

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No. 1

Transferred Application No. 430 of 2010

[Writ Petition No. 13294 of 2008 (S) of M.P. High Court at Jabalpur]

Thursday the 11th day of November, 2010

“Hon’ble Mr. Justice A.N. Varma, Member (J)
Hon’ble Lt. Gen. R.K. Chhabra, Member (A)”

Mohammad Mahasher (JC – 802689A Subedar) S/o Mohammad Siddique,
Headquarters 1 Signal Training Centre, Jabalpur, Cantt Jabalpur (M.P.)

Applicant

By Legal Practitioner Shri K.C. Ghildiyal, Advocate.

Versus

1. Union of India through the Secretary, Ministry of Defence, Govt. of India, New Delhi.
2. Chief of the Army Staff, Army Headquarters, DHQ Post Office, New Delhi.
3. The Officer Incharge, Army Education Corps Records, Pachmarhi, District Hosangabad (M.P.).

Respondents

By Legal Practitioner Shri K.D. Nag, Advocate, Senior Central Government Counsel.

the rank of Subedar with effect from 31.12.2008 afternoon on attaining the age of 50 years. As the person holding the Rank of Subedar is entitled to serve up to 52 years of age or 28 years of service, extendable by two years, whichever is earlier, the petitioner requested to allow him to serve up to 52 years of age. However, the request of the applicant has been turned down vide order dated 16.09.2008, on the ground that the applicant had submitted his unwillingness to serve on extension, therefore, he is no entitled to be retained after 50 years of age. The applicant is therefore, also challenging the order dated 16.092008. It is subkmitted that as sper para 163 of Regulations for the Army, 1987, a Subedar was entitled to serve up to 26 years of service further extendable by two years subject to screening or upto the age of 52 years which ever is earlier. While implementing the recommendation of the 5th Central Pay Commission, the Hon'ble President was pleased to revise the terms and condition relating to the service/tenure and age criteria in respect of the Non Commissioned Officers and Junior Commissioned Officers. It has been provided now that a Subedar will be entitled to serve upto age 28 years of pensionable service, further extendable by two years subject to screening or 52 years of age whichever is earlier. The applicant who had submitted his unwillingness for extension of service has neither completed 28 years of service nor 52 years of age and therefore, even without extension of service he is entitled to continue up to 52 years of age. The decision of the respondent no 3 to retire the

2. As a background the Applicant was born on 02.12.1958. He was enrolled as direct Havildar in Army Education Corps on 05.5.1983. With 20 years of colour service + 3 years reserve service or 46 years whichever is earlier. He was promoted to the rank of Naib Subedar on 01.3.1997 and Subedar on 12.08.2003.

3. As per Regulation of the Army 1987 paragraph 163 a Naib Subedar is entitled to serve upto 26 years for pensionable service or 48 years of age whichever is earlier and a Subedar to serve upto 28 years pensionable service or 50 years of age which ever is earlier.

4. The Government of India revised these conditions vide letter dated 3.9.1998 (annexure P-2) revising the terms and conditions of JCOs wherein a Subedar is entitled to serve upto 28 years pensionable service extendable to two years by screening or 52 years of age whichever is earlier.

5. Accordingly the applicant was asked to submit his willingness/unwillingness On extended tenure of two years in the rank of Subedar during August 2006. Since the applicant intended for only 28 years for the rank of Subedar ever if he would apply for extension it would not have been any use because the applicant would attain the age of 52 years even before completion of pensionable service. Accordingly he submitted unwillingness from service.

6. Thus the applicant as per revised terms and conditions would attain the age of 52 years on 31.12.2010 and by then would have completed 27 years and 7

7. The applicant was asked to receive the order dated 28.09.2007 (annexure P-3) issued by the respondent no. 3 whereby the applicant had been directed to be retired from service with effect from 31.12.2008. He submitted representation to respondent no. 3 requesting him to allow him upto 52 years of age however the same was turned down vide order dated 16.09.2008 contending that since the applicant had also submitted his unwillingness for extension in the rank of Subedar and willing/unwillingness have been irrevocable in view of the Army Headquarters letter dated 06.5.2003 and the applicant was not entitled to change his option.

8. Aggrieved by the impugned order the contention of the respondent that willingness once exercised can not be changed the applicant filed writ petition no. 13294/08 (S) in MP High Court at Jabalpur. He made following prayer :-

(a) A writ order or direction in the nature of Certiorari thereby quashing the order dated 28.09.2007, (Annexure P-4) issued by respondent no. 3.

(b) A writ order or direction in the nature of Mandamus thereby directing the respondents to allow the petitioner to continue in the service upto 31.12.2010 (afternoon) till he attain the age of 52 years.

(c) Any other appropriate writ, order or direction which the Hon'ble court may deem just and proper in the nature and circumstances of the case including cost of the petition.

9. We have heard Shri K C Ghildiyal Learned Counsel for the applicant and

earlier even when extension of service was granted. He further argued that since the contention of respondent was that the applicant was liable to be retired on 31.12.2008 in view of unwillingness submitted by him is wholly illegal and arbitrary because willingness/unwillingness was extension which will have no bearing in the instant case as the applicant would have attained the age for superannuation even before completing 28 years of service. The learned Counsel submitted that the applicant had submitted unwillingness for extension of service on the basis of the fact that he would be completing 28 years of service as he would attain the age of 52 years therefore opting for extension of two years further service would not have benefitted him. However on learning that the respondent were went upon retiring him earlier he wished to change his option from unwillingness to willingness for extension of service.

