

(2014) 10 DEL CK 0230

In the Delhi High Court

Case No : W.P. (C) Nos. 5854 of 2010 and 644/2012

Madan Lal (ASI/M)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Pharmacy Act, 1948 — Section 31, 31(d), 33
Sashastra Seema Bal Act, 2007 — Section 2(v), 2(x)

Citation : (2015) 2 AD 467 : (2015) 215 DLT 665

Hon'ble Judges : Najmi Waziri, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Raunak Jain, Advocates for the Appellant; Manish Mohan, CGSC, Advocates for the Respondent

Judgement

Najmi Waziri, J.—In this writ petition under Articles 226/227 of the Constitution of India, the petitioners have challenged the impugned order of 15th February, 2009 whereby they have been promoted to the rank of Assistant Sub-Inspector (Medic) (ASI/M) in the Sashastra Seema Bal (SSB). Their grievance is that they should have been promoted to the rank of Sub-Inspector (Medic) instead of ASI/M on the date of their eligibility without insistence for their registration under the Pharmacy Act, 1948; that relaxation ought to have been given to them as was given to one Mr. Mohar Singh who was appointed as ASI/M on 5.1.1998. The facts of the case are that the petitioners had been promoted to the rank of Head Constable (Medical) in the year 1992 (while the petitioner No. 6 was promoted in 1996) on the basis of the Recruitment Rules of 1991; that according to Memorandum No. 1/12//84-SCB/SI dated 5.8.1985 issued by the SSB, promotions to the rank of ASI/M and SI/M were to be based on seniority-cum-merit without holding any test, subject to fulfilling other prescribed qualifications. This Memorandum was issued with reference to an earlier Memo dated 3rd June, 1985 dealing with ad hoc promotions of SI/M and ASI (Comp). It recorded that:

"2. The matter has been engaging the attention of the DTE for some time past.

In view of the fact that registrations of Pharmacists has been closed in many states and there is no prospects of its re-opening in the near future, we have already proposed to Cab. Sectt. to amend our draft promotion rules (which are under consideration with them for approval so as to delete the provision of registration.....".

"4. It has now been decided that till promotion/recruitment rules are finalized, eligible HC/Medic and ASI (Comp) may be given ad hoc promotion, without insisting on their registration and without holding and test, subject to the condition that they fulfil the qualifications mentioned in para 2(1) and (2) above. Such ad hoc promotion will also be governed by instructions contained in para 3 of this DTE memo No. 6/1/78 SSB/E2 dated 29.11.1984.....".

2. The learned Counsel for the petitioner submits that the aforesaid two Clauses do not refer to any registration of pharmacists under the Pharmacy Act, 1948 but the recruitment rules, subsequently notified on 2nd July, 1991 require that for promotion to the rank of ASI/M, a candidate must possess qualification specified under Section 31(d) of the Pharmacy Act, 1948 and registered under Section 33 of the said Act. He submits that since the post was to be filled 100% by promotion and since such a requirement did not exist for the earlier rank of Constable or Head Constable, the requirement at the promotional level of ASI/M was without reason, arbitrary and therefore, liable to be quashed. He further submits that in view of the Government having already acknowledged vide Memorandum dated 5.8.1985 that registration of pharmacist had been closed in many States and there was no prospect of its re-opening in the near future, the insistence upon registration and possession of the said qualifications is ex facie, impractical, unjustified and onerous upon Head Constables (Medic). He submits that for the identically placed, direct recruits, although the said condition is supposedly binding, the respondents have not insisted upon it but indeed in the face of it have directly recruited one Mr. Mohar Singh as ASI on 5.1.1998 to the said post. He submits that the said ASI possesses no qualification better than the petitioners.

3. In reply, the respondents have submitted that the said person was reemployed in SSB with effect from 15.1.1998, being qualified in various courses of Medical Cadre in the Army which are (i) General Nursing Technical Class IV of 9 months duration, (ii) General Nursing Technical Class III of 9 months duration, (iii) General Nursing Technical Class II of 6 months duration and (iv) General Nursing Technical Class I of 12 months duration. The justification being that the Recruitment Rules of 1991 itself provided for the re-employment of ex-servicemen, who had held the same or equivalent ranks in the Armed Forces. However, on 1st September, 2008, the Government of India has notified the Sashastra Seema Bal Combatised Medics Cadre (Non-professional) Group "C posts Recruitment Rules, 2008 for the Sashastra Seema Bal (SSB). It dropped the requirement of registration under the Pharmacy Act, 1948 for the rank of ASI/M. The notification was made applicable from the date of its publication in the

Official Gazette i.e., from 19th September, 2008; therefore, it was to be prospective. The impugned order dated 15.2.2009 was issued under the said Recruitment Rules.

