

Defence Security Corps: J.C.O.S./Or 1. Para 5 (c) of R.O.I. 14/92 as amended vide R.O.I. 1/94 is further re-constructed as under:

5 (c) A.C.R. Criteria during last 3 reports.-(i) Sep. and L/NK. (where applicable). No report should be "below average". One report should be "high average" or above.

(ii) Naik.-At least one report should be "high average" or above and none should be "below average". If earned only two reports one should be "high average" or above and none should be "below average". If only one report earned it should be "high average". If not earned any report in the rank, A.C.R. criteria will not be applied.

(iii) Hav.-Two reports should be "high average" or above and none should be "below average" during the last 3 reports. If only earned one or two reports in the rank, it should be "high average". If no reports earned in the rank, A.C.R. criteria will not be applied.

(iv) Nb Sub and Sub.-Should have at least one "above average" and one "high average" report and should not have any "below average" report. If only earned two reports one should be "above average" and one "high average". If only earned one report it should be "above average". If not earned any report in the rank, A.C.R. criteria will not be applied.

Note.-"No cognizance of report initiated after initiation of recommendation will be taken into consideration for the purpose of regulating extension of service".

(Authority: Army H.Q. letter No. A/00583/D.S.C.-1 dated 2 April, 1996.) "Terms and Conditions of service: J.C. Os./Or:

1. Para 5 (c) of R.O.I. 14/92 (Re-constructed vide R.O.I. 02/96 and amended vide R.O.I. 04/98) is hereby cancelled and reconstructed as under:

(a) Nb Sub and Sub.-Minimum three reports in the rank of J.C.O. should be taken into account. However, where the J.C. Os. have not earned three reports in J.C.O. ranks, last three reports should be taken into consideration. Out of three reports, two should be "above average" reports and one "high average" reports.

Note: "No cognizance of report initiated after initiation of recommendation will be taken into consideration for the purpose of regulating extension of service".

2. This policy will come into force from the date of issue of this R.O.I. Past cases will not be re-opened.

(Auth: Army H.Q. letter No. A/00585/D.S.C.-1 dated 7th March, 2001)."

8. Counsel for Petitioner Shri Chandrajeet Yadav submits that Petitioner has been severely wronged and discriminated in refusing extension of service whereas he was meeting the A.C.R. criteria for extension of service. According to him after his promotion as Naib Subedar (Junior Commissioned Officer) he was awarded "high average" report for the year 1999. After his case was referred to Army H.Q. vide R.O.I. record letter dated 2.5.2000 for final decision and was considered for further extension of service vide Army H.Q. letter No. 8th February, 2000 and issuance of discharge order dated 4th May, 2000, he was awarded "above average" report for the year 2000. The said report of the year 1999-2000, should have been taken into consideration for the purposes of regulating extension of service. According to the Petitioner, R.O.I. 02/2001 was

not applicable to the present case as it came into force with effect from 29th March, 2001, and thus the minimum required three reports in the J.C.O. ranks were not required to be considered. He was regulated by R.O.I. 14/92 as reconstructed vide R.O.I. 2/96 and amended R.O.I. 4/98 and that since before expiry of the period of his last extension he had earned one "above average" report and had one "above average" and one "high average" report, he met the criteria for extension of service. Sri Yadav states that the fact that the willingness certificate has to be obtained 18 to 21 months in advance and a long drawn procedure including scrutiny of certificate, scrutiny of A.C. Rs. including necessary enclosures and service documents have to take place much in advance, the Petitioner cannot be denied promotion. His A.C.R. becomes available before his period of extension was over. He submits that modern methods of communication, and of compilation of data and computation, are available with Indian Armed Forces and thus the Army cannot be heard to say that it will not take into consideration the last A.C.R. He also submits that he has been discriminated as against J.C.G.-840736 Naib Subedar Gyan Chand, as he was similarly situate and has been given extension of service.

