
(1999) 11 DEL CK 0016
In the Delhi High Court
Case No : CW. No. 3136 of 1999

R.C. Patial (Sub. Maj.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-11-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 1 AD 513 : (2000) 83 DLT 124 : (2000) 52 DRJ 208

Hon'ble Judges : N.G. Nandi, J

Bench : Single Bench

Advocate : Mr. Vinod Kumar, for the Appellant; Mr. Abhijat, for the Respondent

Judgement

N.G. Nandi, J.—In this writ petition under Article 226 of the Constitution of India, the petitioner has been praying for the relief, directing the respondents to allow the petitioner to physically serve in the rank of Subedar Major (Clerk) for a full tenure of four years w.e.f. 21.10.1997 to 31.10.2001 and restraining the respondents from retiring the petitioner in the rank of Subedar Major (Clerk) from 1.12.1999 together with release of petitioner's arrears of pay and allowances with interest to the date for the rank of Subedar Major (Clerk).

2. The case of the petitioner is that he was enrolled in the Army Service on 29.10.1969 and in course of 30 years of unblemished, meritorious and outstanding service in the Army has earned many medals and was awarded "Comendation Card" of the Chief of the Army Staff in August 1993 in recognition of his outstanding service to the organization; that on 1.8.1991, the petitioner was promoted to the rank of Subedar (Clerk). Subsequently, he was due for promotion to the next rank of Subedar Major (Clerk) in December 1995 but was not promoted, which necessitated the filing of Writ Petition No. 820/97 in this Court against the denial of the promotion by the respondents. In the said writ petition, vide its order dated 9.9.1997, the High Court issued directions and observed :

"There being no fault of the petitioner he cannot be deprived of his right for promotion to the rank of Subedar Major (Clerk). Applying the principle of natural justice and the rules of the respondent directions are given to the respondent to constitute a Special Board for consideration of the petitioner for the vacancy which was due to him as per his slot. The Special Board be constituted before the end of September, 1997 or first week of October, 1997 so that the case of the petitioner for promotion to the post of Subedar Major for the slot of 1995-96 could be considered otherwise petitioner would get retired in October, 1997. In case he is promoted, he would get four years. It is in this background that above directions are given."

That consequent upon the aforesaid order, the petitioner was granted promotion to the rank of Subedar Major (Clerk) on 27.10.1997, the date on which he factually and physically assumed the rank of Subedar Major (Clerk) while maintaining his original seniority i.e. 1.12.1995; that respondent No. 3 did not accept the assumption certificate dated 30.10.1997 signed by the Commanding Officer, 10 Bihar and returned the same unactioned to the unit of the petitioner insisting to forward assumption certificate w.e.f. 1.12.1995. Such a certificate would not only be false but also highly improper and illegal; that the seniority of the petitioner has to be fixed as per his original slot (notional seniority); that the promotion to the rank of Subedar Major with pay and allowances of the said rank has to be given after the convening of the Special Board, which was directed to be held before the end of September, 1997 or first week of October 1997 as per the order dated 9.9.1997; that the petitioner, on promotion, ought to get promotion of Subedar Major (Clerk) from the date of assumption; that the Special Board having been constituted by October 1997, the petitioner assumed the rank of Subedar Major (Clerk) on 27.10.1997 and ought to get four years of service as Subedar Major (Clerk) with pay and allowance from a date subsequent to the Special Board, which is the date of actual physical assumption of the next rank on 27.10.1997; that in accordance with the order dated 9.9.1997 the petitioner, in the event of his promotion to the rank of Subedar Major (Clerk) would get four years of service from the date of promotion/assumption. Hence the petitioner has to serve till October 2001 as Subedar Major (Clerk) for a tenure of four years in accordance with Para 163 of the Army Regulations. In case the assumption certificate is w.e.f. 1.12.1995 as insisted by respondent No. 3 the petitioner shall get to serve only two years and not four years as per para 163 of the Regulations, which will be highly prejudicial to the petitioner and amount to denial of his right to serve for four years as Subedar Major (Clerk). Promotion and the tenure ought to count from the actual physical date of promotion/assumption. Assumption cannot be ante date. In case the assumption certificate being from 1.12.1995 the petitioner will actually serve for only two years and thus earn only two ACRs as Subedar Major (Clerk) and not four ACRs, to which he is entitled to. This would also affect adversely his chances of further promotion, honorary Commission and higher pensionary benefits etc. for no fault of the petitioner besides his retirement on 1.12.1999 instead of serving up to

October 2001, the date on which he actually would complete four years of service in the rank of Subedar Major.

