
(2011) 05 DEL CK 0103
In the Delhi High Court
Case No : Writ Petition (C) 1777 of 2011

Y.N. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Citation : (2011) 05 DEL CK 0103

Hon'ble Judges : Suresh Kait, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : None, for the Appellant; Barkha Babbar and Asit Tiwari, for the Respondent

Judgement

Pradeep Nandrajog, J.—Though none appears for the Petitioner at the hearing today, having perused the impugned order and the pleadings relatable there to, we are constraint to remand the matter to the Tribunal after setting aside the impugned order dated 04.02.2011 and as a consequence restore T.A. No. 394/2009 for fresh adjudication by the Armed Forces Tribunal.

2. Relevant facts are that enlisted as a Senior Non-Commission Officer in the recruiting organization of the Indian Army on 20.01.1962 Petitioner was promoted as a Naik on 12.05.1963 and as a Havaldar 02.09.1969. Initiating court marshal proceedings against him and finding him guilty punishment of reduction to the ranks, RI for 2 years and dismissal from service was passed, Petitioners writ petition filed being WP (C) No. 257/1982 came to be allowed vide order dated 30.03.1987 requiring Petitioner to be reinstated in service with all consequential benefits. The decision attained finality.

3. A dispute arose for the reason restoring the rank of Havaldar of the Petitioner the department treated him as in service only till 30.01.1986 inasmuch as a Havaldar can service only up to 24 years and as per the Petitioner had he not been illegally dismissed from service he would have earned promotion firstly as Naib Subedar in 1981 and then as Subedar in the year 1983 and these

promotions would have entitled him to serve till 31.03.1990.

4. The department paid him back wages in the rank of Havaladar till 31.01.1986 and pension thereafter in said rank.

5. Petitioner filed WP(C) 12284/2004 praying as per his claim as affronted which writ petition came to be transfer to the Armed Forces Tribunal when the Tribunal was created and was registered there as TA No. 394/2009. The same has been dismissed on 04.02.2011 holding that for being entitled to be promoted the requisite ACR criteria to be met could not be ascertained inasmuch as post dismissal from service the Petitioner having not worked his performance could not be appraised. Secondly it has been held that the Petitioner had to pass an examination to be promoted as Naib Subedar and thus the Tribunal has held against the Petitioner.

6. Unfortunately, the Tribunal has lost sight of the maxim impotent excusal legend and the maxim lax non cog it ad impossibily. Impotent excusal legend is that where there is a necessary or invincible disability to perform the mandatory part of the law the impotent excuses. The law does not compel one to do that which one cannot possibly perform. It means that where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.

7. The Tribunal had to pose the question: What would be the effect in law where a right is conditional upon acquiring a qualification and the chance to acquire the qualification is denied by a wrongful act of the opposite party? The Tribunal had to answer the question.

8. But for the penalty imposed upon the Petitioner which has been ultimately found to be wanting in law and for which the Respondents are wholly responsible it is certainly arguable that the Respondents denied the right to the Petitioner to serve and have his AC Rs recorded as also clear the promotional exams and having so done, the Respondents cannot plead the bar of said disability qua the Petitioner.

9. Since the right question required to be posed and answered has neither been posed, much less answered, we dispose the writ petition quashing the order dated 4.2.2011. we restore TA No. 394/2009 with a direction to the Tribunal to re-decide the same after putting the parties to a notice of the date when the Tribunal would be hearing the matter on remand.

10. No costs.