9. Sri N. K. Chatterjee, Additional Standing Counsel, Central Government, on the other hand submits that procedure of extension of service is regulated by various Defence Security Corps Records of Instructions the last of which was issued on 9th March, 2001, as above. Petitioner was Hawaldar in 1996-97 and had earned "above average" and "high average" reports respectively. In the year 1998 his A.C.R. was not initiated due to his promotion to the rank of Naib Subedar on 9th March, 1998. In the year 1999 as Naib Subedar he earned one "high average" report. Under R.O.I. 2/2001 which is the revised A.C.R. criteria for extension of service, last three A.C. Rs. in respect of rank and status were required to be taken into consideration for granting further extension and out of these three A.C. Rs. two should be "above average" and one "high average". Keeping in view of the revised policy, the case of both Sri Gyan Chand and Petitioner were reviewed in accordance with last A.C.R. grading one in the rank of Naib Subedar and two in the rank of Hawaldar. On revision it was found that Gyan Chand has two "above average" gradings as Hawaldar in the year 1996 and 1997 respectively and in the year 1999 he was given a "high average" grading and thus Naib Subedar Gyan Chand fell into A.C.R. criteria under R.O.I. 2/2001 was given extension of service, whereas Petitioner had earned only one "above average" report and denied for extension of service. Cases were examined under R.O.I. 2/01 dated 29th March, 2001 and while discharge order of Naib Subedar Gyan Chand was cancelled, the Petitioner was required to proceed on discharge. Sri Chatterjee submits that granting of extension of service to defence security corps personnel is a lengthy and time consuming process. Willingness certificate is to be obtained by Unit concerned about 18 to 21 months in advance to be forwarded to the Joint Director Defence, Security Corps, who forwards it to Director with his recommendation 17 to 19 months in advance. The Director forwards the certificate to D.S.C. record office with his recommendations or non-

recommendations, 16 to 18 months in advance. On receipt by the D.S.C. record office steps namely scrutiny of the certificates with supportive of service documents in aspect of discipline, medical and education criteria and scrutiny of A.C. Rs. takes place atleast 13 months in advance. Thereafter Part II orders are published for willingness and eligible personnel for grant of extension, necessary entries are made on record regarding grant of extension and thereafter orders are issued in respect of the cases which do not fulfil the eligibility criteria. Since Petitioner's A.C.R. for the year 2000, was not initiated before the records had been forwarded, and a decision was taken, that he was not found to meet the eligibility criteria even in accordance with the unamended R.O.I. before its amendment on 29th March, 2001 and even subsequently on review under revised R.O.I. 2/2001 the Petitioner was not found meeting the A.C.R. criteria and was accordingly discharged.

10. In order to verify the assertion whether Petitioner had earned "above average" report for the year 2000, Sri Chatterjee was required to produce the records. The records were produced on 20.2.2003 and the zerox copies were retained. The records, show that annual confidential report for the period from 1st January, 1999 to 31st May, 2000, in respect of Petitioner as Naib Subedar 103 D.S.C. Platoon Company D.S.C. Rifle Factory Ishapore was initiated on 23.6.2000. On 26.6.2000, the reviewing officer Lt. Col. R. P. G. Ghai found made to be "above average" J.C.O. who is hardworking". Petitioner was promoted to the rank of Naib Subedar on 9th March, 1998, his extended term was due to come an end on 20th March, 2001. He sent willingness certificate for extension of his service from 21st March 2001 to 20th March, 2006. As per para 1 (4) of R.O.I. 2/96, the A.C.R. grading required under the then prevailing R.O.I. 4/98 for grant of extension of service in respect of Naib Subedar and Subedar was one "above average" and one "high average" and should not have any below average report. His A.C.R. for the period 1998-99 was "high average". For the year 1999-2000 ending to 31st May, 2000, his A.C.R. was initiated on 23rd June, 2000 and that on 26th June, 2000, he was awarded "above average" grading, much before his extended term of engagement was due to expire.

11. Sections 191 and 192 of the Army Act, 1950 (the Act) provides for making Rules and Regulations respectively, for purpose of carrying out provisions of the Act. As per Rule 187 of Army Rules, 1954, Defence Security Corps is a Corps defined u/s 3(iv) of the Army Act. All D.S.C. personnel as such are administered by the Act, Rules and Regulations. Regulation 26 of Army Regulations the General Staff Branch, Army H.Q. are responsible to issue policies. Deputy Directorate General, D.S.C. is the Department Head of D.S.C. and is responsible to issue such policies. He is also responsible for issuing instructions, including instructions spelling out policies for extension of service.