3. The respondents, vide counter-affidavit, contended that the present writ petition is an abuse of the process of the Court and is liable to be dismissed. The petitioner had earlier, in pursuance of the directions of this Court in CW 820/97 in September 1997, been promoted to the rank of Subedar Major w.e.f. 1.12.1995 with full pay and allowance admissible to the said rank with effect from the said date. The petitioner has accordingly availed four years count in the said rank and the grievance raised by the petitioner in this behalf of wholly misconceived, that the petitioner was considered in the Department Promotion Committee held on 4-5 November 1993 for promotion to the rank of Subedar Major (Clerk) Along with his other batch-mates; that during the consideration by the DPC, it was found that the petitioner did not fulfill the criteria of at least two ACRs on regimental duty and the Petitioner was placed in the deferred category for promotion. The approved panel drawn by DPC held in November 1993 was reviewed on 11.3.1995 so as to remove Subedars who failed to fulfill the required criteria for ACRs. The petitioner continued in the deferred category for want of one ACR on regimental duty. The case of the petitioner was again placed before the DPC held on 10 and 11 November 1995. Thereafter, the petitioner submitted statutory complaint dated 27.4.1996 which was rejected by the Chief of the Army Staff and pending the decision of the said statutory complaint, the petitioner filed C.W. 820/97 challenging the rejection of his candidature by the DPC; that in compliance with the direction in CW 820/97, a Special Departmental Promotion Committee was held on 0.9.1997 and the petitioner was promoted to the rank of Subedar Major (Clerk) w.e.f. 1.12.1995 with fully pay and allowances from the said date. The said pay and allowances w.e.f. 1.12.1995 have been duly paid to the petitioner. It is further contended that as per the Government of India, Ministry of defense letter dated 3.9.1998 the tenure of service/age of superannuation as Subedar Major is four years in service in the rank of Subedar Major or attainment of 54 years of age, whichever may be earlier. The petitioner having been in service as Subedar Major (Clerk) w.e.f. 1.12.1995 and having received full pay and allowances as Subedar Major (Clerk) from the said date, the period of four years in service of the petitioner as Subedar Major (Clerk) ends on 30.11.1999 and the petitioner shall superannuate on 1.12.1999; that the service tenure of the petitioner as Subedar Major (Clerk) would obviously be calculated from the date of promotion i.e. 1.12.1995, for which the petitioner has been paid full pay and allowances. The petitioner ought not to be allowed to unjustly enrich himself by on the other hand accepting the full pay and allowances w.e.f. 1.12.1995 in the said rank and on the other hand calculating length of his service from a later date; that the officials having retired as Subedar Majors and having served the Army for any duration between 28 to 32 years get identical pensionary benefits, as per the Government of India, Ministry of defense letter dated 3.1.1998.

4. It will be seen from the above that the short question involved in this writ

given promotion w.e.f. 1.12.1995. It only speaks of the promotion to the post of Subedar Major for the slot of 1995-96, meaning thereby that the original slot of seniority was directed to be maintained so that the petitioner may not suffer in seniority vis-a-vis his batch mates. Thus, the consideration of the petitioner's case as per the directions for the slot of 1995-96, would suggest the the petitioner's original seniority was to be maintained subject to the favourable consideration of the petitioner's case by Special Board.

7. It cannot be disputed that the petitioner can assume the charge physically as Subedar Major only after the Special Board is constituted and the petitioner promoted as Subedar Major. Even the assumption certificate (Annexure P-2) suggests that the petitioner physically assumed the rank of PA Subedar Major (Clerk) w.e.f. 27.10.1997. Now the petitioner would be entitled to the pay and allowance attached to the said rank only after he physically assumes the said rank. The reference to the slot of 1995-96 in the direction issued in CW 820/97 would be in the context of the original seniority of the petitioner.

It appears that the respondents decided to give the petitioner rank of Subedar Major w.e.f. 1.12.95. The pay and allowances have been credited to the petitioner's account. It is not the say of the respondent that it was at the instance/request of the petitioner the pay and allowances have been credited in the account of the petitioner with effect from 1.12.1995. The action of crediting the pay and allowances w.e.f. 1.12.95 being unilateral cannot justify the respondents' action of giving promotion ante date i.e. w.e.f. 1.12.1995 since the petitioner would be entitled to the pay and allowances attached to the rank of Subedar Major with effect from the date he physically assumed the charge of said rank and not earlier. The effect of giving promotion to the rank of Subedar Major to the petitioner w.e.f. 1.12.1995 would be that the petitioner would not be able to work/serve as Subedar Major for a full tenure of four years and the aforesaid action of the respondents would tantamount to curtailing the tenure of the petitioner as Subedar Major by two years and thereby the petitioner required to be superannuated w.e.f. 1.12.1999. It may bear repetition but the direction issued in CW 820/97 does not require the respondents to give, subject to favourable consideration by the Selection Board, promotion to the petitioner to the post of Subedar Major effective from any early date. It only directs the consideration of petitioner's case for the rank of Subedar Major in the slot of 1995-96, meaning thereby that the original seniority of the petitioner was not to be affected though he would get promotion subject to consideration of petitioner's case favourably pursuant to the directions issued in the aforesaid writ petition and his entitlement to rank of Subedar Major and higher pay, allowances would be from the date he physically assumed the rank of Subedar Major. Now when the respondent is directed to consider the petitioner for the slot of 1995-96, for the purpose of maintaining his original seniority, then why the petitioner should be made to suffer curtailment of tenure as Subedar Major by two years for no fault of his.

8. In the above view of the matter, the writ petition deserves to be granted and the respondents directed to allow/permit the petitioner to serve/work as Subedar Major for a full tenure of four years from the date he physically assumed the rank of Subedar Major AND not to superannuate the petitioner w.e.f. 1.12.1999 as he has not completed 54 years of Army Service. The respondent would, however, be entitled to adjust the amount credited w.e.f. 1.12.1995 to 26.10.1997 on the basis of promotion to the rank of Subedar Major w.e.f. 1.12.1995 since the petitioner assumed physical charge of PA Subedar Major (Clerk) w.e.f. 27.10.1997.

9. In the result, the writ petition is granted. The respondents are directed to permit/allow the petitioner to physically serve/work in the rank of Subedar Major (Clerk) for a full tenure of four years w.e.f. 27.10.1997 or till completion of 54 years of age whichever is early. The respondents are also restrained from retiring the petitioner in the rank of Subedar Major (Clerk) on 1.12.1999. However, the respondents will be entitled to adjust the amount of pay and allowances credited in the account of the petitioner for the period 1.12.1995 to 26.10.1997.

10. Writ Petition stands disposed of accordingly.