
(2014) 08 DEL CK 0317
In the Delhi High Court
Case No : W.P.(C) 5023/2014

NB Sub (CLK) Kailash Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 08 DEL CK 0317

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

Bench : Division Bench

Advocate : S.S. Pandey and H.S. Tiwari, Advocate for the Appellant; Anurag Ahluwalia, CGSC, Prashant Ghai, Amrit Singh, Advocates, Mrinal Panda and Jitender Singh, Majors, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Najmi Waziri, J.—This petition filed under Article 226 of the Constitution of India seeks issuance of a writ of mandamus directing the respondents to include the petitioner in the second contingent to the United Nations (U.N.) Mission scheduled to leave in August, 2014.

2. The petitioner's case is that he was enrolled in the Indian Army in the year 1994 and was promoted to the rank of Hawaldar in the year 2001. Based on its performance, the 9 Sikh Light Regiment was nominated for U.N. Mission and the Unit came to Delhi for necessary preparation for pre-induction of the Unit. The first contingent left in December 2013. The petitioner was found eligible and selected for the UN Mission second contingent, earlier scheduled to depart in June, 2014. As per the requisite procedure, upon request of the respondents, the petitioner tendered his Adverse Career Certificate and Willingness Certificate which was forwarded by the Unit on 15.03.2014. Having completed all pre-induction formalities including medical examination, passport, visa, issue of kit, government sanction for induction into U.N. Mission as the second contingent was to proceed in June 2014 itself but, due to administrative reasons, the move

of the second contingent got delayed. In the interim, however, the petitioner came to know that he had been replaced in second contingent by respondent No. 6 since he (the petitioner) in the meanwhile, had been promoted to the rank of Naib Subedar with effect from 01.07.2014. The impugned letter stated that the petitioner's case had been taken up for promotion to the rank of Naib Subedar with effect from 01.07.2014 before his induction to the U.N. Mission, hence, the policy of 30th August, 2010/30th December, 2011 in re: Policy SD-3 (UN) would not be applicable to the petitioner. Petitioner's representation dated 09.07.2014 whereby he requested that his unwillingness be accepted and that his name may not be taken off the UN Mission list did not yield positive result.

3. The petitioner impugns the said letter on the ground that he had forgone his promotion and that as per the policy for AMC personnel whose promotion had come in March 2014 and July 2014 were eligible for deployment in U.N. Mission and their seniority was to be maintained accordingly and they were to be promoted to the rank of Naib Subedar on the completion of their U.N. Mission tenure. Vide a fresh unwillingness Certificate dated 08.07.2014, the petitioner had expressed his unwillingness to assume promotion to the rank of Naib Subedar till his de-induction from the UN Mission. He stated that his promotion to the rank of Naib Subedar be considered on de-induction of 2nd rotation of UN Mission on his return as per availability of vacancy.

4. The learned counsel for the petitioner argues that when any person is due for promotion, he is required to tender an Unwillingness Certificate for promotion during deployment in the U.N. Mission and the deferment of promotion is accepted from such persons. As the petitioner could not leave for the U.N. mission due to administrative and logistic reasons, a purposive interpretation of the policy dated 30.08.2010 would be required to be given for such persons who could not be actually deployed. He further submits that U.N. Mission assignment is not a matter of normal posting and transfer for an Army personnel and they get such an opportunity rarely which not only provides the personnel the international exposure and an enhanced career profile but also gives them much enhanced monetary compensation and a feeling of pride. Thus, he submits that denial of such an opportunity to the petitioner is arbitrary and a wrong interpretation of the aforesaid policy.

5. Clause 6 of the said policy i.e., Policy for Selection of PBOR for UN Missions reads as under:

"6. Promotion of PBOR in UN Missions: Promotion of NCOs to a higher (Illegible) rank and that of a JCO to a higher JCO rank will be allowed in the mission A. However promotion of NCO to JCO rank will not be permitted in the mission A to avoid violation. Govt. approved rank structure for the mission and financial implications. In case of PBOR who are likely to be affected for promotion during the tenure in UN mission, the option career cert, as applicable, will be obtained from them.

6. As required, the petitioner had submitted his Unwillingness Certificate which is reproduced as under:

"Unwilling Certificate

(i) Ref 9 SIKH LI letter No 9030/AG dt 03 Jul 2014

(ii) I, No.4472451H Hav(Clk/SD) Kailash Singh was elected for UN Msn dply by Records. The SIKH LI and presently posted with 9 SIKH LI wef 16 Mar 2014 for UN Msn 2nd rotation of the unit.

(iii) The induction of 2nd rotation was scheduled in 3rd week of Jun 2014 and I have already completed all pre-induction formalities ie. Medical, passport, visa, collection of IKI kit and Govt sanction.

(iv) Now, fit schedule has been delayed by a month and tentatively scheduled in 3rd week of Jul 2014. In between by virtue of my seniority, I have been approved for promotion to the rank of Nb Sub (Clk) wef 01 Jul 2014 vide Records The SIKH LI tele log msg dt 02 Jul 2014.