10. The Learned Counsel for the applicant relying upon the judgement in the case of Subedar Jagannath Singh (Retired) vs Union of India and others. The case of Transferred Application no. TA 632/2009 of judgement dated 23.07.2010 by the Principal Bench Armed Forces Tribunal New Delhi wherein the direction of the Hon'ble bench is as under :-

We direct that if the applicant fulfils other criteria for extension of service, he should be granted the extension of service ignoring his earlier unwillingness option with all consequential financial benefits that may

11. The learned Counsel drew our attention to Army Headquarter letter dated 06.5.2003 (annexure R-6) wherein in para 4 and 5 retention of a person who was earlier rejected by screening board have unwillingness could be recommended based on criteria given therein. The learned Counsel for the applicant also challenged the policy letter dated 6.5.2003 which does not permit a person to change his option once it has been exercised.

12. Learned Central Government Counsel in opposition submitted that the applicant was promoted to the rank of Subedar on 01.07.2003. As per para 163(ii) of Regulations for the Army 1987 (Revised), retirement of Subedars of all Arms and Services is compulsory on completion of 28 years of pensionable service or 50 years of age whichever is earlier. The applicant on attaining the age of 50 years on 01.12.2008 completed his terms of engagement on 31.12.2008, thus there is no illegality or arbitrariness in the impugned in the impugned order.

13. As per Revised Order of the Ministry of Defence dated 03.09.1998 and 24.11.1998 the terms of service/tenure limits for retirement of Subedars have been modified as 28 years of pensionable service extendable by two years by screening or 50 years of age extendable upto 52 years after screening, whichever is earlier. Detailed procedure for screening has been delineated in Ministry of Defence letter dated 21.09.1998. Accordingly the process of screening in respect of the applicant commenced on 10.07.2006. The applicant submitted an unwillingness for extension

applicant had not exercised his option for extension, his retirement order on attaining age of 50 years was rightly issued by respondent No. 3 on 28.09.2007.

14. The applicant submitted an application for change of option on 11.09.2008 less than three months from his date of retirement i.e. 31.12.2008. Leaving virtually no time for the respondents to put though the applicant through the screening even if it was possible to change the option from unwilling to willing.

15. Learned Central Government Counsel relied upon the case of Abhay Kumar Versus Chairman Samyut Kshetriya Gramin Bank and others reported in [1994) 3 UPLBEC 1954] decided on 08.07.1994. The paragraph 4 of the said judgment is reproduced herein as under :-

“4. A mere legal law does not by itself render it incumbent upon the court to exercise its discretion under Article 226 of the Constitution in favour of the petitioner. It is the totality of the circumstances of the case that have to be seen. Even if it be taken that the resignation had been accepted after its withdrawal, this withdrawal of resignation took place as far back as six years ago. Taking then its acceptance to have been in 1991, that too now over three years ago and 2 days is the total service of the petitioner. These are clearly no circumstances to warrant any occasion for the grant of any relief. The claim for relief under Article 226 of the Constitution in such a case merely deserves to be high-lighted by its denial.”

“It may be that the Government for their own reasons, had given permission in similar case to some of the employees to withdraw their resignations and had appointed them. The doctrine of discrimination is founded upon existence of an enforceable right. The respondent felt that he was discriminated and denied equality as some similarly situated persons had been given the relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right whatsoever and cannot be given the relief wrongly given to the others. There is no invidious discrimination in this case. Wrong order cannot be foundation for claiming equality. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.”

17. We have heard the arguments of both sides. It seems that the applicant exercised the option of unwillingness for extension due to an incorrect interpretation of the terms and conditions of service in that whereas he thought that he would automatically serve after upto 52 years of age, however, in reality as per para of Regulations for the Army 1987 (Revised) there was no ambiguity in the fact that he was to retire on completion of 50 years of age and thus the respondents rightly issued retirement orders for 31.12.2008.

the Learned Counsel for the applicant does not apply in the instant case as in that case the applicant changed his option from unwilling to willing within one month of giving an unwilling option and almost two years before his actual date of retirement.

19. In so far as the two judgments cited by the Learned Central Government Counsel both cases pertain to civil organization and to resignation and thus its applicability is here doubtful.

20. The respondents had the option of retaining the applicant based on the provisions and criteria delineated Annexure R-6, however, they chose not to do so.

21. It is our considered view that the respondents should have either recourse the provisions and criteria as per Annexure R-6 or giving the benefit of doubt to the applicant allowing him to change the option from unwilling to willing and carried out a screening board of the JCO since over two and half months were available to the respondents and the retirement had actually not been executed.

22. In the circumstances the prayer made by the applicant succeeds. We direct the respondents revise option for willingness for extension of service/age rendered by the applicant on 11.09.2008 should be taken into account. We direct that if the applicant fulfils other criteria for extension of service he should be granted the extension of service ignoring his earlier unwillingness option with all consequential benefits that may accrued.

quashed. Interim order dated 14.11.2008 passed by the Madhya Pradesh High Court at Jabalpur is vacated.

24. The Respondents are further directed to complete this exercise within three months from the date of receipt of a certified copy of this order.

25. No order however as to costs.

(Lt. Gen. R.K. Chhabra)
Member (A)

(Justice A.N. Varma)
Member (J)

Dwi/NKS