12. The question which calls for consideration in this case is whether his A.C.R. for the year 1999-2000 initiated on 23rd June, 2000 and awarded on 26th June, 2000, could be taken into consideration for taking decision of extension of his

service beyond 20th March, 2001. For this purpose the validity of the note appended to para 5 (c) of the amended R.O.I. 1/94 has been challenged. Counsel for Petitioner states that where the A.C.R. for the last year becomes available before the term of engagement expired, it cannot be ignored and that the note appended to in R.O.I. 1/94 to para 5 (c) so far as it provides otherwise is wholly arbitrary, discriminatory and violative of Articles 14 and 16 of Constitution of India. The note is quoted as below:

Note: No cognizance of report initiated, after initiation of recommendation will be taken into consideration for the purpose of regulating extension of service".

13. The next question which calls for consideration is whether the Respondents rightly exercised power of review in terms of R.O.I. 2/2001. According to counsel for Petitioner the R.O.I. 2/2001, dated 29th March, 2001, was not applicable as the amendment came into force much after decision was taken to discharge him. It is submitted that the amended R.O.I. 2/2001 had not seen light of the day when the decision was taken for discharge of Petitioner, i.e., 8th February, 2000 and the date of order of discharge dated 4th May, 2000 and the actual discharge dated 20th March 2001. It is contended that the review R.O.I. 2/2001 has been applied only to justify the extension of service of Naib Subedar Gyan Chand who was otherwise similarly situate as Petitioner and that his term could not have been extended as he also did not meet the A.C.R. criteria according to unamended R.O.I. as A.C.R. reports for the period prior to his promotion as Naib Subedar could not have been taken into consideration when a decision was taken to give him extension having same A.C.R. criteria namely one "high average" report after their promotions and thus, Petitioner has been discriminated as against Naib Subedar Gyan Chand.

14. Petitioner was given promotion as Naib Subedar during his last extension of the terms of his engagement on 21st March, 1996 to 20th March, 2001. Prior to his promotion as Hawaldar he was awarded one "above average" and one "high average" report in the year 1996 and 1997. In the year 1998 his A.C.R. was not initiated due to his promotion to the rank of Naib Subedar on 9th March, 1998. The present case is not a case of discharge on the ground of unsuitability and thus, the decisions cited by counsel for the Petitioner in respect of compulsory retirement are not applicable. It is a case of selection for extension of service on the basis of A.C.R. criteria as eligibility for further extension of service. The Respondents have not pleaded that the Petitioner was either unsuitable for further extension in service or that he was discharged as a measure of punishment. The discharge order is on the ground that Petitioner was not selected for further extension in service, as he did not meet the eligibility criteria basis on annual confidential reports.

15. It is surprising that with modern means of communication and compilation of data, available to a efficient disciplined and modern armed force of our country, it takes about one and a half years for compilation of data. In the present case the only ground taken for not considering the A.C.R. for the year 1999-2000 which

became available to the Respondents on 26.6.2000, i.e., about 9 months before the Petitioner's last extension was due to expire, is the period of time, which the records office takes to compile data proceeding and recommendations. The matter of Petitioner's extension was initiated with his willingness certificate for consideration, which was referred to Army H.Q. vide D.S.C. record letters dated 26th January, 2000 and it was disapproved on 23rd February, 2000, i.e., about nine months before the last extension came to an end. On the date when the Petitioner was considered for further extension of service, he had almost one year left to serve. The decision not to extend his service was taken much before the initiation of his A.C.R. for the year 1999-2000. The policy decision of the selection for further retention in service did not restrict the consideration of the last. A.C.R. report, and that on the date when Petitioner's extension came to an end, he met the A.C.R. criteria vide R.O.I. 4/1998 as the Petitioner had one "high average" and one "above average" reports. The last report was not taken into consideration only on the ground that decision for extension of his service has to be taken in advance, and thus, the last A.C.R. cannot be taken into consideration. In fact as promoted J.C.O., the Petitioner got his assessment by the Respondents for his performance only of one year, whereas after promotion he served for more than two years. There was nothing adverse against him and he was graded "above average" hard working officer. In *Lt. (Mrs.) Indira Kumari Kartiayoni v. Mahanideshak Raksha Mantralaya, Shastra Sena, Chikitsa Seva, New Delhi 1991 Supp (2) SCC 149*, the Apex Court held that according to departmental instructions for periodical review of performance for retention in service, Petitioner who was in Military Nursing Service was required to be allowed to prove her ability in the two years following her marriage. But for marriage, her performance was sufficiently good average to be retained in service. Notwithstanding her fairly good average record, her services were discontinued because of her marriage coupled with the fact that she had not obtained high efficiency performance rate during last three years of marriage. Having laid down criteria of assessment for two years after marriage the Army Authorities could not have relied upon her performance prior to marriage. In the present case, two A.C.R's. were available much before (nine months) the date of actual discharge, out of which one which entitled him for extension was not considered, only due to administrative efficiency.