(v) I hereby declare my unwillingness to assume the promotion to the rank of Nb Sub till my induction from UN Msn. My promotion to the rank of Nb Sub be considered on de-indn of 2nd rotation of UN Msn on my return as per availability of vacancy.

(vi) I am aware about supersession and will not claim my seniority at later stage.

Sd/-

No. 4472451H Hav (Clk) Kailash Singh)

Dated :08 Jul 2014

7. The learned counsel for the respondent submits that Clause 6 is applicable only to such personnel who are actually serving on UN Mission. He relies upon the following sentence:

"In case of PBOR who are likely to be affected for promotion during the tenure in UN msn, the option for selecting either promotion or UN dply will be left with them and an adverse career cert. as applicable, will be obtained from them.

8. We are unable to accept this argument since undeniably it has been the practice of the respondents to obtain Adverse Career Certificate as well as Unwillingness Certificate from the prospective PBOR before he is considered for being selected as part of the UN Mission contingent. In any case, the expression "who are likely to be affected for promotion during the tenure in UN Mission" would include all prospective candidates who could be made a part of the UN Mission contingent.

9. The learned counsel for the respondent has produced a list of seniority of top ten Hawaldar (Clk) as on 01.07.2014 in SIKH LI REGT wherein petitioner's name

is shown at serial No. 7. However, the said list shows that the first three personnel were either found unfit for the contingent because of over-age or because of otherwise lack of mandatory qualification. Personnel at serial nos. 4, 5 and 6 were found fit and are now on the UN Mission contingent and hence, they were not promoted. Accordingly, three vacancies were sought to be filled up by the personnel next in seniority i.e., 7, 8 and 9. However, this Court is of the view that insofar as the petitioner has rendered himself ineligible against the adverse career certificate, he ought not to have been considered for promotion and the officer below in seniority to the petitioner ought to have been considered for the said promotion. This Court is also conscious that it would affect the morale of troops and their confidence in the system if the rights which accrue to them are denied because of such promotional exercise for which the personnel have voluntarily withdrawn themselves with due notice.

10. This Court in Naib Subedar K.C. Jena Vs. Union of India (UOI) and Others has held that the material date on which the entitlement to proceed on UN Mission is considered to be the date on which the nomination order of the unit for the UN Mission is effected. While referring to the records of instructions, this Court held that these instructions lay down a comprehensive policy governing the selection procedure for short listing personnel for a UN Mission. Para 9 of the policy declares that the actual date on which the nomination order of the Unit for the UN Mission is signed at the Army Headquarters, the same will be taken as the cut-off date with regard to the matter relating to upholding/cancellation of posting orders as and when required. As per these instructions, a posting order signed on or after the date of nomination of the unit for a UN Mission will be cancelled. This court further held that it is an admitted position that the UN Mission has not required deployment of personnel by specification of a rank structure i.e., it is not rank specific. Therefore, reliance of the respondent on such rank is wholly misplaced. As far as the UN Mission is concerned, whether the contingent comprises BPORs or JCOs, it would make no difference to the UN Mission.

11. This Court is of the view that when an officer is ready and willing to forgo his promotion in rank and also undertakes not to claim such rank upon completion of such UN Mission tenure or undertakes not to claim compensation for loss of seniority or promotion in lieu of a stint in the UN Mission which incidentally, is permissible as per the rules, the respondents could not deny him his right. Since the petitioner had already stated that he would forgo his future promotion on account of his deployment in the U.N. Mission, he had in effect withdrawn his candidature from being considered for promotion to the rank of Naib Subedar. The respondent ought not to have included his name in the promotional exercise conducted in July 2014. The personnel lower in seniority to the petitioner ought to have been considered for promotion to the rank of Naib Subedar to which the petitioner is now sought to be promoted. By withdrawing his name from the list of persons eligible for promotion, the petitioner made himself ineligible for promotion and opened the avenue for promotion for the persons below in

seniority to him. This was a serendipitous opportunity for the persons lower in seniority to the petitioner, just as it was equally serendipitous for the petitioner to be selected for the UN Mission second contingent which offers him not only a chance for travelling exposure to a foreign country while serving as a part of the United Nations but also carries with it a higher monetary remuneration. The petitioner or the persons selected for the UN Mission contingent were not available for consideration for promotion to the next higher rank since they had all voluntarily given up this right in favour of their inclusion in the UN Mission contingent. For the respondents to now cancel the petitioner's inclusion in the UN Mission contingent is unfair. The impugned order/letter dated 11.07.2014 is arbitrary and not in accordance with the policy. Accordingly, it is quashed. The writ petition is allowed. The petitioner shall continue to be a part of the UN Mission scheduled to leave some time in August 2014 or thereafter. In case the petitioner has joined the higher rank due to constraint of adverse proceedings against him, the same would be of no consequence for his deployment to and he would be considered to be of the same rank at which he had applied for the UN Mission.

The petition is disposed off in the above terms. No order as to costs.

Dasti to learned counsel for the parties under the signatures of the Court Master.