4. Mr. Raunak Jain, the learned Counsel for the petitioners submits that the petitioners have been working on the rank of ASI/M since 2003, when they were allowed to wear the rank badge of ASI/M. This development was on account of an order issued by the Government of India on 19/25th August, 2003 which reads as under:

"Promotion to the rank of ASI (Comp/Medic) from HC/Medic have not taken place since long owing to certain clarification laid down in Pharmacy Act, Amendment in eligibility condition of qualification prescribed in Clause D of Section 31 of Pharmacy Act and registration under Section 33 of said Act for promotion of HC (Medic) to ASI (Medic) is being proposed. Pending the amendment, the Director General, SSB is pleased to approve wearing of rank badge of ASI (Medics)/Comp by the under mentioned H.C. (Medics) who have fulfilled the other eligibility conditions except the once stated above. It is, however, clarified that wearing of the rank badge will not entitled them to any kind of seniority in the subsequent promotion or any service or financial benefits in pay, allowance and pension, etc."

5. Mr. Jain contends that the petitioners ought to have been considered for promotion to the rank of ASI/M in the year 1995 (1999, in the case of petitioner No. 6); that in a petition before the High Court of Jammu and Kashmir, the Hon"ble Court had directed the respondents to take a decision in this regard and pass an appropriate order for promotion of the petitioners. The learned Counsel submits that the High Court had directed the respondents to take a decision apropos the relaxation of the eligibility criteria in view of the order of the Government on 25.8.2003 which mentioned the now effected proposal to amend the requirement of registration under the Pharmacy Act, 1948. It is submitted that the petitioners in the meanwhile since 25.8.2003 had already been working in the rank of ASI/M. Later, when the impugned order of 15.2.2009 was passed, one of the petitioners sought initiation of contempt proceedings before the High Court of Jammu and Kashmir. The petition was disposed off with the observation that the Court's direction had been duly complied with. However, liberty was granted to initiate proceedings in case it was felt that there was a violation of a right.

6. The learned Counsel for the petitioners submits that all along, the Government itself did not insist upon the requirement of registration under the Pharmacy Act, 1948; that for a similarly placed person viz., Mr. Mohar Singh, who too was required to cross the hurdle of registration under Pharmacy Act, the respondents/Government overlooked the requirement thus, acknowledging that the requirement was only in name and was not to be put into effect or insisted upon; that the Government's own communications and orders would show that all alone ever since 1985, the Government had been contemplating the removal of the requirement under the Pharmacy Act because the registration under the said

Act had already closed long ago in many states and there was no likelihood of its opening in the near future; and finally that the notification of 2008 itself effected the removal of the said requirement. The learned Counsel further submits that the petitioners are identically placed with the direct recruits who have been recruited to the rank of ASI/M, who do not possess the qualification under the Pharmacy Act; therefore, the petitioners have been discriminated against. He seeks parity in law. He further submits that the petitioners have been working in the rank of ASI/M, therefore, under the principle of equal pay for equal work they should be paid equal money as well as treated as regular ASI/M, under Article 14 of the Constitution of India; that the delay in taking a decision with respect to removal/dropping of the requirement under the Indian Pharmacy Act is entirely on part of the Government for which the petitioners cannot be blamed nor be subjected to suffer the consequences of such lethargy.

7. Mr. Manish Mohan, the learned Standing Counsel for the Central Government submits that the order impugned has been passed under the applicable rules after consideration of all the facts pursuant to the orders of the Hon'ble High Court of Jammu and Kashmir. However, there is no clear answer forthcoming when this Court asked the learned Counsel as to why the case of Mr. Mohar Singh was treated differently from those of the petitioners, although they were equally placed i.e., neither of them possessed the qualification and registration prescribed under the Indian Pharmacy Act.

8. Having heard the learned Counsel for the parties, this Court is of the view that the petitioner has made out a case for being treated equally with the direct recruits such as Mr. Mohar Singh whose induction as a direct recruit has not been answered by the respondents. We have noted hereinabove that there is relaxation for ex-servicemen for their consideration to the rank of ASI/M, if they held same or equivalent rank in the armed forces and it does not insist for their registration under the Pharmacy Act. Therefore, the petitioners too should be treated likewise. The respondents had contended that the principle of equal pay for equal work would not be applicable in the present case because the petitioners only wore the rank badge of ASI/M but they were performing the duty in the Unit Hospital as Head Constable (M). Therefore, they argue that till such time they perform the duty of an ASI(M) they could not seek equal pay for the said rank. However, on behalf of the petitioners, it is submitted that they have not only been promoted to the rank of ASI/M in the year 2003 but also made to perform the duties on the said rank ever since. Their duties included:

"(a) The rank of HC/M comes under Non-Commissioned Officer or Under Officer ["NCO/UO"] in terms of Section 2(x) of the SSB Act, 2007 while the rank of ASI/M comes under Junior Commissioned Officer or Subordinate Officer ["JCO/SO"] in terms of Section 2(v) of the SSB Act, 2007. The same position existed even prior to enactment of the SSB Act, 2007.