16. It has been stated in paragraph 12 of the second supplementary counter-affidavit of Cap. R. J. Randhwa that D.S.C. is a corps having more than 45,000 troops and it is necessary to follow the laid down policy of each and every subject strictly in accordance with proceeding. The policy laid down in R.O.I. 14/92 in 2/96 are very clear in granting of extension of terms of engagement as para 11 of R.O.I. 14/92 D.S.C. record office is the authority to ensure proper eligibility of D.S.C. personnel for granting extension of service and thus, action taken for discharge is as per rule and subject, and such cases cannot be a ground for granting of extension ignoring the laid down policy.

17. The fact that thousands of persons have to be considered for extension of

service cannot by itself be a ground to deny extension of service to those who meet A.C.R. criteria. The note appended to R.O.I. 14/92, 2/96 and 4/98 takes away a right of the D.S.C. personnel to be considered for extension on his performance only on the ground on administrative delays. It defeats his rights, and is counter-productive to the efficiency and performance of the personnel. A J.C.O. of the rank of Naib Subedar promoted two years before giving above average performance cannot be discharged only on the ground that D.S.C. does not have infrastructure and means to examine his case and needs one and half years for processing. He is denied for consideration of extension of service only on the ground that the Army does not have inclination and equipment to consider his last report which due dispatch. A person, who serves Army with full devotion and shows exemplary performance, cannot be denied for consideration for extension of service only on the ground that the Army takes a long time to process his case. Such a restriction is grossly arbitrary, discriminatory and takes away his rights guaranteed to him by Articles 14 and 16 of Constitution of India. Having laid down the criteria, no further restriction can be put as to whittle it down and deny its full benefit to the persons who demonstrate best performance in discharge of their duties. In the present case, Petitioner's A.C.R. for the year 1998 was not initiated because in the year he was promoted as Naib Subedar. He got "high average" rating for the year 1999 and for 1999-2000 he got "above average" report which is the highest rating. He, therefore, meets the eligibility A.C.R. criteria for further extension of service but was denied only on the ground that his A.C.R. for the year 1999-2000 was not initiated, before this case was taken up for processing for extension of service. Petitioner has been grossly wronged and discriminated.

18. Now coming to the question whether this case could have been reviewed under R.O.I. 2/2001, I find that it was not even in force when the Petitioner's case considered for the extension of service. This amendment allowed consideration of A.C.R.'s. awarded ever prior to the promotion as Naib Subedar. Naib Subedar Gyan Chand had two "above average" report prior to his promotion whereas Petitioner has only one. And thus Naib Subedar Gyan Chand was retained. On the date the decision was taken to discharge their services of both Naib Subedar, Gyan Chand and Petitioner, this criteria was not even applicable and could not have been pressed into service to review the case of Gyan Chand and allow him to continue.

19. For the aforesaid reasons the writ petition is allowed. The note appended to R.O.I. 2/96 as amended by R.O.I. 4/98 is declared to be illegal, arbitrary and violative of Articles 14 and 16 of Constitution of India and principles of equity and thus inoperative in law. The discharge order dated 4th May, 2001, is set aside. The Petitioner meets the A.C.R. criteria under the aforesaid R.O.I., for extension of service and shall be entitled to extension of his service from 21st March, 2001 to 20th March, 2007. He will be allowed to join and serve with full consequential benefits. There shall be no order as to costs.