(b) As per Provisioning Manual, Volume I of SSB regarding arms, ammunition, explosives and general stores, Clause 20 states that "All stores received which

are above the value of Rs. 25/- will be examined by the Board of Officer Presided over by a Gazetted Officer and constituted under the order of DIG/Commandant. The board will meet to examine the stores and furnish in duplicate a survey committee report in the form as per department Line Committee Report form." Clause 23 of the said manual further provides that the Board of Officer for conduct of Survey will be composed of officers as given below--

"Up to Rs. 1 lakh -- One Gazetted Officer and two Subordinate Officers Between Rs. 1 lakh and Rs. 5 lakh--

One Dy. Commandant/Equivalent Officer, one Ac and two Subordinate Officers.

Rs. 5 lakh and above--

One Commandant/AD/Equivalent Officer, one DC/AC and two Subordinate Officers."

Accordingly, the Office Order dated 1.6.2004 of the Respondents shows that a board of officer was detailed for opening of quotations, purchasing committee of Government stores and to conduct line committee of Government stores. In the said Officer Order, Petitioner No. 3 has been shown to be holding the rank of ASI/M and has been detailed for opening of quotations. There are several such Office Orders that have detailed the Petitioners in their capacity as ASI/M. It is to be noted that a HC/M cannot be detailed to open quotations, etc. And hence the Petitioners could not have been detailed in case they were still HC/M for all practical purposes as contended by the Respondents.

(c) A bare perusal of the Force Orders published by the Respondents prescribing weekly duties of the Petitioners would reveal that the duties performed by the Petitioners from 2003-2009 are that of Subordinate officers i.e. ASI/M while the associated pay benefits have not been extended. The list of duty NCOs or HC/M has been shown separately and distinct from that of duty SOs. There are several such Force Orders that have detailed the petitioners in their capacity as ASI/M.

(d) The duties performed by the Petitioners in their capacity and rank of ASI/M have been appreciated and duly commended by various authorities including the Director General, SSB. All the said commendations mention the rank of the concerned Petitioner as ASI/M.

(e) As per Charter of Duty of Medical Officer and Para-Medical staff in terms of Letter dated 4.10.2008 of the Respondents, it can be noticed that the duties prescribed to Petitioner Nos. 1 and 4 are that of ASI/M and are different from that prescribed for HC/M.

(f) Pursuant to Order dated 19/25.8.2003 of the Respondents, the Petitioners have always worn the uniform of AS/M. The identity card issued by the Respondents also states that the Petitioners are ASI/M."

9. In view of the preceding discussion, this Court is of the view that the petitioners are entitled to be treated at par with the direct recruits and others

similarly placed, who were inducted in the SSB, without insistence upon the requirements of the Pharmacy Act. For the past nearly 30 years the Government's own conduct and admission has been that there was no registration under the Pharmacy Act. The need to do away with this requirement has been acknowledged all along and after much consideration it was dispensed with under the 2008 Rules. Quite clearly, the petitioners could not have complied with the requirements under the Pharmacy Act, since by the Government's own admission, it was an impossibility because many States had closed the registration years ago. For the respondents to not have considered the case of the petitioners because of their failure to perform an impossible act, would be untenable and unjustified. The legal maxim *Lex Non Cogit Ad Impossibility* would operate in these circumstances. The Government could not encroach upon the petitioners' right to be considered for promotion till such time that it removed the unfeasible requirement under the Pharmacy Act. The petitioners have a right to be treated equally with Mr. Mohar Singh a direct recruit, and they shall be so treated. This Court notices that simply because a candidate had held an equivalent rank in the armed forces, he would not automatically qualify the eligibility criteria. Having held the same or equivalent rank in the armed forces, an ex-serviceman is only eligible for consideration of re-employment. It does not in any case waive or alter the prescribed eligibility criteria. Additionally from the records, it is borne out that the petitioners had been promoted to the rank of ASI/M but they were not treated equivalent because of the impediment in complying with the requirements under the Pharmacy Act. Therefore, insofar as the petitioners have worked in the rank of ASI/M, they would be entitled to the benefits applicable to the said rank.

10. Accordingly, the petition is allowed. The petitioners shall be deemed to have been promoted to the rank of ASI/M from 25th August, 2003 and shall be entitled to all consequential benefits of service and pay. The respondents shall issue the requisite notifications/letters within a period of four weeks from today. The learned Counsel for the petitioners does not insist upon any other claim or relief. The petition is disposed of in the above terms.